**Appeal No. 15-16466**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

*vs.*

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

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

**Appeal No. 15-16552**

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

*vs.*

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

and

COUNTY OF MAUI,
*Defendant-Appellee.*

Appeal from the United States District Court for the District of Hawai`i
Case No. 1:14-CV-00511-SOM-BMK

# REPLY BRIEF OF APPELLANTS

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# REPLY BRIEF OF APPELLANTS

Appellees' Answering Brief distorts the Federal Plant Protection Act (PPA) and Hawai‘i's Plant and Quarantine Law, two co-existing laws involving the quarantine of dangerous plants and pests. These laws do not preempt the Maui County Ordinance regulating the practice of growing Genetically Engineered (GE) crops. Appellees ignore the touchstone factor in both federal and state preemption analyses: Whether Congress and the Hawai‘i State Legislature *intended* to prevent the County of Maui from regulating GE operations. There is no legislative intent, either express or implied, on either the federal or state level, preempting the Ordinance. The Ordinance is a valid exercise of a county's police powers to protect its citizens' health, native environment, and cultural resources.

Neither the federal government, nor the State of Hawai‘i, have any statutes that regulate GE operations, let alone protect against the harms associated with these practices. The federal and state laws relied on by Appellees are designed to regulate the importation and exportation of dangerous plant pests and noxious weeds and to designate certain organisms as being subject to quarantine, not to regulate GE operations. As a result, GE operations, which involve an abnormal and destructive farming process, have been allowed to continue unregulated in Maui County.

Appellees go even further by trivializing the serious environmental and health harms as "unsubstantiated fears," but arguing at the same time that the small financial benefit provided by GE is "vital" to Maui's economy. Appellees' claims are false. The scientific evidence and the evidence submitted to the District Court show conclusively that GE operations create substantial harms, including higher exposure to dangerous pesticides into the environment, increased health risks to farm workers and nearby communities, increased erosion and chemical runoff based on the farming procedures used, and interference with Native Hawaiian traditional practices. 7ER1768-1780. To contradict this evidence, Appellees prevented all discovery, and instead rely on a compilation study that has been criticized and debunked for relying on largely irrelevant studies and ignoring studies that showed harmful effects. *See* Answering Brief at p. 10, n.5.[1] No studies have ever been conducted in Hawai'i to evaluate whether the GE practices conducted in Hawai'i are safe, which is the main purpose of the Maui County Ordinance. 7ER1778-1779.

Further, GE practices are not "vital" to Maui's economy, and the harms greatly outweigh any small financial benefit. Combined, Monsanto and Agrigenetics, the only known commercial GE developers on Maui, employ only

[1] *See* GMO Myths and Truths, *available at* http://earthopensource.org/gmomythsandtruths/sample-page/2-science-regulation/136-2/.

785 people in the entire County (2ER155; 2ER156) out of a total population of 163,019.[2] The small financial benefit of less than 1,000 jobs compared to other industries in Hawai‘i like tourism and organic farming is not even measureable.

Maui citizens who voted to adopt the Ordinance were in the best position to balance the harms against the small financial gains when they adopted the Ordinance. The District Court erred in disregarding their vote and invalidating Maui voters' efforts to protect themselves. The Ordinance is not preempted and does not conflict with federal and state laws, nor does it conflict with any provisions of the Maui County Charter.

## I. THE ORDINANCE IS NOT PREEMPTED BY THE PLANT PROTECTION ACT

### A. The Intent Of Congress Controls Preemption Analysis

Appellees ignore the "ultimate touchstone" in determining federal preemption -- *the intent of Congress.* *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted)). Courts must assume that the historic police powers of the states are not preempted unless there is a "clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal quotation marks and citations omitted).

[2] United States Census Bureau for Maui County, available at http://www.census.gov/quickfacts/table/PST045215/15009.

Appellees' citation to *City of N.Y v. FCC*, 486 U.S. 57 (1988) that "administrative action may have preemptive effect" is misleading because it ignores the key consideration for preemption. The nature and scope of an administrative agency's ability to preempt state law is determined based on the authority granted by Congress. *Id.* at 66 ("[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."). Appellees make the same error in discussing the standard for implied preemption by focusing on the "purposes and objectives of a federal agency," where the critical consideration is Congressional, not agency, intent. *See* Answering Brief at 34; *Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941) (noting that when the question of whether a federal act overrides state law "the entire scheme *of the statute* must of course be considered[;] … the state law must yield to the regulation of Congress *within the sphere of its delegated power*") (emphasis added) (citation omitted). Here, the PPA does not preempt local regulations on the farming practices associated with growing GE crops. Appellees' patchwork attempt to imply Congress's intent based on various executive orders and regulations that predate the PPA only underscores the lack of Congressional intent to preempt.

### B. There Is No "Clear and Manifest Purpose" By Congress To Preempt County Regulations On GE Operations

Appellees characterize the PPA as a federal statute designed to give the federal government exclusive regulatory power over growing GE crops. Under this theory, if a farmer grows GE corn, states and counties have no jurisdiction to regulate its practices. However, if a farmer grows organic corn, the state and county are free to regulate. Such an interpretation is absurd and has no support in the origins, intent and language of the PPA, nor in the regulations of the Department of Agriculture.

Congress enacted the PPA in 2000 to streamline various prior plant and pest quarantine statutes, including the Plant Quarantine Act, the Federal Plant Pest Act, and the Federal Noxious Weed Act. 7 U.S.C. § 7701 et seq. The express purpose of the PPA is to control "the spread of plant pests or noxious weeds … for the protection of the agriculture, environment, and economy of the United States[.]" 7 U.S.C. § 7701(1). Under the PPA, the Secretary of Agriculture is authorized to, among other things: (1) adopt regulations requiring a permit for the import, export and interstate movement of certain plants and other organisms that the Secretary deems harmful; and (2) "cooperate" with "other Federal agencies or entities, *States or political subdivisions of States*, [and other governments]" in carrying out its authority under the PPA. 7 U.S. C. §§ 7712(c), 7751(a) (emphasis added).

The PPA includes a limited express preemption clause that only applies where the state regulation: (1) involves "movement in interstate commerce" of any article, means of conveyance, plant pest, or noxious weed; (2) was adopted "in order to" control a plant pest or noxious weed; and (3) if the Secretary has issued a regulation or order to prevent the dissemination of the biological control organism, plant pest, or noxious weed within the United States.

Here, Congress did not intend that the PPA would preempt local regulations of GE operations, and the elements necessary for preemption have not been met. GE food crops intended for human and animal consumption are by definition neither "plant pests" nor "noxious weeds." GE crops are not mentioned anywhere in the statutory language, its purposes, or in its legislative history. Appellees' various arguments that ignore the statutory language only bolster the fact that Congress did not have a "clear and manifest purpose" to preempt local regulations of GE operations.

First, there is nothing in any of the regulations or the statutory language indicating that Congress delegated preemption powers to APHIS to have *exclusive* regulatory control over the development of GE crops, or if it did, that APHIS acted on such delegated power. The regulations addressing GE crops predate the adoption of the PPA. *See* 7 C.F.R. Chapter 340. Thus, the Secretary

has not even adopted regulations under the authority conferred by the PPA.[3] Further, the existing regulations do not have a preemption clause, and nothing contained in the regulations indicate an intent or belief that local regulations on GE farming practices are preempted.

Second, APHIS has made clear that its regulations are to be narrowly construed to limit their preemptive effect and to not interfere with local regulations. According to APHIS on its own webpage, "[APHIS is] guided by the March 11, 2011 memo to Executive Agencies on the Principles for Regulation and Oversight of Emerging Technologies issued by the Executive Office of the President. This memo emphasizes coordination with *local* regulators and states: "**There should be clear recognition of the statutory limitations of each Federal and state agency and an effort to defer to appropriate entities when attempting to address the breadth of issues**." *Id.* (emphasis added).[4] *See also* Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 4, 1999) ("Any regulatory preemption of State law shall be restricted to the minimum level necessary to

[3] Appellees incorrectly cite 7 U.S.C. § 7758(c) for the proposition that "APHIS's existing regulations could remain in place indefinitely." 7 U.S.C. § 7758(c) states that the prior regulations "shall remain in effect until such time as the Secretary issues a regulation under Section 7754 of this title that supersedes the earlier regulation." Thus, Congress did not envision that these regulations would stay in force "indefinitely" as Appellees claim.

[4] A link to this executive order is provided on APHIS's website at: https://www.aphis.usda.gov/aphis/ourfocus/biotechnology/sa_brs_vpm/ct_reg_guidance.

achieve the objectives of the statute pursuant to which the regulations are promulgated.").

Third, while Appellees pay great attention to the detailed analysis that APHIS follows in administering permitted field trials, this is irrelevant to preemption analysis. The inquiry is not whether APHIS does a good job implementing the PPA. The questions are whether Congress had a "clear and manifest intent" to delegate the power to preempt state laws regulating GE practices to the Secretary, and whether the Secretary has exercised that right consistent with its authority. Here, neither component has been satisfied. Further, the detailed permitting process that Appellees describe is only followed in one percent of the cases to develop a new GE crop.[5] The vast majority of new GE crops are released based solely on notification from the developer. *Id.* APHIS's jurisdiction is also limited to controlling "plant pest harms" --- it does not protect against other harms such as "transgenic contamination" or increased pesticide use that the Ordinance seeks to regulate. *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 839-41 (9th Cir. 2013).

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[5] *See* Maria R. Lee-Muramoto, Reforming the "Uncoordinated" Framework for Regulation of Biotechnology, 17 DRAKE J. AGRIC. L. 311, 318 (2012) (citation omitted).

[5] Freese et al., *Hawai'i Ctr. for Food Safety, Pesticides in Paradise: Hawai`i's Health and Environment at Risk* "Key Findings" ( 2015), http://www.centerforfoodsafety.org/files/key-findings_2nd_ed_61347.pdf.

Finally, the preemption language that Congress ultimately adopted closely resembles the narrow preemption clause that was addressed by this Court in *Guam Fresh, Inc. v. Ada*, 849 F.2d 436 (9th Cir. 1988), under the predecessor statute, the Plant Quarantine Act ("PQA"). Like the PPA, the preemption clause under the PQA provided that states could quarantine plants until the Secretary determined that quarantine was necessary. *Id.* at 437-38. This Court held that the PQA did not preempt local quarantine laws and that Congress intended to "restore the *concurrent* regulatory scheme" involving plant quarantine. *Id.* at 438-39 (emphasis added). Further, states have an inherent right to protect their borders from pests and the spread of disease. *Id.* Here, under the PPA, and consistent with the holding in *Guam Fresh*, there is a "concurrent regulatory scheme" allowing for local regulations on GE crops notwithstanding that APHIS conducts field trials affecting some GE crops.

C. The Ordinance Is Not Expressly Preempted By The PPA

Appellees fail to demonstrate that each element under the PPA's express preemption clause was satisfied. With regard to each element, Appellees' arguments only demonstrate that Congress did not intend to preempt local regulations of growing GE crops through regulations of plant pests and noxious weeds, and the PPA and the regulations do not preempt the Ordinance.

1. The Ordinance Was Not Adopted "In Order" To Control A Plant Pest Or Noxious Weed

The preemption clause only applies to state and county regulations that are adopted "in order to" control a plant pest or noxious weed. 7 U.S.C. § 7756(b)(1). It is undisputed that this is not the purpose of the Ordinance, but rather the Ordinance is intended and designed to address harms caused by GE operations, in particular, transgenic contamination, economic impacts to organic farmers, increased pesticide use, health-related issues, preserving public trust resources and the cultural heritage of Native Hawaiians. 2ER204. These harms are not addressed or regulated under the PPA, and this Court has affirmed that USDA's role is limited to protecting against plant pest harms. *Vilsack*, 718 F.3d at 840, 841. The Ordinance cannot be read to have been adopted "in order to" protect against the limited harms addressed under the PPA. Therefore, Appellees' arguments fail.

Appellees' further contention that the purpose of the Ordinance is irrelevant is contrary to the intent of Congress, and renders the preemption language, "in order to," superfluous. *Azarte v. Ashcroft*, 394 F.3d 1278, 1288 (9th Cir. 2005) (statutes are to be interpreted to give meaning and force to all provisions). The PPA is a limited federal law designed to allow for quarantine of dangerous plants and organisms. It was not intended to interfere with local quarantine laws that do not conflict with federal law, such as Hawai'i 's Plant and

Quarantine Law, HRS Chapter 150A, let alone interfere with local regulations of agriculture and farming practices that happen to involve GE crops.

Appellees' attempt to distinguish *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) is also unpersuasive. The fact that *PG&E* involved implied preemption only makes the limits of federal preemption under the PPA clearer. In *PG&E*, the Court was forced to imply that Congress "left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons." *Id.* at 223. Here, Congress has made its limitation express by restricting the scope of federal preemption to local laws that are adopted "in order to" control a plant pest or noxious weed. *See Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (where Congress includes express preemption language making local intent relevant, that language is the "best evidence" of Congress's intent).

Further, there is no relevant factual distinction between *PG&E* and this case. In *PG&E*, Congressional intent was limited to nuclear plant safety, while preserving the ability of states to decide the need for nuclear plants based on economic considerations. Here, Congressional intent under the PPA is limited to protecting against harm from plant pests and noxious weeds, while preserving local regulation of agriculture as well as the "concurrent regulatory scheme," allowing states to "protect their borders from pests and the spread of disease." *Guam Fresh*,

*Inc.*, 849 F.2d at 438-39. The holding in *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) does not limit the holding in *PG&E*. Instead, it emphasizes that the *PG&E* Court considered both the state's purpose and "actual effect" on nuclear safety. *English*, 496 U.S. at 84. A county ordinance that establishes field trials to determine whether certain GE crops may cause plant pest risks may be preempted. But the PPA does not prevent states or counties from adopting regulations that protect against harms caused by GE operations or the manner in which producers grow GE crops where it causes local harms.

2. APHIS Does Not Classify Any GE Crops As Plant Pests Or Noxious Weeds

For the PPA preemption clause to apply, Appellees must show that "the Secretary has issued a regulation or order to prevent the dissemination of the … plant pest … within the United States." Appellees have not shown that the Secretary has classified any GE crops as "plant pests" under 7 C.F.R. Chapter 340. Appellees grossly distort Chapter 340 to state that "the Secretary of Agriculture, through APHIS, has classified as plant pests all GE plants that are made with a plant pest[.]" Answering Brief at 21. Although Chapter 340 lists multiple organisms that are deemed plant pests, GE crops are not listed. Further, APHIS does not classify GE crops as "plant pests," rather it classifies (and defines) certain GE crops as "regulated articles" because they are engineered with genes from an agrobacterium that the USDA classifies as a plant pest. 7 C.F.R. 340.1 (defining

"regulated articles"); *Vilsack*, 718 F.3d at 835; 73 Fed. Reg. 60008, 60009 (October 9, 2008). Appellees make the overbroad claim that "APHIS deems nearly all GE plants *to be* plant pests[,]" (at 23), but this is simply not true. 73 Fed. Reg. 60008, 60009 ("Regulated Articles are essentially GE organisms which might pose a risk as a plant pest."), 60010 ("As defined under the current regulations and the PPA, most plants are not plant pests, with the exception of a few parasitic plant species, such as striga, witchweed, and dodder."). The argument that GE crops are plant pests is belied by the fact that the USDA has never determined a GE crop to be a plant pest, and of the 117 applications for deregulation since 1992, the USDA has granted all of them, concluding that none were plant pests.[6]

### 3. The Ordinance Does Not Involve Movement In Interstate Commerce

The preemption provision of the PPA only applies to local regulations of plant pests or noxious weeds that involve "movement in interstate commerce[.]" 7 U.S.C. § 7756(b)(1). Here, regulated articles cannot lawfully be "in commerce" and the Ordinance does not involve the "interstate movement" of any plants.

Appellees' focus on the definition of "movement" ignores the distinction between "in interstate commerce" and "affecting interstate commerce." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) (explaining that

[6] USDA, *Petitions for Determination of Nonregulated Status*, https://www.aphis.usda.gov/biotechnology/petitions_table_pending.shtml.

the words "in commerce" have a narrower meaning than "affecting commerce" or "involving commerce"). APHIS has authority over activities "in or affecting interstate commerce," 7 U.S.C. § 7701(9), but the preemption clause of the PPA is *intentionally narrower*, covering only activities "in interstate commerce." *Id.* § 7756(b)(1). While GE crop field trial experiments in Maui County may indirectly *affect* interstate commerce, the preemption clause only applies to activities *in*, not *affecting*, interstate commerce. Hence the Ordinance's application does not fall within the preemption provision.

Appellees' reliance on the definition of "movement" ignores the statutory language in the preemption clause that state or county law must also seek to regulate "in interstate commerce." Congress defines "interstate commerce" as "trade, traffic, or other commerce … between a place in a State and a point in another State, or between points within the same State but through any place outside that State." 7 U.S.C. § 7702(7). Thus, while Congress recognized that APHIS would have broader regulatory power over plant pests and noxious weeds that "affect" interstate commerce, the preemption clause is limited to requiring travel between a point in one State and a place outside the State (i.e., "in interstate commerce" as defined under the PPA). If Congress intended for the preemption clause to encompass the entire scope of APHIS's regulatory power, the preemption clause would have read the "movement of any plant pest or noxious weed." As

Congress included the phrase "in interstate commerce," this phrase must be given affect.

Finally, Appellees' argument begs the question why Congress did not simply include a subsection banning regulation of intrastate commerce if this was the intent behind the preemption provision. Although Appellees claim that interpreting "movement in interstate commerce" as proposed by Appellants would lead to an "absurd result," Congress, elsewhere in the statute, felt it necessary to clarify the distinction. Subsection 7731 of the PPA authorizes the Secretary to conduct warrantless inspections of "any person or means of conveyance moving (1) into the United States . . . (2) in interstate commerce . . . and (3) in *intrastate commerce* . . ." 7 U.S.C. § 7731 (emphasis added). If Congress intended that a provision of the PPA apply to intrastate activities, it was able to make this intent clear and manifest by including express language, but did not.

4. The Exceptions For Preemption Under The PPA Apply

The Ordinance falls within both exceptions to the PPA. The PPA specifically allows states and counties to impose prohibitions or restrictions on plant pests or noxious weeds that are "consistent with and do not exceed the regulations or orders issued by the Secretary." 7 U.S.C. § 7756(2)(A). The Ordinance is not a ban on GE operations. Rather, it is a requirement that a GE operator conduct a study prior to commencing or continuing GE operations. The

study is intended to address transgenic contamination, pesticide contamination and health risks caused by GE operations. 2ER206-207. These separate harms are not regulated under the PPA. The Ordinance does not regulate the specific field trial protocols and other matters addressed by APHIS regulations.

Further, even if the Ordinance was construed to be a ban, which it is not, the preemption exclusion allows for "prohibitions or restrictions" that are consistent with and do not exceed the regulations issued by the Secretary. The plain meaning of the preemption provision is that states and counties can issue additional regulations, including *prohibitions*. They cannot however override federal regulation by setting lower standards that would be preempted by regulations or orders issued by the Secretary. Under Appellees' argument, states and counties could never adopt a law that places a "prohibition" or additional "restrictions" on any plant pest or noxious weed.

The second exception also applies. The PPA allows for local regulation where "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). The evidence before the District Court, based on "sound scientific data," showed the harms caused by GE operations, which, at the very least, warrants presentation to the Secretary of a "special need" to allow the Ordinance. This argument was not waived. Appellants were denied the

opportunity to fully litigate their state court action, which sought to compel the County to take action to implement the Ordinance. Instead, the District Court granted summary judgment on an expedited schedule without allowing any discovery.

D. The Ordinance Is Not Preempted By Implied Obstacle Preemption

Like they do with express preemption, Appellees deliberately ignore the overarching standard for implied preemption: Congressional intent is the touchstone factor, and there is an even higher presumption that implied preemption does not exist where Congress has included an express preemption provision. *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 517 (1992).

Appellees begin their argument with the faulty premise that the purpose of the PPA is to "facilitate commerce in non-dangerous plants and promote the growth of biotechnology." *See* Answering Brief at 38. This is not accurate. Rather, the PPA has the opposite objective. The purpose of the PPA, as Congress expressly stated, is to "*control*…the spread of plant pests or noxious weeds for the protection of agriculture, environment, and economy of the United States." 7 U.S.C. § 7701(1) (emphasis added). Further, the Secretary is to facilitate import, export and interstate commerce of products that may harbor plant pests or noxious weeds "*in ways that will reduce, to the extent practicable*, the risk of dissemination of plant pests or noxious weeds." 7 U.S.C § 7701(3) (emphasis

added). Nothing in the statute indicates Congress's intent to facilitate and promote the growth of biotechnology, especially at the risk of harms to communities and infringing on local police powers.

Appellees argue that because Congress adopted the phrase "release into the environment," that this somehow equates to Congressional intent to promote GE crop development at the expense of state and local regulations. The only inference that can be made is that Congress decided to use a phrase that is commonly used in multiple other federal statutes. *See e.g.,* 7 USCS § 8302; 42 USCS § 9601; 42 USCS § 9604; 42 USCS § 6981; 42 USCS § 13101 (federal statutes that all use the phrase "release into the environment"). There is no basis to believe that Congress intended to preempt local regulations by including this phrase. Defining "movement" to include "release into the environment" *is not* the same thing as Congress expressing its intent that the PPA preempts local regulations on the development of GE crops.

Appellees' second point that the Ordinance conflicts with the PPA because it is allegedly supported only by "precautionary principals" and not "sound science" is factually inaccurate and not relevant to the test for preemption. Appellees opposed any discovery that would reveal the nature and extent of GE operations and resulting harm. 9ER2031-2032. Notwithstanding the lack of

discovery, the record below demonstrates significant harm based on first hand observations, expert testimony, and sound science. In particular:

1. International research has directly linked the exposure to pesticides in GE operations to severe respiratory problems, brain tumors, developmental disorders, physical birth defects, and fetal death, among other documented adverse side-effects. 7ER1776-1778. These harms are heightened in Maui given the multiple growing seasons and potentially higher amounts and combinations of pesticides that are being used. 7ER1773-1779.

2. GE operations have resulted in significant environmental harms supported by scientific data, including: (1) pesticide and chemical drift – chemicals contaminating streams, soil, the ocean, other natural resources, and nearby communities and schools; (2) "superweeds" – the development of weeds that are resistant to high applications of pesticides; (3) the development of insects that are resistant to pesticides; and (4) transgenic contamination – GE traits contaminating native species and threatening natural farming. 7ER1773-1776.[7]

3. GE operations involve the use of a disproportionately small portion of the land, leaving large areas barren and susceptible to higher environmental pollution. 7ER1770.

Moreover, while the harmful impacts are compelling, the scientific data under which Maui adopted the Ordinance is not relevant for preemption analysis. The scope of the PPA is limited to protecting against plant pest harms and does not regulate the harms that the Ordinance seeks to redress, and the Ordinance does not stand as an obstacle to Congress's purposes and objectives. *Vilsack*, 718 F.3d at 839-41.

[7] George A. Kimbrell & Aurora L. Paulsen, The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense, Vermont Law Review; Winter 2014, Vol. 39, Issue 2, p. 354.

Finally, the leading cases Appellees cite to support their implied preemption argument actually support SHAKA's position. In *Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 498 (U.S. 1987), the Court held that property owners could not bring a suit under Vermont law against a paper mill operator for creating a continuing nuisance where the source of the pollution was from the state of New York. The *Int'l Paper* Court held that the claim was preempted under the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., which established a federal permit program to regulate the discharge of pollutants in partnership with the state that was the source of the pollutant. *Int'l Paper Co.*, 479 U.S. at 498. The Court further held that the plaintiffs could bring the claim under New York law because the CWA allows states to impose *higher* standards for discharge as the source state, and enforcement of the laws of the source state does not disrupt the regulatory partnership established by the CWA. *Id.* at 499. The Court further recognized that "States can be expected to take into account their own nuisance laws in setting permit requirements." *Id. See also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992) (holding that preemption under OSHA only extends to laws adopted for workers' safety and not to laws of "general applicability," which do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike).

The same situation is present in this case where the PPA expressly requires "cooperation" with local regulators, and the statutory framework involves a "concurrent regulatory scheme" between federal and state regulators. *See Guam Fresh, Inc.*, 849 F.2d at 437. On the federal level, APHIS's review is limited to protecting against plant pest harms allowing for local regulations. The Ordinance at issue here does not frustrate any purpose of Congress to control plant pests or noxious weeds.

Finally, a point Appellees ignore, is that once deregulated, APHIS ceases to monitor or regulate commercial GE crops in any way. There are no federal statutes that the Ordinance would possibly conflict with, nor is there a purpose that is being frustrated.

## II. THE ORDINANCE IS NOT PREEMPTED BY STATE LAW

### A. There Is No Comprehensive Regulatory Scheme Addressing The Same Subject Matter As The Ordinance

Appellees cannot show that the Ordinance regulates a subject "already staked out by the legislature for exclusive and statewide statutory treatment." *Richardson v. City & Cnty. of Honolulu*, 868 P.2d 1193, 1207 (Haw. 1994). As explained in SHAKA's Opening Brief, HRS Chapter 26, establishing the Department of Agriculture ("DOA"), Chapter 141, defining the jurisdiction of the DOA, Chapter 150A, regulating quarantine of danger plants, and Chapter 152,

concerning noxious weeds, [8] do not establish a "comprehensive regulatory scheme" under the standard established by controlling Hawai'i precedent.

Under Hawai'i law, the standard for finding a comprehensive regulatory scheme is high. In *Richardson*, the court considered a state law and a county ordinance, both of which addressed condemnation of leasehold interests for purchase by homeowners. 868 P.2d at 1210-11. On review of the relevant laws, the court determined that the state statute at issue only covered involuntary fee conversion of "residential lots" and that the County was therefore free to regulate lease to fee conversions of condominium apartment buildings. *Id.* at 1211. The *Richardson* court readily disposed of the notion that four other chapters of the Hawai'i Revised Statutes, addressing various aspects of condominium governance, management, and negotiation of leases, precluded the County from legislating in the area of lease to fee conversion. *Id.* at 1211. The court stated that "[n]one of these chapter address **the substantive process of involuntary lease-to-fee conversion**." *Id.* (emphasis added). In other words, the court concluded that the County had authority to regulate where there was a gap in a seemingly

[8] In addition to HRS Chapters 26, 141, 150A and 152, the Appellees discuss HRS Chapter 149A, governing pesticides. Answering Brief at 55-57. The District Court explicitly found that HRS Chapter 149A does not address the same subject matter as the Maui Ordinance, and thus was not a factor in its preemption holding. 1ER058-59.

comprehensive set of statute regulations governing lease-to-fee conversion and condominium properties.

As in *Richardson*, none of the state laws cited by Appellees cover GE operations, leaving a distinct gap in the regulatory scheme in which the County is authorized to legislate, even in light of the number of different statutes Appellees cite. Hawai‘i Revised Statutes Chapter 26 establishes the Board of Agriculture as part of the executive branch but does not establish any substantive regulations. The fact that each county has representation on the Board is irrelevant to preemption analysis and should not have been relied upon by the District Court. 1ER056. Equally unavailing is Appellees' lengthy citation to HRS §§ 141-1 and -2. The first section enumerates the administrative duties and functions of the DOA and does not relate to any substantive areas of agriculture regulations. Similarly, the second section enumerates the areas in which the DOA has jurisdiction to regulate by rule-making, but does not establish any substantive standards. The fact that the DOA has jurisdiction to regulate in this area does not establish the existence of preemptive state regulations. In fact, consistent with *Richardson*, the County has the authority to regulate in these areas pending the adoption of any rule by the State because a gap in the regulatory regime exists. Further, none of the enumerated areas relate to GE operations or conventional farming operations.

Notably, Appellees fail to cite to any regulations directly governing GE operations under Chapter 141, or the importation of GE crops under Chapter 150A. That is because there are none. The noxious weed regulations relied upon the District Court in its Order, 1ER052-53, are inapposite, and apply to noxious weeds which have been designated for "eradication and control projects" by the DOA. HAR § 4-68-3. Further, to meet the definition of noxious weeds, a plant must meet "all of the criteria in § 4-68-4 through § 4-68-8", *id.*, which include criteria based on plant reproduction characteristics, growth characteristics, detrimental effects, methods of control, and distribution and spread. In summary, there is no comprehensive regulatory scheme that addresses experimental GE crop cultivation on Maui County. Because there is no such scheme, Maui County has authority to regulate in this area pursuant to HRS § 46-1.5(13).

### B. Appellees' Intent Argument Misconstrues The Relevant Portions Of The Hawai'i State Constitution And State Statutes

A review of the same constitutional and statutory provisions Appellees cite in the first part of their preemption analysis demonstrate that the counties have dual authority to regulate in the areas of land use, the natural environment and, most importantly, agricultural policies. This dual regulatory authority sets a presumption against preemption in these particular areas of law.

Appellees rely on Article XI, section 3 of the Hawai'i Constitution, which provides that "the State shall conserve and protect agricultural lands,

promote diversified agricultural, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands," to suggest that the State has exclusive regulatory power over agricultural issues. Answering Brief at 48. Appellees later state that Appellants "paints with far too broad a brush" in citing to HRS Chapter 205. *Id.* at 59. However, Chapter 205 implements Article XI and *explicitly provides* for county regulation of agricultural lands:

> **State and county agricultural policies, tax policies, land use plans, ordinances, and rules shall promote the long-term viability of agricultural use of important agricultural lands** and shall be consistent with and implement the following policies . . .

HRS §205-43, "Land Use Commission; Important Agricultural Lands, Policies" (emphasis added) *See also Sierra Club v. D.R. Horton-Schuler Homes, LLC*, 136 Hawai'i 505, 531, 364 P.3d 213, 239 (2015) ("To the extent that Article XI, Section 3 requires implementing legislation to be enforceable, the legislature has provided the necessary legislation in Part III of Chapter 205.") The findings and statutory purpose of the Maui Ordinance are consistent with the mandate of Chapter 205 generally, and HRS § 205-43 specifically, allowing for county regulation in the area of agriculture.

Second, the public trust doctrine, as embodied in Article XI, section 1 of the Hawai'i Constitution, is an important touchstone in defining the dual regulatory authority of the State and its counties with respect to the environment. Further, Article XI, section 9 grants to each person "the right to a clean and

healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources." Although Appellees rely on Article XI, section 3, they have little to say about these other constitutional provisions. Appellees may be correct that the public trust doctrine and the rights conferred under the Hawai‘i Constitution do not replace preemption analysis; however, they are eminently relevant to the intent prong of the analysis.

The State has explicitly recognized that the counties have dual regulatory authority with respect to agricultural policies. *See* HRS §§205-2, -43. Similarly, the State and counties have dual regulatory authority over the environment and natural resources under Article XI, sections 1 and 7 of the Hawai‘i Constitution, which establish the public trust as a self-executing duty of the State and county governments. *In re Water Use Permit Applications*, 9 P.3d 409, 444 n.30 (Haw. 2000). In the absence of any specific statutes or regulations addressing GE crops, it is implausible that the State intended to usurp long-standing municipal powers to regulate in the area of environmental protection.

In summary, Appellees' arguments on intent fail to account for the structure and organization of the Hawai‘i's state and municipal governments. A review of the relevant constitutional and statutory provisions makes it clear that that the counties have dual regulatory authority in the areas of agriculture and

environmental policy. Silence in the area of GE regulation does not indicate any intent to foreclose county-level regulations in the areas of agricultural land and the environment, which have long been within the purview of county regulation under relevant statutes and the Hawai‘i State Constitution.

C. The Ordinance Does Not Exceed The County's Legislative Authority

The issue whether the Ordinance is invalid under the Maui County Charter implicates (1) the substantive penalty provision, and (2) the severability of the penalty provision, as stated in SHAKA's Statement of Issues Presented. Opening Brief at 2-3. The District Court erred in both portions of its analysis.

First, the District Court erred by finding that the Charter conflicts with the Ordinance in that the Charter limits the Council's penalty power to "$1,000, or one year's imprisonment, or both." Maui County Charter § 13-10. The Ordinance was adopted by voter initiative and is not governed by §1310, which established the limits of the county council's legislative powers. *Fasi v. Honolulu*, 823 P.2d 742, 743 (Haw. 1992), concerns the separation of powers between the legislative and executive branches of the county government and is therefore inapposite to the facts of this case.

Assuming *arguendo* that the penalty provision is invalid, the District Court incorrectly concluded that it was without authority to sever the offending provision. 1ER062. The Ordinance explicitly allows for severability. 3ER461.

"The general rule of law concerning the concept of severability is that if any part of a statute is held invalid, and if the remainder is complete in itself and is capable of being executed in accordance with the apparent legislative intent, then the remainder must be upheld as constitutional." *State v. Bloss*, 62 Haw. 147, 153, 613 P.2d 354, 358 (Haw. 1980) (citing *Territory v. Tam*, 36 Haw. 32 (Haw. 1942)).

As stated in SHAKA's Opening Brief and argued before the District Court, the primary purpose of the Ordinance is to require an environmental and health impact study of GE operations. The graduated penalty provision is accessory to this primary purpose and is included only in order to facilitate the performance of sections 4 through 7 of the Ordinance. *Compare* Ordinance §§ 4 "Purpose," 5, "Temporary Moratorium," 6 "Moratorium Amendment or Repeal," 7 "Environmental and Health Impacts Study (EPHIS)" *with* § 9 "Right of Action for Violations- Attorney's Fees" (addressing fines). Therefore, having ruled the penalty provision invalid, the District Court should have severed it because the remainder of the Ordinance is "complete in itself."

The key question is whether the legislature would have preferred what is left in the statute or no statute at all. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006). The ballot initiative was adopted in order to assess the impact of GE Operations on health and environment. The clear legislative preference of the people is to have "what is left of the statute," i.e., all

of the substantive provisions included in the Ordinance, rather than no statute at all. Appellees do not provide any persuasive reason to depart from this well-established legal precept.

## III. THE DISTRICT COURT MADE PROCEDURAL ERRORS IN DECIDING STATE LAW AND DENYING DISCOVERY

With respect to the remaining issues on appeal, these points are fully briefed in the Opening Brief. First, the District Court misapplied the coercive action doctrine when it denied remand of the State Court Action. Second, the District Court erred in refusing to certify the state law issues to the Hawai‘i Supreme Court where no Hawai‘i court has decided the relationship between County regulations and State law involving agriculture and environmental protection. Third, there were critical factual issues concerning the scope of federal and state regulations that required discovery, which the District Court denied improperly.[9]

[9] The District Court did not reserve ruling on the additional arguments that Appellees raise with respect to the County Charter. *See* Answering Brief at p.12, n.6. The District Court expressly denied Appellees' argument that the Ordinance violated the notice and cure provisions under HRS § 46-1.5 because the Court "presumes that the department would comply with state law[.]" 1ER061. After the ruling, the only claim that Appellees reserved was the Commerce Clause claim, Count III of the Complaint, which was dismissed without prejudice. *See* DKT 170 and 177 in Case # 1:14-cv-00511. Appellees did not file a notice of appeal with respect to any portion of the District Court's ruling, never requested that the District Court affirmatively rule on the additional arguments, and has not asserted these arguments in its Answering Brief. Accordingly, such claims have been waived and Appellees should not be allowed to relitigate those claims.

## IV. CONCLUSION

The District Court made grave errors in rushing to decide this case. The lower court incorrectly denied discovery on disputed facts, seized jurisdiction over SHAKA's first-in-time state court action asserting *only* state claims, and continuing an injunction that was entered into by two non-adverse parties (the GE Industry/Appellees and the County of Maui) without balancing the harm to the community.

Ultimately, the District Court substituted its judgment over the decision of county voters. The District Court overrode the rights of the electorate to adopt a county ordinance by popular vote to protect against dangerous activities happening in their backyard. The District Court ignored the rights conferred under Hawai'i's Constitution guaranteeing each person the right to a "clean and healthful environment," and "affirming that "[a]ll political power of this State is inherent in the people[,] and the responsibility for the exercise thereof rests with the people." Haw. Const. Art. I, section 1, Art. XI, section 9.

What is clear from the record is this: Federal and State statutes and regulations that impact GE crops have a narrow focus. They address the import, export, and commerce of plant pests and noxious weeds. These laws do not protect the harms related to the destructive and dangerous process of growing GE crops. In neighborhoods on Maui near GE fields, the residents are not concerned about

confining plant pests or noxious weeds. Their concerns, as expressed by the language of the Ordinance, is (1) protecting themselves from toxic chemicals that are placed into the environment; (2) preserving Maui's natural resources and agricultural lands; (3) protecting Maui's economy that centers on tourism and organic agriculture; and (4) preserving traditional Native Hawaiian practices and use of the land. These citizens' votes, rights and their safety should not be ignored.

DATED: Honolulu, Hawai'i , March 18, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) this brief is proportionately spaced, has typeface of Times New Roman 14 point or more and contains 6,709 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 document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 18, 2016. The following parties who are registered CM/ECF users will be served by the appellate CM/ECF system.

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