Nos. 15-16466, 15-16552

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALIKA ATAY; LORRIN PANG; et al.,
Plaintiffs-Appellants,
v.
COUNTY OF MAUI; et al.,
Defendants-Appellees,

ROBERT ITO FARM, INC.; et al.,
Plaintiffs-Appellees,
v.
COUNTY OF MAUI,
Defendant-Appellee,

ALIKA ATAY; et al.,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court for the District of Hawai`i
Case Nos. 1:14-CV-00582-SOM-BMK; 1:14-cv-00511-SOM-BMK

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March 4, 2016

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees state as follows:

Agrigenetics, Inc. is a wholly owned subsidiary of Mycogen Plant Science, Inc., which in turn is a wholly owned subsidiary of Mycogen Corporation. Mycogen Corporation is owned 11.89% by Centen Ag Inc., and 88.11% by Rofan Services Inc. Centen and Rofan are both wholly owned subsidiaries of The Dow Chemical Company, a publicly held company.

Monsanto Co. has no parent corporations and no publicly held corporation owns 10% or more of its stock.

Friendly Isle Auto Parts & Supplies, Inc. has no parent corporations and no publicly held corporation owns 10% or more of its stock.

New Horizon Enterprises, Inc. has no parent corporations and no publicly held corporation owns 10% or more of its stock.

Robert Ito Farm, Inc. has no parent corporations and no publicly held corporation owns 10% or more of its stock.

Dow AgroSciences LLC's only parent corporation is The Dow Chemical Company. The Dow Chemical Company is publicly traded and owns 10% or more of the stock of Dow AgroSciences LLC. No other corporation holds 10% or more of Dow AgroSciences LLC's stock.

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STATEMENT OF JURISDICTION

The district court exercised jurisdiction over the two actions involved in these consolidated appeals under 28 U.S.C. §§1331, 1367(a), and 1441. Appellants timely filed notices of appeal from both final judgments. 1ER1-3; 1ER65-67. For the reasons stated in Appellees' motions to dismiss (No. 15-16466, Dkt. #18; No. 15-16552, Dkt. #20), because the County of Maui has not joined those appeals, Appellants lack standing to pursue the appeals.[1] If Appellants had standing, this Court would have jurisdiction under 28 U.S.C. §1291.

INTRODUCTION

These consolidated appeals involve the validity of a Maui County ordinance (the Ordinance) that bans the cultivation and testing of genetically engineered (GE) plants based on admittedly unsubstantiated fears that these plants and any associated pesticide use will harm other plants and the environment. The district court held

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[1] Although the County of Maui was a defendant in *Robert Ito Farm, Inc. v. County of Maui*, No. 1:14-cv-00511-SOM-BMK (D. Haw.), it did not appeal the district court's judgment declaring the Ordinance preempted by federal and state law and in excess of the County's authority. The County is technically designated an "Appellee" in both of these appeals, but it has chosen not to participate substantively in either appeal. This brief therefore uses the term "Appellees" to refer solely to the non-government Appellees.

that the Ordinance is preempted independently in its entirety by both federal and state regulatory schemes, and that it exceeds the County's statutory authority. Notwithstanding Appellants' heated rhetoric and factually inaccurate claims about GE plants and farming, the questions presented by this appeal are purely legal. The key issue is not *whether* GE plants may or should be regulated, but *by whom*.

The federal government oversees a detailed and comprehensive safety regime for evaluating and bringing new GE plants to market. The cornerstone of that regime is a testing process conducted under the strict supervision of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), which authorizes those field trials through permits issued under the Plant Protection Act and analyzes their results to determine the risks posed by the plant (if any). To the extent it interferes with field testing of GE plants, the Ordinance is expressly preempted by the Plant Protection Act's prohibition of any local law that exceeds federal regulation. More broadly, the Ordinance is impliedly preempted in its entirety by the Plant Protection Act and its implementing regulations because the County's complete ban on GE plants frustrates Congress's and the agency's objectives of establishing

a uniform federal regime that restricts commerce in plants only when justified by actual plant-specific risks established on the basis of sound science.

Moreover, even if federal law left room for non-federal regulation of GE plants, the Ordinance would still be preempted, because Hawai`i law reserves to *the State* the power to regulate plants that may pose safety or economic concerns. The State has established a comprehensive and uniform statewide framework to address those concerns, and that framework occupies the field, leaving no room for *counties* to impose additional patchwork regulations.

If this Court agrees with *either* of the district court's independent conclusions respecting federal and state preemption, the Ordinance is invalid in its entirety and the judgments below must be affirmed.

Finally, irrespective of the preemptive scope of federal and state law, the Ordinance exceeds the powers granted to the County in its Charter in multiple respects. As the district court noted, the penalty provisions of the Ordinance are *fifty-fold* the maximum amount permitted under the Charter. Should this Court not affirm the judgments, the district court would have to address several additional

ways in which the Ordinance exceeds the County's authority under the Charter.

The district court correctly concluded that the Ordinance is invalid on multiple grounds and its judgments should be affirmed.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the Ordinance is both expressly and impliedly preempted by federal law.
2. Whether the district court correctly concluded that the Ordinance is impliedly preempted by state law.
3. Whether the district court correctly concluded that the Ordinance conflicts with the Maui County Charter.
4. Whether the district court acted within its broad discretion when it declined to certify to the Hawai`i Supreme Court questions that required only the application of well-settled state law.
5. Whether the district court acted within its broad discretion when it declined Appellants' request for a

summary judgment continuance to take irrelevant discovery.

6. Whether the district court correctly exercised removal jurisdiction over Appellants' anticipatory state action.

STATUTORY AND REGULATORY PROVISIONS

Pertinent constitutional provisions, statutes, and rules not included in the Opening Brief's Statutory Addendum are set forth in the Statutory Addendum filed concurrently herewith.

STATEMENT OF THE CASE

A. Background On GE Plants

For thousands of years, farmers have cross-bred plants to enhance desirable traits. As science has advanced, these efforts have become more targeted and more effective. GE technology is one significant advance in this continuing evolution of modern agriculture. Using GE techniques, seed companies have successfully developed crops that have greater resistance to drought, disease, viruses and other pests, and pesticides, and that can be farmed with less soil erosion and a smaller carbon footprint. GE technology is widely acknowledged to be an important tool for ensuring an adequate food supply for a growing world population.

Over the past 20 years, farming GE plants has become a generally accepted and crucial part of agriculture throughout the United States, including in Hawai`i. For example, the Rainbow papaya, a GE variety of papaya that is resistant to aphid-transmitted ringspot virus, is credited with saving Hawai`i's papaya industry.[2] The vast majority of several major U.S. crops are now GE varieties, including 92% of all corn and 94% of all soybeans and cotton.[3]

GE plants are particularly important to the livelihood of Appellees (and their members and employees), who include a broad cross-section of Maui County agricultural workers, farmers, community businesses, concerned citizens, the local farmer's cooperative, and two seed companies operating in the County. Appellees have invested significant time, land, and other resources to testing and cultivating additional GE varieties that will benefit local and national agriculture. 2ER229-31,

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[2] *See also* Tom Callis, *Papaya: A GMO Success Story* (June 10, 2013), http://hawaiitribune-herald.com/sections/news/local-news/papaya-gmo-success-story.html (last visited Mar. 4, 2016).

[3] *See* Economic Research Service, USDA, Adoption of Genetically Engineered Crops in the U.S., http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us.aspx (last visited Mar. 4, 2016) (follow link to "Genetically engineered varieties of corn, upland cotton, and soybeans, by State and for the United States, 2000-15").

278-83, 293-95, 302-06; 5ER1104-05, 1184-86, 1188-89. Appellees Monsanto Company and Agrigenetics, Inc. own or lease thousands of acres of farmland in the County, where they farm seed to be grown by farmers around the world. 5ER1184-86, 1188-89; Declaration of Sam Eathington ¶¶17-18, *Robert Ito Farm, Inc. v. County of Maui*, No. 1:14-cv-00511 (D. Haw. Nov. 14, 2014), Dkt. #20. Both companies make extensive use of GE technology on their farms, including by conducting APHIS-regulated field tests of GE plants. *Id.* These seed farms are vital to the economies of Maui and Molokai and to diversified agriculture throughout the United States. 2ER229-31, 293-94, 313, 316-17, 340-66; 5ER1104. Indeed, a significant percentage of the nation's corn seed supply is developed from these farms. 2ER227; Eathington Decl. ¶17.

B. Federal And State Regulation Of GE Plants

As described in more detail below, *see infra* at 16-20, the federal government ensures the safety of GE plants through a regulatory regime that coordinates the scientific safety standards of multiple federal statutes under the supervision of three federal agencies: the Environmental Protection Agency (EPA), the Food and Drug

Administration (FDA), and APHIS. *See* 49 Fed. Reg. 50,856, 50,856-57 (Dec. 31, 1984). The federal review process typically requires multiple years of regulated field tests, evaluations, and scientific review before a GE plant may be commercialized. To date, more than 100 GE plants have cleared federal review.[4]

In addition, the State of Hawai`i has a comprehensive regulatory scheme governing agriculture in the State, overseen by its Department of Agriculture. *See* HRS tit. XI, chs. 141-169; *infra* at 48-52. Among other things, the Department is responsible for regulating plants that may endanger other plants and the environment, *see* HRS §§141-2, 147-121, 150A-6.1(a)-(b), 150A-10, 152-1, 152-2; *id.* ch. 149A; HAR §§4-68-6, 4-68-8, and all pesticides and pesticide use, *see* HRS ch. 149A, throughout the State.

C. The County Ordinance

On November 4, 2015, Maui County residents narrowly approved an initiative titled "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms." 2ER199-210. The Ordinance

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[4] *See* APHIS, USDA, Petitions for Determination of Nonregulated Status, https://www.aphis.usda.gov/biotechnology/petitions_table_pending.shtml (last visited Mar. 2, 2016).

makes it "unlawful for any person or entity to knowingly propagate, cultivate, raise, grow or test Genetically Engineered Organisms within the County of Maui." Ordinance §5(1), 2ER205. The only relevant exception to the ban is if the GE plant is in "mid-growth cycle" when the Ordinance becomes effective. *Id.* §5(2)(a), 2ER205.

Under the Ordinance, the County Council can amend or repeal the ban as to a particular GE plant only if (1) "an Environmental and Public Health Impacts Study (EPHIS) … has been completed," (2) the Council finds that "such GE Operation or Practice does not result in significant harm and will result in significant benefits to the health of present and future generations of Maui citizens, [and] significantly supports the conservation and protection of Maui's natural beauty and all natural resources," and (3) the amendment or repeal is approved by a super-majority vote of "at least *two-thirds* (2/3) of the council membership." Ordinance §6(2) (emphasis added), 2ER205. As the district court observed, "satisfying the requirements appears time-consuming, expensive, and unlikely." 1ER18, 82.

The Ordinance includes purported "findings" about the potential dangers posed by GE plants and pesticides. Ordinance §2(1), (4)-(5),

2ER199-200. In making these "findings," the Ordinance does not even acknowledge—much less rebut—the contrary overwhelming scientific consensus, based on years of testing and scientific review, that there is nothing inherently unsafe about GE plants.[5] Instead, the Ordinance relies on a "precautionary principle," which boils down to the Ordinance's proponents banning GE plants because they believe there is not 100% certainty that no damage can occur. Ordinance §3(4), 2ER203.

Violation of the Ordinance's ban is punishable by civil penalties of $10,000 for the first day, $25,000 for the second day, and $50,000 for every day thereafter. Ordinance §9(2), 2ER207. Violations also carry a criminal penalty of up to one year imprisonment, a $2,000 fine, or both. Ordinance §9(3), 2ER207.

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[5] *See, e.g.*, Alessandro Nicolia, Alberto Manzo, Fabio Veronesi, & Daniele Rosellini, *An Overview of the Last 10 Years of Genetically Engineered Crop Safety Research*, 34 Critical Reviews in Biotechnology 77, 84 (2014) (reviewing more than 1,700 peer-reviewed studies and concluding "that the scientific research conducted so far has not detected any significant hazard directly connected with the use of GM crops").

D. Procedural History

After the Ordinance's passage, two lawsuits were filed to test its validity. As they had previewed in the press, Appellees brought suit in federal court seeking to invalidate the Ordinance, requesting declaratory and injunctive relief against the County. 2ER150-98. Appellants—the proponents of the initiative and their affiliated advocacy group, the SHAKA Movement (collectively, "SHAKA")—intervened as defendants in that case. 5ER1064. In anticipation of Appellees' suit, SHAKA also filed its own suit in state court the day before, requesting the opposite relief. 6ER1262-72. SHAKA originally named as defendants the County, Monsanto, and Dow AgroSciences (a company affiliated with Agrigenetics). 6ER1262, 1264-65. It later amended its complaint to name as defendants all of the other plaintiffs in the principal federal case. 4ER889, 892-94. SHAKA's mirror-image suit was eventually removed to federal court and assigned to the same district judge handling the principal case, who denied SHAKA's request to remand. 6ER1238-55; *Atay v. County of Maui*, No. 1:14-cv-00582-SOM-BMK (D. Haw. Dec. 31, 2014), Dkt. #5.

After extensive briefing and a hearing, the district court denied SHAKA's request for a summary judgment continuance (because the legal issues presented required no discovery) and granted in part Appellees' motion for summary judgment. 1ER13, 22-24, 62. The court held that the Ordinance is expressly and impliedly preempted by federal law. 1ER27-46. The court also held that the Ordinance is impliedly preempted by Hawai`i's "comprehensive scheme of state statutes and regulations" governing the introduction, transportation, and propagation of potentially harmful plants, which was "intended to be exclusive and uniform throughout the state." 1ER46-59. Finally, the court held that the Ordinance's penalty provision violates the Maui County Charter. 1ER59-62. In light of its resolution of these issues, the court reserved judgment on the remainder of Appellees' challenges to the Ordinance under federal law and the County charter,[6] 1ER62, 1ER45-46, and entered judgment for Appellees in both cases. 1ER7-8, 71-72.

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[6] If this Court were to reverse the judgments of the district court, those issues would need to be addressed by the district court on remand, in addition to the unaddressed Commerce Clause claim pled by Appellees.

Only SHAKA appealed those judgments. Because SHAKA has no independent Article III standing, Appellees moved to dismiss these appeals. No. 15-16466, Dkt. #18; No. 15-16552, Dkt. #20. Those motions remain pending for resolution by the Court. No. 15-16466, Dkt. #56; No. 15-16552, Dkt. #58 (order of the Appellate Commissioner referring the motions to the merits panel).

SUMMARY OF ARGUMENT

The district court correctly held that the Ordinance is invalid for several *independent* reasons.

I. The Ordinance is expressly and impliedly preempted by federal law. Under the Plant Protection Act, APHIS regulates in detail how, when, and where GE plants can be planted for testing purposes throughout the United States. The Ordinance's complete ban of such testing within the County obviously exceeds those requirements, and is therefore expressly preempted by the Act's prohibition on such state or local regulation.

The Ordinance fails in all its applications under well-established principles of implied preemption. The overriding purpose of the Plant Protection Act is to *facilitate commerce* in non-dangerous plants while

protecting the nation from plant pests. APHIS's testing regime implements that objective in the context of GE plants by evaluating any dangers posed by GE plants based on the particular characteristics of each plant and sound scientific principles. The Ordinance's indiscriminate ban on testing, planting, and cultivating GE plants anywhere in the County—regardless of the plant's individual characteristics or whether or not it has cleared the federal testing regime—halts all commerce in GE plants, and impermissibly frustrates the purposes and objectives of federal law.

II. The Ordinance is also preempted by state law. Hawai`i has established a comprehensive regulatory regime under the auspices of the Hawai`i Department of Agriculture for regulating agriculture throughout the State. This state regime manifests an intent to occupy the field of agricultural regulation in the State, including regulating any plant that may be harmful to the environment or other plants. The Ordinance impermissibly intrudes directly into this occupied field.

III. Finally, the Ordinance exceeds the County's regulatory authority under the Maui County Charter. The Ordinance's penalty provisions, which impose civil and criminal penalties of up to

$50,000/day for violations of its ban, plainly exceed the Charter's explicit $1,000 limit on penalties. The Ordinance also conflicts with the Charter in several other respects that would need to be addressed on remand should the Court not affirm the district court's judgment on federal or state preemption grounds.

IV. SHAKA's remaining claims of error are unavailing. The district court was not required to certify state-law issues to the Hawai`i Supreme Court, because the governing legal test for state-law preemption is well established. SHAKA's state-court action was properly removed as anticipating the undisputedly federal case filed by Appellees the following day and consolidated here. And the district court did not remotely abuse its discretion by denying SHAKA's request for irrelevant discovery, before resolving the relevant issues in this case as a matter of law.

ARGUMENT

I. THE ORDINANCE IS PREEMPTED BY FEDERAL LAW

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land …, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

U.S. Const. art. VI, cl. 2. Preemption "may be either express or implied, and is compelled whether Congress'[s] command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Shaw v. Delta Air Lines, Inc,*, 463 U.S. 85, 95 (1983) (citation omitted); *see Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010). As with statutes, administrative action may have preemptive effect. *City of N.Y. v. FCC*, 486 U.S. 57, 64 (1988).

This case presents a straightforward application of both express and implied preemption. The Plant Protection Act expressly preempts the Ordinance's application to field tests of regulated GE plants. And, more broadly, the Ordinance is impliedly preempted in all of its applications because it conflicts with the Plant Protection Act and its implementing regulations.

A. The Federal Government Has An Extensive Regulatory Scheme Governing GE Plants

The federal government began regulating GE plants in the mid-1980s, after the President's Office of Science and Technology Policy created the "Coordinated Framework for Regulation of Biotechnology" and directed APHIS (along with EPA and FDA) to establish a "comprehensive federal regulatory policy for ensuring the safety of

biotechnology research and products," 51 Fed. Reg. 23,302, 23,302 (June 26, 1986), with the goal of "achieving national consistency" with uniform regulation of GE plants, 49 Fed. Reg. at 50,857. Under the Coordinated Framework, APHIS was directed to regulate the safety of GE plants, EPA was directed to regulate pesticides that might be applied to GE plants, and FDA was directed to address any potential food safety issues.

Pursuant to this Coordinated Framework directive and its then existing statutory authorities under the Plant Quarantine Act and Federal Plant Pest Act, in 1987 APHIS promulgated its Part 340 regulations governing GE plants, which are still in effect today with only minor changes. *See* 7 C.F.R. pt. 340. APHIS's regulations provide "that a genetically modified organism is regulated as a plant pest if it is created using an organism that is itself a plant pest." *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 835 (9th Cir. 2013) (citing 7 C.F.R. §340.1). APHIS calls such plants "regulated articles." 7 C.F.R. §340.0(a) & n.1; *id.* §340.1 (definition of "regulated article"); *id.* §340.2 (groups of organisms that are or contain plant pests). Because almost all GE plants have been made with a plant pest (*i.e., Agrobacterium*),

those plants were at least initially classified as regulated articles.[7] *See Vilsack*, 718 F.3d at 835; 7 C.F.R. §340.2(a) (including all members of "Genus Agrobacterium" as plant pests).

Part 340 prohibits the "release into the environment"—*i.e.*, the use "outside the constraints of physical confinement that are found in a laboratory, contained greenhouse, … or other contained structure," 7 C.F.R. §340.1—of regulated articles without APHIS's permission, *id.* §340.0(a). APHIS's permitting process imposes strict conditions on any field test or other approved release in order to prevent the dissemination of regulated articles. *Id.* §340.3(c) (providing performance standards), §340.4(f) (providing general permit conditions, which are in addition to detailed specific conditions in the permit itself). When APHIS determines whether to authorize a field test, it considers the unique ecological conditions present in the particular location of the test site and imposes permit conditions to mitigate any risk. For example, "[a]s part of the Agency's review of all Hawaii biotech field tests, [APHIS] biotechnologists consider the State's unique ecology,

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[7] A small number of GE plants are not regulated by APHIS because they were not made with a plant pest. Those types of GE plants are not at issue in Maui or this case.

including the fact that the islands have more threatened and endangered species per square mile than any other place on earth."[8]

In 1993, APHIS created a formal petition process to remove a GE plant from Part 340 regulation. 58 Fed. Reg. 17,044, 17,044 (Mar. 31, 1993); *see also Vilsack*, 718 F.3d at 835 (describing process). To succeed in such a petition for non-regulated status, an applicant must demonstrate through an extensive evaluation process (involving open-air field tests conducted under APHIS authorization) that the regulated article is no more likely to pose plant pest risks than its non-GE counterpart. *See Vilsack*, 718 F.3d at 835; 7 C.F.R. §340.6(c)(3), (4); 57 Fed. Reg. 53,036, 53,039-40 (Nov. 6, 1992). The process typically requires years and millions of dollars to complete, and results in an informal adjudication subject to notice-and-comment and accompanied by National Environmental Policy Act analysis. *See Vilsack*, 718 F.3d at 837. For a variety of reasons, primarily related to yield, effectiveness, and other characteristics relevant to future commercial

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[8] Biotechnology Regulatory Services, APHIS, *USDA Regulation of Biotechnology Field Tests in Hawaii* at 1 (Feb. 2006), http://www.co.maui.hi.us/DocumentCenter/View/94680.

success, the vast majority of regulated articles do not make it beyond the field-test stage.[9]

In 2000, Congress passed the Plant Protection Act to empower "the Secretary [of Agriculture]" to facilitate commerce in non-dangerous plants while also protecting the nation from dangerous "plant pests" and "noxious weeds." 7 U.S.C. §7701(3), (5), (7). The Act "consolidate[d]" and "enhance[d]" APHIS's longstanding authority to regulate plant pests. *See* H.R. Rep. No. 106-639, at 153 (2000); *Vilsack*, 718 F.3d at 834-36 (explaining part of regulatory history). Congress expressly ratified APHIS's preexisting Part 340 regime by including in the Act a provision stating that all of APHIS's existing regulations could remain in place indefinitely. 7 U.S.C. §7758(c). Congress also included in the Act an express preemption clause, prohibiting states or municipalities from regulating plants or plant pests in a manner inconsistent with the agency's regulations or orders, absent APHIS approval. *Id.* §7756(b).

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[9] *Compare* Biotechnology Regulatory Services, APHIS, Public permit and notification data (Mar. 2, 2016), *available at* https://www.aphis.usda.gov/brs/status/BRS_public_data_file.xlsx (showing thousands of field trials), *with* APHIS, Petitions for Determination of Nonregulated Status, *supra* note 4 (showing deregulations).

B. The Ordinance's Application To Regulated GE Field Trials Is Expressly Preempted

The Plant Protection Act's express preemption clause precludes the Ordinance's application to GE plants regulated by APHIS as plant pests. *Id.* §7756(b)(1). That clause provides that "no State or political subdivision of a State may":

> [(i)] regulate the movement in interstate commerce of any … plant, … plant pest, [or] noxious weed … in order to control ... , eradicate ... , or prevent the introduction or dissemination of a … plant pest, or noxious weed, [*if*]
>
> [(ii)] the Secretary has issued a regulation or order to prevent the dissemination of the ... plant pest ... within the United States.

Id. Both conditions of preemption under the clause are met here.

Taking them in reverse order, the second condition is satisfied for nearly all GE plants that have not been deregulated by APHIS, because the Secretary of Agriculture, through APHIS, has classified as plant pests all GE plants that are made with a plant pest, and has prohibited their "introduction"—defined as their "release into the environment" or "move[ment] interstate"—without agency approval through the permitting process. 7 C.F.R. §§340.0(a), 340.1; *see supra* at 18, 25-29. This regulatory regime is specifically designed to prevent the

dissemination of all regulated GE plants. *See, e.g.*, 7 C.F.R. §§340.3(c), 340.4(b)(2), 340.4(f) (imposing controls); 68 Fed. Reg. 11,337, 11,337 (Mar. 10, 2003) ("Field test permits include … conditions [that] are designed to confine the regulated articles to the test site during the test and ensure that they do not persist in the environment beyond the conclusion of the field test."). Indeed, APHIS has explicitly concluded that the regime is *necessary* "to prevent the ... dissemination ... of plant pests in the United States." 52 Fed. Reg. 22,892, 22,892 (June 16, 1987).

As for the first condition of preemption, the Ordinance "regulate[s] the movement in interstate commerce" of such regulated GE plants by banning all testing, planting, or cultivation of GE plants to "prevent the[ir] introduction or dissemination" throughout the County. Under the Plant Protection Act, "movement" of a plant pest expressly includes its "release into the environment," 7 U.S.C. §7702(9)(E), and any such release "outside the constraints of physical confinement," *i.e.*, open-air planting or testing, 7 C.F.R. §340.1, has long been understood to be "in interstate commerce," because "living organisms do not acknowledge State lines," 52 Fed. Reg. at 22,894.

Accordingly, the Ordinance is expressly preempted as it applies to all GE plants that are regulated articles under Part 340. None of SHAKA's counterarguments is persuasive.

1. Regulated Articles Are Plant Pests Under The Preemption Clause

SHAKA argues (at 32-34) that the Act's preemption clause is inapplicable because regulated articles are not "plant pests," but rather organisms that APHIS has "reason to believe" are plant pests. But SHAKA misunderstands how Part 340 operates. Part 340 governs the introduction of two types of "regulated articles": (1) those that are plant pests, *and* (2) those that APHIS has "reason to believe" are plant pests. *See* 7 C.F.R. §340.0 n.1 ("Part 340 regulates … the introduction of organisms and products altered or produced through genetic engineering *that are plant pests or are believed to be plant pests*." (emphasis added)); *see also id.* §340.2(a). It is not clear that the distinction matters for the purposes of the preemption clause, but in any event only regulated articles that *are* plant pests are at issue here.

Under Part 340, APHIS deems nearly all GE plants *to be* plant pests. Section 340.2 contains a list of "organisms that are or contain plant pests," including *Agrobacterium*. 7 C.F.R. §340.2(a). If a GE

plant is made with such an organism, which nearly all GE plants have been, by operation of law APHIS considers it a plant pest. 51 Fed. Reg. 23,352, 23,355 (June 26, 1986) ("USDA believes that an organism or product *is a plant pest* if the donor, recipient, vector or vector agent of the genetically engineered organism or product comes from a member of one of the groups listed in §340.2." (emphasis added)); *Vilsack*, 718 F.3d at 835 (under the Part 340 regulations "a genetically modified organism *is regulated as a plant pest* if it is created using an organism that is itself a plant pest." (emphasis added) (citing 7 C.F.R. §340.1)); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 144-45 (2010).[10]

Separate and apart from GE plants that are automatically plant pests under this rule, the Administrator of APHIS may also deem as a regulated article any other GE plant "which the Administrator ... *has reason to believe* is a plant pest." 7 C.F.R. §340.1 (emphasis added); 52 Fed. Reg. at 22,892 (explaining ways an organism can become a regulated article). As APHIS has explained, this latter track provides

[10] It does not matter for these purposes that APHIS can, and occasionally does, later determine that a GE plant should no longer be considered a plant pest. Congress specifically contemplated that APHIS would make these sorts of decisions. *See, e.g.*, 7 U.S.C. §7711(c)(2). But as long as the plant is classified as a plant pest, the express preemption provision applies.

the Administrator separate authority to "designate an organism as a regulated article based upon … an objective, informed decision made after review of substantive information regarding demonstrated plant pest risks." *Id.* at 22,896. Such authority is conceivably relevant only to a small number of plants, and there is no indication those sorts of plants are at issue.

2. The Ordinance Regulates Movement Of Plant Pests In Interstate Commerce

SHAKA (at 34-36) and *amici* Center for Food Safety *et al.* (CFS) (at 14-15) say that the Ordinance is not regulating "movement in interstate commerce," within the meaning of preemption clause, because the Ordinance applies only within the County and Part 340 prevents any regulated article from being in commerce at all. They are wrong.

As an initial matter, Part 340 does not prevent any regulated article from being in commerce. It only prohibits the introduction of GE plants *without APHIS's approval*. *See* 7 C.F.R. §340.0. Those plants, which APHIS has authorized to be introduced under certain conditions, are precisely the GE plants at issue here.

As for whether the regulated GE plants to which the Ordinance would apply are "in interstate commerce," as noted, the statute expressly defines a "movement" to include a "release into the environment," 7 U.S.C. §7702(9)(E), and any release of a plant pest "outside the constraints of physical confinement," *i.e.,* any open-air use, 7 C.F.R. §340.1, constitutes "movement in interstate commerce." *See* 52 Fed. Reg. at 22,894 ("[L]iving organisms do not acknowledge State lines."); *see also* 7 U.S.C. §7701(9) ("[A]ll plant pests, noxious weeds, [and] plants … regulated under this chapter are in or affect interstate commerce or foreign commerce."); SHAKA Br. at 34 & n.22 (arguing that regulated articles have escaped into interstate commerce, causing billions in economic losses).

Appellees' interpretation is confirmed by the history of the phrase "release into the environment." APHIS began regulating the "release into the environment" of GE organisms in 1987, at which time it explicitly rejected the view advanced by SHAKA here that the agency's authority over international and interstate movement should be narrowly interpreted to preclude regulation of intrastate releases. 52 Fed. Reg. at 22,893. When Congress passed the Plant Protection Act in

2000, it adopted the phrase "release into the environment" *from APHIS's Part 340 regulations* and incorporated it into the statutory definition of "movement." *Compare* 7 U.S.C. §7702(9)(E), *with* 7 C.F.R. §§340.1, 340.4(b). "[W]hen Congress adopts an agency interpretation, Congress intends the agency construction to be incorporated into the statute." *Nunez-Reyes v. Holder*, 646 F.3d 684, 711 (9th Cir. 2011); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982); *cf. FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012).

Any other interpretation of that phrase would lead to absurd results. Most notably, Congress used the phrase "movement in interstate commerce" throughout the Act, including the provisions that authorize APHIS to regulate plants and plant pests (and therefore GE plants) in the first place. 7 U.S.C. §7712(a), (c)(1), (e); *see id.* §7711(a) ("[N]o person shall … *move in interstate commerce* any plant pest, unless … authorized under general or specific permit and ... in accordance with such regulations as the Secretary may issue ...." (emphasis added)).[11] If "movement in interstate commerce" were as restrictive as SHAKA claims—essentially, trucks carrying plant pests

[11] The terms "move" and "movement" have the same definition under the Act. *See* 7 U.S.C. §7702(9).

across state lines—APHIS would have no enabling or enforcement authority over intrastate GE plant releases. APHIS's Part 340 prohibition against planting unapproved GE plants and restrictions governing thousands of ongoing field tests of experimental GE plants would be invalid, and federal law would have no meaningful role in GE plant regulation. There is absolutely *no indication* that Congress intended this absurd result.

To the contrary, when it passed the Plant Protection Act, Congress provided that APHIS's existing regulations, including Part 340's comprehensive regulation of GE plant cultivation, "shall remain in effect" indefinitely. 7 U.S.C. §7758(c). There is nothing ambiguous about Congress's intentions in this regard. But, even if "movement in interstate commerce" were ambiguous, the agency has long, and more than reasonably, interpreted the statute to authorize its regulation of intrastate GE plant releases, and that interpretation is owed controlling weight under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

SHAKA's principal case, *Circuit City Stores, Inc. v. Adams*, does not compel a different result. 532 U.S. 105 (2001). That case

interpreted the phrase "engaged in … interstate commerce" to be narrower than the full scope of Congress's Commerce Clause power. But the question is not whether "movement in interstate commerce" was intended to go as far as Congress could possibly go; it is whether it encompasses intrastate releases of GE plants. *Circuit City Stores* instructs courts that "statutory jurisdictional formulations" do not "necessarily have a uniform meaning whenever used by Congress," because such phrases must be construed "with reference to the statutory context in which [they are] found and in a manner consistent with the [statute's] purpose." *Id.* at 118 (citation omitted). Here, the statutory context and purpose support Appellees' (and APHIS's) broader reading of the phrase.

3. The Ordinance Seeks To Control And Prevent The Introduction And Dissemination Of GE Plants

SHAKA also argues (at 29-31) that the preemption clause is inapplicable because the Ordinance was enacted to prevent "the harms of GE crops" and not the introduction or dissemination of plant pests. That is just a word game. The preemption provision covers local laws that "regulate" environmental releases of plant pests "in order to "control … eradicate, … or prevent [their] introduction or

dissemination." That is exactly what the Ordinance does. Ordinance §5(1), 2ER205; *see also id.* §§4(1)-(2), 3, 2ER204, 203-04. It bans almost all planting of GE plants *to prevent them from being grown and spread in the County*. *Why* the County wants to prevent the introduction and dissemination of these plants is irrelevant to the preemption question. Regulations always have second-order purposes, often several. But nothing in the Plant Protection Act suggests that the application of its preemption clause turns on the nature of those second-order motivations. As long as the state or local law seeks to prevent the introduction or dissemination of plant pests—as this Maui Ordinance unquestionably does—it is preempted. Period.

SHAKA's contrary reliance (at 30) on *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, is unavailing. 461 U.S. 190 (1983). To begin with, *PG&E* is an *implied preemption* case. When, as here, "a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress'[s] pre-emptive intent.'" *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 131 S. Ct. 1968, 1977 (2011) (citation omitted).

Moreover, *PG&E* rejected a broad implied field preemption argument and held that states could impose a moratorium on new nuclear power plants for economic reasons, because the relevant federal statutory scheme evinced a congressional intent to occupy the field only with respect to nuclear plant safety, while preserving the ability of states to decide whether such plants were needed and economically feasible. *See PG&E*, 461 U.S. at 203-14. *PG&E* did not establish that states and localities can always avoid preemption simply by claiming a second-order purpose different from that motivating the preemptive federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 84-85 (1990) (explaining that, under *PG&E*, state laws are preempted if they have *either* the *effect* or *purpose* of regulating nuclear safety); *see also PG&E*, 461 U.S. at 212 ("It would clearly be impermissible for California to attempt to [regulate the construction or operation of a nuclear power plant], even if enacted out of non-safety concerns …."). The Ordinance's ban has both the purpose and the effect of preventing the introduction and dissemination of plant pests.

4. The Ordinance Does Not Fit Within Either Of The Exceptions To The Preemption Clause

Finally, the Ordinance does not qualify for either exception to the preemption clause. First, the Ordinance is clearly "[in]consistent with and ... exceed[s]" APHIS's Part 340 regulations. 7 U.S.C. §7756(b)(2)(A). Part 340 controls when and where regulated GE plants may be released into the environment, and under Part 340 APHIS can authorize, and has specifically *authorized*, field trials of GE plants in Maui County. The Ordinance *prohibits* planting and testing those very same GE plants in the County. Prohibiting what is authorized is not "consistent"—it is opposite. Similarly, the Ordinance's requirements for lifting the ban greatly "exceed" the permitting requirements imposed by APHIS to allow field testing. *Compare* Ordinance §§6, 7, 2ER205-07, *with* 7 C.F.R. §340.3(b) (providing that "[r]egulated articles which meet all of the following six requirements and the performance standards … are eligible for introduction"), *and id.* §340.4(b) (listing requirements for permit application).

Even farther afield is SHAKA's contention (at 37-38) that the Ordinance meets the second exception to the preemption clause. That exception allows for regulation where a "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)(2)(B) (emphasis added). Maui County has neither requested nor obtained a special needs exception from the Secretary. SHAKA does not dispute this. Instead, it argues (at 38) that *the district court* erred by failing to order the County to do so. But the district court had no such obligation or, for that matter, power. It is up to the state or political subdivision to petition the Secretary, then left to the discretion of the Secretary to make a finding. In any event, SHAKA can hardly fault the district court for failing to issue such an impermissible order, considering that SHAKA *did not request one below*. *See* 7ER1736-37. The issue is waived. *Mercury Interactive Corp. Sec. Litig. v. Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010).

C. The Ordinance In Its Entirety Is Impliedly Preempted By Federal Law

The Ordinance is also impliedly preempted in all of its applications by the same federal law. Any state or local law that stands as "'an obstacle to the accomplishment and execution of the full purposes and objectives' of a federal law" is impliedly preempted.

Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323, 330 (2011) (citation omitted). To make that determination, courts consider "the entire scheme" of the federal statute *and related regulations*, including their text, context, history, and policies. *Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941) (citation omitted). The purposes and objectives of a federal agency in promulgating regulations must be considered in addition to Congress's. *See City of N.Y.*, 486 U.S. at 64 ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874-86 (2000) (analyzing obstacle preemption by regulation by reference to *agency's* purposes and objectives); *Williamson,* 562 U.S. at 330-37 (same). Because in all of its applications the Ordinance would frustrate the purposes and objectives of the Plant Protection Act and APHIS's Part 340 regulations, it is preempted entirely.[12]

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[12] "Congress'[s] inclusion of an express pre-emption clause 'does *not* bar the ordinary working of conflict pre-emption principles.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (citation omitted); *see also Geier*, 529 U.S. at 869; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89 (1995); *Motor Vehicle Casualty Co. v. Thorpe Insulation Co.*, 677 F.3d 869, 890 (9th Cir. 2012).

1. *A Primary Purpose Of The Plant Protection Act And Part 340 Is To Facilitate Commerce In Non-Dangerous Plants*

A primary purpose of the Plant Protection Act is *to facilitate commerce in non-dangerous plants*, while protecting the nation from dangerous plant pests and noxious weeds. *See, e.g.*, 7 U.S.C. §7701(5), (7) (finding that "smooth movement of [non-problematic] plants ... within the United States is vital to the United States' economy and should be facilitated to the extent possible"); *id.* §7701(3) ("[I]t is the responsibility of the Secretary to facilitate exports, imports, and interstate commerce in agricultural products ... that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, ... the risk of dissemination of plant pests or noxious weeds.").[13] Congress granted APHIS broad rulemaking authority to accomplish that purpose, *id.* §7754, and directed APHIS to exercise that authority on the basis of "sound science," *id.* §7701(4).

Consistent with Congress's intent, APHIS's Part 340 regulations create a detailed risk-based regime, allowing GE plants to be released

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[13] *See also* Brief for Federal Respondents 2, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (No. 09-475), 2010 WL 740752 (acknowledgement by the Solicitor General to the U.S. Supreme Court that this is the Plant Protection Act's principal purpose).

into the environment with APHIS's permission, controls, and oversight. APHIS explained that a delicate balance in GE plant regulation is necessary because "[t]he manner in which regulations for biotechnology are implemented in the United States will have a direct impact on the competitiveness of U.S. producers in both domestic and world markets," and "[i]nconsistent or duplicative regulation will put U.S. producers at a competitive disadvantage." 49 Fed. Reg. 50,856, 50,904 (Dec. 31, 1984). Therefore, "during the development of the U.S. regulatory procedures for biotechnology products," special attention was paid to "the need for achieving consistency in national regulation with international harmonization." *Id.* APHIS's regulations are designed to "reduce regulatory constraints on certain introductions [of GE plants] to achieve the Federal policy goal of oversight commensurate with the risk." 57 Fed. Reg. at 53,036. That is, they seek to "provide regulatory relief for the agricultural biotechnology research community and yet provide adequate oversight to assure the public of the safe development of new products." *Id.*

The Coordinated Framework—under which APHIS promulgated the Part 340 regulations—further evinces a purpose of establishing a

uniform regime that balances the desire to harness biotechnology to advance agricultural competitiveness with the need to ensure public safety.[14] Through the Coordinated Framework, the federal government sought to "achiev[e] national consistency" with uniform regulation of GE plants, so that regulatory decisions would "protect[] human health and the environment, allow[] U.S. producers to remain competitive and, most importantly, assur[e] that everyone will reap the benefits of this exciting biological revolution." 49 Fed. Reg. at 50,857. The guiding principle of the framework is that GE plants should not be discriminated against solely because they are genetically engineered: "[p]roducts developed through biotechnology processes do not *per se* pose risks to human health and the environment." 57 Fed. Reg. 6753, 6756 (Feb. 27, 1992). As the policy explained, "[r]egulations that seek to reduce health or safety risks should be based upon scientific risk-

[14] CFS misses the point (at 17) when it argues that "the framework cannot support preemption" because it is a "*policy* document." APHIS promulgated Part 340 to implement the Coordinated Framework, and has referenced the Coordinated Framework when discussing the basis for its Part 340 rulemakings. *See, e.g.*, 51 Fed. Reg. 23,336, 23,336 (June 26, 1986); 51 Fed. Reg. at 23,352; 52 Fed. Reg. at 22,906; 60 Fed. Reg. 43,567, 43,572 (Aug. 22, 1995); 62 Fed. Reg. 23,945, 23,952 (May 2, 1997); 68 Fed. Reg. at 11,337. The Coordinated Framework, therefore, is directly relevant regulatory history. The Framework explains the federal government's purposes and objectives.

assessment procedures, and should address risks that are real and significant rather than hypothetical or remote." *Id.* at 6762.

Consistent with these purposes and objectives, APHIS's Part 340 regulations allow GE plants to be commercially cultivated when a plant-specific evaluation determines there is no significant risk to agriculture. *See* 7 C.F.R. §§340.4(b)(5)-(14), 340.3(b)(1)-(6) (authorizing field test permits upon scientific risk determination), §340.6(c)(5) (removing regulatory impediments to commercialization when the genetically modified plant presents no greater risk of plant harm than the nonmodified plant). Once the regulatory hurdles imposed by APHIS's regulations are cleared, APHIS treats a GE plant as equivalent to its conventional counterpart.

2. The Ordinance Frustrates The Purposes And Objectives Of The Plant Protection Act And Part 340

The Ordinance frustrates the above-described objectives of the Plant Protection Act and Part 340 in several respects.

First, rather than facilitate commerce in non-dangerous plants and promote the growth of biotechnology, the Ordinance indiscriminately bans nearly all commerce in GE plants in the County, including those that APHIS has determined do not pose any special

agronomic risk—and thus has deregulated. In so doing, it hinders the national advancement of agricultural biotechnology.

Second, rather than regulate based on "sound science" and risks that are "real and significant" rather than "hypothetical or remote," the Ordinance relies on the thoroughly unscientific "precautionary principle" that government should not wait "until the scientific community agrees on what [environmental risks] are or are not dangerous before it acts." Ordinance §3(4), 2ER204 (citation omitted).[15] The Ordinance rejects APHIS's sound-science determination that the Part 340 field test regulations adequately protect against risks from regulated GE plants, and APHIS's sound-science determinations about individual plants reached through informal adjudication during the deregulation process. Indeed, the Ordinance directly impedes the development of "sound science" by prohibiting the federally authorized

[15] Notably, the federal government has explicitly rejected the "precautionary principle" as a permissible basis for foreign restrictions on GE plants in successful litigation before the World Trade Organization, *see* WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products, Reports of the Panel* 1, 99-101 (Sept 29, 2006), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (follow "all documents" hyperlink and navigate to document), providing yet another ground for preemption. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 426-27 (2003) (finding a local law preempted where it interfered with foreign affairs goals).

and supervised open-air testing of GE plants that is essential to APHIS's scientific risk evaluation process, substantially interfering with the cornerstone of APHIS's regulatory regime.[16] *See Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 494 (1987) (state cannot interfere with "methods by which the federal [law] was designed to reach" goal); *Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 649-50 (9th Cir. 2004) (same); *see also Young v. Coloma-Agaran*, 340 F.3d 1053, 1055-57 (9th Cir. 2003) (concluding that Hawai`i state ban on commercial boating in Hanalei Bay was preempted by the federal government's issuance of coasting licenses).

Third, rather than regulate GE plants based on their individual characteristics and risk profiles, the Ordinance's ban applies to all GE plants solely because of their production method. Ordinance §§5, 11, 2ER205, 209. Likewise, the purported "EPHIS" study necessary to potentially lift the ban as to any specific use of a GE plant does not focus on the specific risks posed by the particular plant, but instead focuses broadly upon all "GE Organisms" and "environmental and

[16] 57 Fed. Reg. at 53,039-40 (noting that scientific data is "necessary in order for APHIS to determine that the regulated article … does not present a plant pest risk" and that "APHIS believes … [that] field testing may be required" to make the necessary showing).

public health questions related to large-scale commercial agricultural entities." *Id.* §7(2)-(3), 2ER206.

Fourth, rather than promote national uniformity, the Ordinance and similar state and local laws would substitute an unworkable patchwork of regulation for the consistent application of risk-based findings of an expert federal agency reached through a formal process carrying the force of the law. *See Ouellette,* 479 U.S. at 494 (preemption where agency undertook to "balance … public and private interests" under federal water pollution laws and state tried to "upset[]" the agency determination);[17] *Geier,* 529 U.S. at 881 (preemption where an agency scheme as a whole is specifically designed to promote a full range of "safe" product choices); *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008); *Ventress v. Japan Airlines*, 747 F.3d 716, 722 (9th Cir.) (patchwork regulation), *cert. denied*, 135 S. Ct. 164 (2014).

In short, the Ordinance completely disregards the national regime for GE plant regulation and attempts to substitute in its place a local

[17] Indeed, in some circumstances an agency's decision to merely refrain from regulating could itself have preemptive effect. *See Sprietsma,* 537 U.S. at 64.

regime that is antithetical to, and would substantially impede, the national regime's purposes and objectives.

It is little wonder that APHIS believes that its "existing regulatory framework ... combined with the NIH Guidelines which are mandatory for all research grants are *adequate and appropriate* for regulating research, development, testing and evaluation, production, and application of [agricultural] biotechnology products." 49 Fed. Reg. at 50,898 (emphasis added). APHIS has repeatedly explained that the appropriate role for states is to review and comment on federal regulatory actions, and to work cooperatively with (*not* at odds with) APHIS in federal enforcement. *See, e.g.*, 58 Fed. Reg. 17,495, 17,504 (Apr. 5, 1993) (noting that the process established under this rule will enable, with continued cooperation by the states, identification and communication of any issues of state or local concern, so that those issues will be directly considered as part of the federal actions); 52 Fed. Reg. at 22,902 (similar). That is no empty gesture; APHIS takes the views of states seriously when regulating under the federal regime. For example, APHIS noted in 2006 that it "has never approved a field test permit over the objections of State counterparts or without

accommodating additional permit conditions recommended by the States." *USDA Regulation of Biotechnology Field Tests in Hawaii, supra* note 8, at 1. And Hawai`i, through the Department of Agriculture, is "one of the most active States when it comes to providing input." *Id.* at 2.

But *APHIS* "has ultimate authority for regulating biotech crops." *Id.* "State regulation of the intrastate movement of genetically engineered plants … is preempted [if] … different than, or otherwise inconsistent with, the provisions of [Part 340]." 58 Fed. Reg. at 17,053. When, as here, APHIS has acted, "neither the States nor Territories [nor Counties] can establish additional requirements concerning the particular subject matter regulated thereby." *Id.* The Supremacy Clause forbids that sort of local interference with national interests. APHIS's views on preemption are longstanding and consistent. *See, e.g.*, 57 Fed. Reg. at 53,040; 60 Fed. Reg. 43,567, 43,572 (Aug. 22, 1995); 62 Fed. Reg. 23,945, 23,956 (May 2, 1997). They are correct and entitled to deference here. *See Chae*, 593 F.3d at 949-50 (according deference to agency's view on preemption due its own regulations).

3. SHAKA's Arguments Against Implied Preemption Are Unpersuasive

SHAKA never seriously grapples with these conflicts, instead relying primarily on two faulty points.

SHAKA says (at 40) that the Plant Protection Act does not expressly seek to promote, or even mention, GE plants. That is incorrect: Congress incorporated portions of APHIS's GE regulations into the Act (the concept of a "release into the environment"), sought to "consolidate" and "enhance" APHIS's authority, and specifically provided for Part 340 to remain in place when it repealed APHIS's old plant authorities. *Supra* at 20, 22, 26-28. But even if Congress had not had GE plants specifically in mind, it clearly articulated its objective to promote commerce in plants that do not pose plant pest (or noxious weed) risks, *see supra* at 35-38, and APHIS's administration of the Part 340 process facilitates and implements that objective.

The Supreme Court "frequently has observed that a statute is not to be confined to the 'particular [applications] … contemplated by the legislators." *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (alterations in original) (citation omitted) (concluding that GE plants are patentable inventions despite lack of mention in statute). That is

especially true where the statute expressly delegates rulemaking authority to an agency to fill in the details of a broad statutory regime, as is the case here. 7 U.S.C. §7754. APHIS clearly had GE plants in mind when it promulgated Part 340, and its purposes and objectives are just as relevant here. *See City of N.Y.*, 486 U.S. at 64; *Geier*, 529 U.S. at 874-86.

SHAKA (at 41) and CFS (at 18) also argue that there cannot be obstacle preemption because the Ordinance seeks to protect against harms not regulated by the Plant Protection Act and Part 340. But regardless of the Ordinance's *aims*, its indiscriminate *methods* would still frustrate the purposes and objectives of the federal regime. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992) ("Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field."); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971) (concluding that state law is not saved from preemption because "the state legislature in passing its law had some purpose in mind other than one of frustration," as such a rule would "enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a

legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law").

For that reason, Appellees' position that the Ordinance would frustrate the federal regulatory scheme is perfectly consistent with this Court's decision in *Vilsack*. 718 F.3d 829. There, this Court held that APHIS's regulatory authority over GE plants does not extend to the economic consequences of natural cross-pollination ("gene flow") between GE and non-GE plants. *Vilsack*, 718 F.3d at 841. Gene flow is a natural phenomenon not unique to GE plants and refers to the spread of pollen between sexually compatible plants by wind, insects, and the like. As a matter of agronomics, some plants (including GE plants) pose no risk of gene flow whatsoever because, for example, they are self-pollinating. But even when gene flow conceivably poses an economic issue, it is relevant only in an extremely limited context—when for example two neighbors are growing related crops in the same vicinity, and one is attempting to obtain a high level of varietal purity so that he can sell specialty seed from the crop at a premium.

An appropriate local entity (in Hawai`i, the state Department of Agriculture, *see infra* Part II) might be able to fill gaps in the federal regime to address these issues, such as by facilitating a way for neighboring farmers to address cross-pollination between sexually compatible crops when that presents a genuine issue. But it cannot do so as the Ordinance would, in a way that would cripple the federal regime. The Ordinance fails for that reason. It is not, as SHAKA and CFS would have it, a complementary measure crafted to address harmoniously a gap in the federal regime. It is a blunt instrument that bans nearly all GE plants based solely on how they are made—an unscientific, simplistic approach that conflicts with and undermines the objectives of the federal regime. It cannot co-exist.

II. THE ORDINANCE IS PREEMPTED BY STATE LAW

The Ordinance is also preempted by state law. SHAKA accepts that the relevant Hawai`i preemption test is set forth in *Richardson v. City & Cty. of Honolulu*, 868 P.2d 1193, 1209 (Haw. 1994); SHAKA Br. 43. But SHAKA incorrectly asserts (at 45) that Hawai`i's counties have "authority to do whatever is not specifically *prohibited* by the State." (citation omitted.) That turns the law upside down. Under Hawai`i

law, counties have only those powers *delegated* by the State; unlike the states in the federal union, Hawai`i counties do not have residual powers. *See, e.g.*, *Ruggles v. Yagong*, 353 P.3d 953, 964 (Haw.), *cert. denied*, 136 S. Ct. 552 (2015); *In re Application of Anamizu*, 481 P.2d 116, 118 (Haw. 1971). There is thus no "presumption against preemption" under Hawai`i law. *See* 1ER47-48. Under *Richardson*, the only question is whether the municipal ordinance covers the same subject matter as state law. *See State v. Ewing*, 914 P.2d 549, 554 (Haw. Ct. App. 1996); *Richardson*, 868 P.2d 1209. And, if so, whether the statutory scheme "disclos[es] an express or implied intent to be exclusive and uniform throughout the state." *Richardson*, 868 P.2d at 1209. The Ordinance flunks both steps of that test.

A. Hawai`i State Law Creates A Comprehensive Regulatory Regime Encompassing Allegedly Harmful Plants

The Hawai`i Constitution specifies that "*[t]he State* shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands," and that "*[t]he legislature* shall provide standards and criteria to accomplish the foregoing." Haw. Const. art. XI, §3 (emphases

added); *see also* 1ER51. Pursuant to that constitutional mandate, the state legislature established a state agency, the Hawai`i Department of Agriculture, and gave that Department comprehensive authority to "[p]romote the conservation, development, and utilization of agricultural resources in the State." HRS §26-16(c)(1). By law, "[t]he department of agriculture shall be headed by an executive board to be known as the board of agriculture," and that board "shall consist of ten members," including (as relevant here) at least one "resident of the county of Maui." *Id.* §26-16(a)(2). The Chair of the Board is directed to "[i]dentify problems related to agriculture and the appropriate *state* agencies and departments needed to solve the problem," and "[w]ith the approval of the governor, the designated agencies shall provide any necessary assistance to the chairperson until the problem is resolved." *Id.* §26-16(b)(2) (emphasis added).

The legislature thus gave the Department authority to administer an entire Title of the Hawai`i Revised Statutes devoted to "Agriculture and Animals." *See generally id.* chs. 141-169; *see also id.* §141-1 (describing the Department's "general" duties). In addition to Chapter 141, which establishes the Department of Agriculture in the first place,

two additional Chapters of that Title are especially relevant here: Chapter 150A ("Plant and Non-Domestic Animal Quarantine and Microorganism Import," a/k/a the "Hawaii Plant Quarantine Law," HRS §150A-1), and Chapter 152 ("Noxious Weed Control").

In particular, the legislature directed the Hawai`i Department of Agriculture to:

> adopt, amend, and repeal rules ... for and concerning: (1) The introduction … and propagation of ... plants; [and] (2) The quarantine, inspection, ... destruction, or exclusion ... of any ... seed ... or any other plant growth or plant product ... that is or *may be* in itself injurious, harmful, or detrimental to [the agricultural or horticultural industries or the forests of the State].

HRS §§141-2(1), (2) (emphasis added). These rules apply not only to the introduction of injurious plants into the State, but also "from one island within the State to another island therein, or ... one part or locality of any island to another part or locality of the same island." *Id.* §141-2(3); *see also id.* §141-1(2) ("The department of agriculture shall ... [e]ncourage and cooperate with ... all private persons and organizations doing work of an experimental or educational character coming within the scope of the subject matter of chapters 141, 142, and 144 to 150A ….").

The Department—acting qua Department or through its Board—is specifically empowered to restrict by rule and require permits for the introduction of potentially harmful plants:

> (a) The board shall maintain a list of restricted plants that require a permit for entry into the State. Restricted plants or any portion thereof shall not be imported into the State without a permit issued pursuant to rules.
>
> (b) The department shall designate, by rule, as restricted plants, specific plants that may be *detrimental or potentially harmful to agriculture, horticulture, the environment, ... or public health* .... In addition, plant species designated by rule as noxious weeds are designated as restricted plants.

HRS §§150A-6.1(a), (b) (emphasis added). The Board's deliberations are assisted by an Advisory Committee that includes "the chairperson of the board of land and natural resources, the director of the office of environmental quality control, the director of the department of health," and five other members who "are thoroughly conversant with modern ecological principles and the variety of problems involved in the adequate protection of [the State's] natural resources." *Id.* §150A-10. And the Board is authorized to issue permits for the importation of "restricted plants" into the State for research, *id.* §150A-6.1(a), (d); *see also id.* §141-2(6) (authorizing the Department of Agriculture to adopt rules regarding "[t]he manner in which agricultural product promotion

and research activities may be undertaken"); *cf.* *`Ohana Pale Ke Ao v. Bd. of Agric.*, 188 P.3d 761, 764-65 (Haw. Ct. App. 2008) (recognizing that state Board of Agriculture has authority to regulate GE algae under HRS §150A-6).

Hawai`i statutes thus establish a statewide regime for the regulation of "restricted" or "noxious" plants, *i.e.*, "any plant species which is, or which may be likely to become, injurious, harmful, or deleterious to the agricultural, horticultural, aquacultural, or livestock industry of the State and to forest and recreational areas and conservation districts of the State, as determined and designated by the department from time to time." HRS §152-1 (defining "[n]oxious weed"); *see also id.* §150A-6.1(b) (defining "restricted plants"). Although the parties here obviously differ sharply over whether GE plants are harmful, and thus qualify as "restricted" or "noxious" plants in the first place, there is undeniably a robust statewide regulatory framework in place for Maui residents to pursue their professed concerns about such plants' allegedly adverse impacts.

B. The Ordinance Regulates The Subject Matter Encompassed Within This Comprehensive Regime

By its terms, the Ordinance bans GE plants based on a concern that they may endanger non-GE plants, as well as the County's environment, economy, and "cultural and spiritual heritage." Ordinance §§2(1), (11)-(13), 2ER199, 201. In so doing, the Ordinance covers a subject matter "embraced within [the] comprehensive state statutory scheme." *Richardson*, 868 P.2d at 1209; *see also Hawai`i Floriculture & Nursery Ass'n v. Cty. of Hawai`i*, No. 14-267, 2014 WL 6685817, at *3-6 (D. Haw. Nov. 26, 2014), *appeals docketed*, No. 14-17538 (9th Cir. Dec. 2014), No. 15-15020 (9th Cir. Jan. 2015); *Syngenta Seeds, Inc. v. Cty. of Kaua`i*, No. 14-14, 2014 WL 4216022, at *8-9 (D. Haw. Aug. 25, 2014), *appeals docketed*, Nos. 14-16833, 14-16848 (9th Cir. Sept. 2014).

The Ordinance overlaps in several respects with the state statutes giving the state Department of Agriculture comprehensive authority to regulate potentially harmful plants. For example, the Ordinance bans most testing of GE plants for research within the County, *see* Ordinance §5(1), 2ER205 (making it unlawful "to knowingly ... test [GE] Organisms within the County of Maui"), because of their purported

potential harm to other plants. But state law, as noted above, authorizes the Board to issue permits for the importation of "restricted plants," including potentially harmful noxious weeds, into the State for research, *see* HRS §150A-6.1(d), and authorizes the Department of Agriculture to adopt rules regarding "[t]he manner in which [such] research activities may be undertaken," *id.* §141-2(6). State law also directs the Department to "[e]ncourage and cooperate with ... all private persons and organizations doing work of an experimental or educational character coming within the scope of the subject matter of chapters 141, 142, and 144 to 150A," *id.* §141-1(2). The Ordinance, on the other hand, seeks to bring an abrupt end to precisely such experimental work. *See* Ordinance §§1, 2(8)-(10), 5(1), 2ER199-201, 205.

SHAKA's principal response is semantic: SHAKA insists that none of these state laws specifically addresses GE plants *as such*. *See, e.g.*, SHAKA Br. 2-3 ("[N]o statutory, or any legislative material mentions GE crops or their harms …."); *id.* at 5 ("There are not state laws or regulations that even mention GE crops."); *id.* at 19 ("[N]o state laws regulate GE crops."); *id.* at 43 ("[T]he Hawai`i legislature has not adopted any law addressing GE crops …."); *id.* at 44 ("[T]here is no

statute addressing GE crops or their related harms ...."); *id.* at 46 ("[N]o state statutes regulate GE crops ...."). But there is nothing talismanic about the *words* "genetically engineered." *See Diamond*, 447 U.S. at 315-16 (concluding that GE plants are patentable inventions despite lack of mention in statute). The question is whether state law comprehensively regulates a field that includes the plants that the Ordinance purports to regulate. And the answer, as the district court explained, is "yes." *See* 1ER54-55.

SHAKA also misses the point (at 47) by protesting that "no GE crop has ever been declared a noxious weed in Hawai`i or elsewhere." If anything, that only underscores the State's view to date that GE crops do not present the potential dangers that SHAKA alleges.

It is also no answer that one purpose of the Ordinance's GE plant ban is to avoid pesticide use that accompanies some GE plant testing and cultivation, and that the state regime concerning harmful plants does not specifically address "pesticide use." SHAKA Br. 48. A different state regime does specifically address pesticide use. The Agriculture and Animals title of the Hawai`i Code also has an entire chapter devoted to pesticides—Chapter 149A, the "Hawaii Pesticides

Law." HRS ch. 149A. This Chapter "creates a global or comprehensive mechanism for regulating pesticide licensing, sales, use, and enforcement within the State" that itself is "both uniform and exclusive." *Syngenta Seeds*, 2014 WL 4216022, at *8. It includes a licensing scheme for every person in the State who commercially applies *any* pesticide. *See* HRS §§149A-11, -13, -31. It authorizes the Department of Agriculture to establish "limitations and conditions" for all pesticides use, *id.* §149A-33, which the Department has exercised "to prevent unreasonable adverse effects on humans or the environment." HAR §4-66-23(9). And it creates a Pesticide Advisory Committee to "advise and assist the department in developing [further] laws and rules to carry out and effectuate the purposes of" Chapter 149A. HRS §149A-51.

Under this authority, the Department "*shall* evaluate a licensed pesticide when unreasonable adverse effects to humans or the environment have been documented and associated with the use of that pesticide." HAR §4-66-32.1(b) (emphasis added). That evaluation "shall consist of identification of unreasonable adverse effects to humans or the environment, including the social, economic, and environmental

costs of the pesticide, identification of the uses of the licensed pesticide, identification of the benefits of the pesticide, identification of alternatives to the licensed pesticide, identification of regulatory controls … mitigating unreasonable adverse effects on humans or the environment, … [and] whether the effects on humans or the environment are unreasonable." *Id.* §4-66-32.1(c). In the event a pesticide or pesticide use poses danger, "the chairperson of the board of agriculture, in consultation with the advisory committee on pesticides and also with the approval of the director of health" is empowered to "suspend, cancel, or restrict the use of certain pesticides or specific uses of certain pesticides." HRS §149A-32.5. Thus, to the extent the Ordinance's ban on GE plants is a means of *indirectly* regulating pesticides, the Ordinance intrudes into the comprehensive state pesticide regime as well.

C. The Statewide Regulatory Regime Discloses An Intent To Preempt Counties From Regulating Allegedly Harmful Plants

This comprehensive state scheme for the regulation of potentially harmful plants "disclos[es] an express or implied intent to be exclusive and uniform throughout the state." *Richardson*, 868 P.2d at 1209. As

the district court explained, the state regulatory scheme vests the Hawai`i Department of Agriculture and the Hawai`i Board of Agriculture with plenary authority over allegedly harmful plants, but "does not speak to county involvement in rulemaking, oversight, or enforcement relating to that scheme." 1ER56. That omission is telling: it is not reasonable to infer that the State went to the trouble of establishing a comprehensive statewide framework to regulate allegedly harmful crops and plants only to have counties bypass that scheme by unilaterally banning such plants on their own. None of the various state laws at issue here contemplates *any* independent role for counties in regulating allegedly harmful plants outside the statewide statutory framework. Rather, state law provides the Department of Agriculture authority to "determine[] and designate[]" which species require regulation, HRS §152-1, and explicitly places the Department in charge of implementing the entire "Agriculture and Animals" title of the state code. *Id.* §26-16; *id.* chs. 141-169; *see also id.* §141-1. Because "state law is 'so thorough and detailed as to manifest the Legislature's intent to preclude local regulation,'" SHAKA Br. 43 (quoting *Ruggles*, 353 P.3d at 961), the Ordinance is preempted.

SHAKA insists (at 48) that "a review of various [state] statutes illustrates legislative intent vesting the counties with broad authority to regulate agriculture and to protect the environment." But SHAKA paints with far too broad a brush. It cites the power of the state land use commission "to establish the boundaries of the districts in each county, 'giving consideration to the master plan or general plan of the county.'" *Id.* at 48-49 (citing HRS §205-2). But county involvement in general land-use planning is a far cry from county involvement in the regulation of allegedly harmful plants. Indeed, if anything, the land-use statute cuts against SHAKA, because there is no similar statute requiring state regulators to give consideration to county regulators with respect to the regulation of allegedly harmful plants.

Similarly unavailing is SHAKA's invocation of state law governing control of invasive species. *See* SHAKA Br. 49-50 (citing HRS ch. 194). That law establishes a state-level "invasive species council," and authorizes that Council to "create and implement a plan that includes the prevention, early detection, rapid response, control, enforcement, and education of the public with respect to invasive species." HRS §194-2(a), (a)(4). That provision specifies that the state Council "shall

collaborate with the counties and communities to develop and implement a systematic approach to reduce and control coqui frog infestations on public lands," *id.* §194-2(a)(4), and, more generally, "[i]nclude and coordinate with the counties in the fight against invasive species to increase resources and funding and to address county-specific activities that involve invasive species," *id.* §194-2(a)(12). Nothing in that provision remotely suggests that a county has the authority unilaterally to regulate any plant as an "invasive species"—*wholly independent of coordination with the State*—and ban that plant from the county. To the contrary, that provision underscores the imperative for *coordination* between State and county regulators in the fight against invasive species.

Nor, contrary to SHAKA's argument (at 45), does the "public trust" doctrine reduce the preemptive effect of state law. That doctrine, as SHAKA notes, requires the State and the counties to "conserve and protect Hawai`i's natural beauty and all natural resources, including land, water, air, minerals, [and] energy sources." *Id.* (citing Haw. Const. art XI §1). But that provision has nothing to do with the division of regulatory authority between the State and the counties, which is the

issue here. That doctrine "does not permit the County to legislate 'in an area already staked out by the legislature for exclusive and statewide statutory treatment.'" *Hawai`i Floriculture & Nursery Ass'n*, 2014 WL 6685817, at *6 (emphasis added) (quoting *Richardson*, 868 P.2d at 1207). SHAKA's two-sentence argument on the "public trust" doctrine does not even purport to explain how that doctrine trumps ordinary preemption principles to allow counties to regulate in an area comprehensively regulated by the State, or forecloses an intent for state law to be exclusive. The State, after all, can fulfill its "public trust" obligations either by delegating regulatory authority to the counties or by retaining such authority for itself.

In a last ditch effort to save the Ordinance, SHAKA (at 50-51) leans on legislative *inaction*. According to SHAKA, Hawai`i counties should be deemed to have authority to regulate allegedly harmful plants because "the state legislature has … *refused to overturn* county regulations that reach the same area as the Ordinance." SHAKA Br. 50 (emphasis added). But legislatures decline to pass laws for any number of reasons—including the obvious reason that additional legislation is unnecessary because existing legislation will do the trick. *See, e.g.*,

State v. Medical Underwriters of Cal., 166 P.3d 353, 365 n.11 (Haw. 2007) ("[L]egislative inaction is not a cogent expression of legislative intent."). The Hawai`i Legislature, moreover, has never had any need to pass legislation confirming that state law preempts county ordinances regulating allegedly harmful plants, because no court has ever held otherwise. The only decisions to address that issue—the district court in *Syngenta Seeds*, *Hawai`i Floriculture*, and this case—have consistently held that the comprehensive state statutory scheme *does* preempt the field. SHAKA's "legislative inaction" argument, thus, is ironic: if anything, the legislature's failure to enact any legislation on the topic suggests that the legislature has no problem with the rulings in these cases.[18]

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[18] In fact, in the most recent legislative session, conflicting bills were introduced in the Legislature: some would have expressly preempted county ordinances dealing with GE plants, *see*, *e.g.*, S.B. 610, 28th Leg. (Haw. 2015), http://www.capitol.hawaii.gov/session2015/bills/SB610_.htm, while others would have expressly authorized such ordinances, *see*, *e.g.*, H.B. 687, 28th Leg. (Haw. 2015), http://www.capitol.hawaii.gov/session2015/bills/HB687_.htm. The legislature enacted none of those bills in the most recent legislative session. Thus, SHAKA's "legislative inaction" argument is at best a wash.

III. THE ORDINANCE IS INVALID UNDER THE MAUI COUNTY CHARTER

Finally, several aspects of the Ordinance are also invalid under the Maui County Charter. As most relevant here, the Charter provides the County with authority to "provide for punishment of violations of ordinances and rules having the force and effect of law, but *no penalty shall exceed the amount of $1,000.00*." Maui County Charter §13-10 (emphasis added). The Ordinance purports to impose a graduated set of "civil monetary penalt[ies]" against any person or entity that violates it ranging from $10,000 to $50,000, with "each day of violation" considered a separate violation, Ordinance §9(2), 2ER207, and an additional criminal fine of $2,000, with a new criminal offense for each day that the violation continues after conviction, *id.* §9(3), 2ER207. These penalty provisions are blatantly invalid, as the County rightly admitted in its Answer and the district court held. *See* 1ER60; 4ER840 (admitting to paragraph 75 of the Complaint); 2ER192-93 (Complaint);

SHAKA argues (at 52) that the specific penalty provisions of the Ordinance cannot be invalidated by the general commands of the Charter because as a matter "of statutory construction, the more specific provisions prevail over the more general." But that rule does

not hold true when, as here, the two laws occupy different places in the hierarchy. It is a "basic tenet of municipal corporation law" that "an ordinance which conflicts with an express provision in a charter is invalid." *Fasi v. City Council of City & Cty. of Honolulu*, 823 P.2d 742, 744 (Haw. 1992); *see* Maui County Charter §2-1 (granting the County "all power possible for a county to have under the constitution and laws of the State of Hawaii … [and] not prohibited by such constitution or by this charter"). The fact that the Ordinance is a *specific* violation of a *general* Charter provision does not save it.

SHAKA also insists (at 52-53) that, even if the penalty provisions are invalid, they must simply be severed from the rest of the Ordinance. The district court did not reach this question, since it had already decided the entire Ordinance was preempted under federal and state law. It concluded only that, while it could conceivably reduce the criminal provision from $2,000 to $1,000, it could not save the civil fine provisions in the same manner, because the Ordinance "demonstrated an intent to increase the penalties for subsequent violations." 1ER61-62. SHAKA does not challenge that holding here.

It would be premature for this Court to address the broader severability question in the first instance. In addition to these penalty provisions, Appellees attacked several other aspects of the Ordinance as inconsistent with the County Charter, *see* Mot. for Summ. J. 52-68, 5ER1153-69, including on an additional ground that the County conceded in its Answer. *See* 4ER840 ¶14 (admitting that "[t]he Ordinance improperly modifies and limits the County Council's repeal powers," 2ER193 ¶76). If this Court were to reverse, those issues would have to be decided by the district court on remand before any severability analysis could be properly done. *See, e.g.*, *Hawaiian Tr. Co. v. Smith*, 31 Haw. 196, 202 (1929) (permitting severance only "if, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent" (citation omitted)).

IV. SHAKA'S REMAINING ARGUMENTS ARE UNAVAILING

A. The District Court Did Not Abuse Its Discretion By Declining To Certify The State-Law Issues To The Hawai`i Supreme Court

SHAKA argues that "the district court should have certified the state law issues to the Hawai`i Supreme Court." SHAKA Br. 56 (capitalization altered). SHAKA recognizes that "[c]ertification to the

state supreme court ... [is] reviewed for abuse of discretion." *Id.* at 21 (citing *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009)). Indeed, "[e]ven where state law is unclear, resort to the certification process is not obligatory." *Riordan*, 589 F.3d at 1009 (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974)). The district court here did not remotely abuse its discretion by declining SHAKA's invitation to certify the state-law issues to the Hawai`i Supreme Court.

With respect to the state-law preemption issue, there is no dispute as to the governing legal test: all parties, and the district court, agreed that it is the two-part test articulated by the Hawai`i Supreme Court in *Richardson*. *Richardson* itself was an answer to a certified question by the District of Hawai`i seeking clarity on how to apply then-unclear state preemption standards to a local ordinance. *See* 868 P.2d at 1198; *Richardson v. City & Cty. of Honolulu*, 802 F. Supp. 326, 344-45 (D. Haw. 1992). The Hawai`i Supreme Court explained in excruciating detail how to determine whether local laws are preempted by Hawai`i state law. *Richardson*, 868 P.2d at 1206-14. The only dispute here is over the application of that test to the facts of this case. It was certainly within the district court's discretion to decide that this case-

specific application of established law did not warrant the extraordinary step of certification.

The same conclusion applies to the county-charter issue. The requirements of the Maui County Charter are clear on their face, and SHAKA has identified no legal ambiguity requiring clarification by the Hawai`i Supreme Court. Unless this Court is planning to get into the business of certifying *every* question of state law to a state court—which would mark a sharp break with its past practice, and undermine the efficiency of the federal judicial process—the district court did not abuse its discretion by refusing to certify the county-charter issue to the Hawai`i Supreme Court. *See, e.g.*, *Riordan*, 589 F.3d at 1009; *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1087 (9th Cir. 2003).

Indeed, under these circumstances, it would have been an abuse of discretion *to* certify these questions. To accept certification, there must be "no clear controlling precedent in the Hawai`i judicial decisions." Haw. R. App. P. 13(a). The relevant state legal precedents here are sufficiently clear to allow resolution by the federal courts.

B. SHAKA's Anticipatory *Atay* Action Was Properly Removed Because It Arises Under Federal Law

SHAKA argues (at 53-56) that the district court erred by refusing to remand its preemptive state-court action against Appellees and the County. At the outset, it is worth clarifying the narrow reach of this argument. Because SHAKA's preemptive action is essentially a mirror image of Appellees' case against the County and no one disputes that the district court had jurisdiction to decide *Appellees'* case, whether SHAKA's action should be remanded does not affect whether any other issue in this appeal is properly before this Court.[19] In any event, under settled Ninth Circuit law, the district court correctly exercised jurisdiction over SHAKA's request for a declaration that, in direct contrast to Appellees' undisputedly federal claims, the Ordinance is "valid and enforceable." 4ER901 ¶65.

A civil action is removable to federal court if the district court could have exercised original jurisdiction over the case. 28 U.S.C. §1441(a). And a district court's original jurisdiction extends to all civil actions "arising under the Constitution, laws, or treaties of the United

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[19] For purposes of this brief, Appellees assume that the Court finds that SHAKA has standing.

States." *Id.* §1331. The question is whether SHAKA's request for declaratory relief "arises under" federal law for purposes of Section 1331.

The "arising under" doctrine is an "unruly" one. *Gunn v. Minton*, 133 S. Ct. 1059, 1064-65 (2013). But it is generally *sufficient* to confer jurisdiction that the plaintiff states a cause of action created by federal law. *See id.* at 1064. And it is generally *insufficient*, by itself, that the defendant has raised (or is expected to raise) a federal defense. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950). Requests for declaratory relief, however, present a special case. Declaratory judgment actions typically are brought in anticipation of a traditional coercive suit (for damages or injunction) by the declaratory-judgment defendant, with the purpose of settling the validity of the declaratory-judgment plaintiff's anticipated defense. The Supreme Court long ago held that the federal Declaratory Judgment Act, 28 U.S.C. §2201, which makes this role reversal possible in federal court, is "procedural only." *Skelly Oil*, 339 U.S. at 671 (citation omitted).

That means two things. First, "[a] declaratory judgment plaintiff may not assert a federal question in his complaint if, but for the

declaratory judgment procedure, that question would arise only as a federal defense to a state law claim." *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985). Second, "[i]f, however, the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then [the Court] *ha[s] jurisdiction*." *Id.* (emphasis added). In other words, in a declaratory judgment case, "it is the character of the *threatened action*, and not the [anticipated] defense, which will determine whether there is federal-question jurisdiction in the District Court." *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952) (emphasis added).

Although this rule developed in the context of the federal Declaratory Judgment Act, the Supreme Court has since made clear that the same rule also applies to removal jurisdiction over actions seeking declaratory relief under state declaratory judgment statutes. *See Franchise Tax Bd. v. Construction Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 18 (1983). And it resolves jurisdiction over SHAKA's request for a declaratory judgment here.

SHAKA filed its preemptive state-court action in *express anticipation* of Appellees' suit against the County to enjoin enforcement

of the Ordinance. SHAKA told the state court that, after the enactment of the Ordinance, Monsanto and Dow (a company affiliated with Appellee Agrigenetics) "made public statements that [they] intend[] to challenge the legality and enforceability of the [Ordinance] in court." 6ER1267 ¶¶25-26. And it forthrightly informed the court that it sought to preempt that "imminent and inevitable litigation" to obtain the opposite declaration that the Ordinance is "valid and enforceable." 6ER1269-70 ¶¶32-33, 40. As the district court rightly found, the state-court action "was filed in anticipation of the coercive *Robert Ito Farm* Action." 1ER144.

Indeed, SHAKA's amended complaint (the operative one when the case was removed) eliminated any conceivable doubt. Expanding on the allegations from the original complaint, SHAKA confirmed that, as expected, "Defendants collectively initiated a Federal Court action one day after Plaintiffs filed their Complaint in this case, addressing the validity and legality of the Ordinance. *This is the same issue that is before this Court*." 4ER900 ¶56 (emphasis added). SHAKA complained that the preliminary injunction in Appellees' case had "delay[ed] the certification and implementation of the Ordinance," 4ER898 ¶48,

persisted in its request for declaration that the Ordinance was "valid and enforceable," 4ER901 ¶65, and asked the Court to declare that the County was "obligated to certify the election results and immediately implement the Ordinance," 4ER903 ¶78, notwithstanding the federal preliminary injunction in place prohibiting such implementation.

No one disputes—nor reasonably could—that Appellees' complaint against the County arises under federal law. *See Shaw*, 463 U.S. at 96 n.14 ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute … presents a federal question which the federal courts have jurisdiction under 28 U.S.C. §1331 to resolve."). SHAKA's declaratory judgment action in anticipation of that suit thus does as well.

SHAKA insists (at 54-55), however, that the anticipated action must be one that the declaratory-judgment defendant would bring against the declaratory-judgment *plaintiff*—not, as in this case, a co-defendant. That is certainly the normal state of affairs.[20] But this

[20] Indeed in most cases, were the threatened suit not one against the declaratory-judgment plaintiff, one might reasonably question whether the declaratory-judgment plaintiff had any interest in the resolving the disputed question. *Cf.* Motions to Dismiss (No. 15-16466, Dkt. #18; No. 15-16552, Dkt. #20).

Court has not limited the doctrine in that manner. To the contrary, it has repeatedly said that the question is whether "the declaratory judgment defendant could have brought a coercive action in federal court *to enforce its rights*." *Janakes*, 768 F.2d at 1093 (emphasis added); *see also Nat'l Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562, 566 (9th Cir. 1987) (same); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986) (same); *Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1253 (9th Cir. 1987) ("[T]o ascertain the presence of federal jurisdiction in a declaratory judgment action, it is necessary to determine whether the defendant against whom declaratory judgment is sought could have asserted his rights in a federal court."). "In other words, in a sense [federal courts] can reposition the parties in a declaratory relief action by asking whether [federal courts] would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy." *Standard Ins. Co. v. Sklad*, 127 F.3d 1179, 1181 (9th Cir. 1997); *see Janakes*, 768 F.2d at 1093. Here, Appellees' anticipated coercive action seeks a federal remedy against an invalid and unenforceable

Ordinance—precisely the issue at the center of SHAKA's preemptive complaint.

SHAKA also contends (at 55) that, even if the district court would have had jurisdiction had SHAKA initially filed its request for declaratory relief in federal court, it does not have jurisdiction because the case was instead *removed* from state court. But that argument cannot be squared with the text of Section 1441(a), which provides that "*any* civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants." 28 U.S.C. §1441(a) (emphasis added). SHAKA urges the Court to follow a Third Circuit decision (and a district court decision following it), which dismissed the reasoning of *Wycoff* as dictum and held that the rule from *Skelly Oil* and *Wycoff* does not apply to claims for declaratory relief under state law. *See* SHAKA Br. 55-56 (citing *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 344-45 (3d Cir. 1974)). *La Chemise Lacoste*, however, was decided before the Supreme Court said exactly the opposite in *Franchise Tax Bd.,* 463 U.S. at 18. More recent decisions from other courts have properly followed the Supreme Court's lead. *See, e.g.*, *Wisconsin Interscholastic Athletic*

Ass'n v. Gannett Co., 658 F.3d 614, 620 (7th Cir. 2011) (applying *Wycoff* to uphold the removal of a state-court action for declaratory relief). This Court should do the same.

C. The District Court Did Not Abuse Its Discretion By Denying SHAKA's Request For Irrelevant Discovery

SHAKA's charge (at 58) that the district court abused its discretion by refusing to defer its summary judgment ruling until discovery closed is frivolous. Under Rule 56(d), a district court may defer consideration of a summary judgment where a nonmovant "cannot present facts *essential* to justify its opposition." Fed. R. Civ. P. 56(d) (emphasis added). That was clearly not true here. "Preemption is predominantly a legal question, resolution of which would not be aided greatly by development of a more complete factual record." *Hotel Employees & Rest. Employees Int'l Union v. Nevada Gaming Comm'n*, 984 F.2d 1507, 1513 (9th Cir. 1993). And the "facts" SHAKA points to on appeal—the purpose and reach of a statute—are not "factual" issues at all, but instead legal questions that federal courts resolve all the time without discovery. Indeed, SHAKA did not even claim below that either of those "facts" would be aided by further discovery, but instead sought

discovery on other irrelevant issues. *See* 1ER22; 8ER1982 ¶4; 7ER1721-22.

CONCLUSION

For the foregoing reasons, if SHAKA has standing to pursue these appeals, the district court's judgments should be affirmed.

Respectfully submitted,

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March 4, 2016

STATEMENT OF RELATED CASES

Appellees agree with the Statement of Related Cases provided in the Brief of Appellants.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, Brief for Appellees is proportionately spaced, has a typeface of 14 point and contains 13,646 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 4, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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