Appeal No. 15-16466

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

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

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

OPENING BRIEF OF APPELLANTS

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OPENING BRIEF OF APPELLANTS

Plaintiff-Appellants/Intervenors Defendants-Appellants Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and Sustainable Hawai'ian Agriculture for the Keiki and the 'Aina Movement (collectively, "Appellants") hereby submit their Opening Brief.[1]

I. JURISDICTIONAL STATEMENT

This is a consolidated appeal from two district court cases. In the first action, Appellants filed suit in state court against Defendant-Appellees Maui County and the private Chemical Companies.[2] The state court action was subsequently removed as Civ. No. 1:14-CV-00582-SOM-BMK ("State Court Action"). In the second action, Civ. No. 1:14-CV-00511-SOM-BMK ("Federal Court Action"), the Plaintiff-Appellees Chemical Companies filed suit against Defendant-Appellee Maui County and Appellants subsequently intervened as Intervenor-Defendants. In the Federal Court Action, the Chemical Companies based the district court's subject matter jurisdiction on 28 U.S.C. § 1331 and supplemental jurisdiction on 28 U.S.C. § 1367(a). Appellants maintain that the

[1] Pursuant to Ninth Circuit Rule 30-1, Appellants filed its Excerpts of Record, volumes 1-10 concurrently with this Brief. Citations to the record are to volume (1ER) and page number (001).

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

State Court Action was improperly removed pursuant to 28 U.S.C. §§ 1331 and 1367. This Court has appellate jurisdiction over this action pursuant to 28 U.S.C. § 1291.

Appeals from both cases were timely filed within 30 days pursuant to Federal Rules of Appellate Procedure ("FRAP") Rule 4(a)(1)(A).

II. STATEMENT OF ISSUES PRESENTED

A. Whether the district court erred in overriding the strong presumption against federal preemption and holding that the Plant Protection Act ("PPA") preempts a Maui County Ordinance placing a temporary moratorium on the growth of genetically engineered ("GE") crops, notwithstanding that: (1) the PPA does not address GE crops; (2) the PPA has a narrow express preemption provision with several prerequisites that are not met; and (3) there is no congressional purpose to which the Ordinance allegedly stands as an obstacle.[3] Appellants' arguments were raised at 7ER1731-40. Express preemption was decided at 1ER043-46, 1ER093-107, and implied conflict preemption was decided at 10ER043-46, 1ER107-110.

B. Whether the district court incorrectly decided state law issues by: (1) ruling that state law involving the powers of the Hawai'i Department of Agriculture ("HDOA") constitutes a "comprehensive statutory scheme" where no

[3] Pertinent statutes and regulations are set forth in an addendum to this brief.

statutes, or any legislative material mentions GE crops or their harms; and (2) ruling that the monetary penalty section of the Ordinance was contrary to the County Charter and could not be severed. Appellants' arguments were raised at 7ER1740-49 and decided at 1ER047-58, 1ER111-22 and 1ER059-62, 1ERR123-26.

C. Whether the district court erred in rushing to decide this case by: (1) refusing to remand a properly filed state court action alleging exclusively state law claims; (2) refusing to certify the state law issues to the Hawai‘i Supreme Court where there was no controlling Hawai‘i law; and (3) denying Appellants' request for 56(d) discovery on the scope of regulations affecting GE crops. Appellants' arguments concerning remand were raised at 7ER1491 and decided at 1ER145. Appellants' arguments concerning certification were raised at 7ER1719 and decided at 1ER047, 1ER111. Appellants' request for 56(d) discovery was raised at 7ER1721 and decided at 1ER024, 1ER088.

III. CONCISE STATEMENT OF THE CASE

Maui County is "ground zero" for the testing and development of GE crops. The testing and development of these crops require unprecedented chemical spraying and a highly destructive use of the land as compared to other commercial agricultural activities. 7ER1773-1775. These practices have been linked to serious environmental and public health problems, including environmental pollution,

pesticide runoff and drift, transgenic contamination, and the creation of "superweeds" that are resistant to high levels of pesticides. 7ER1773-1775. Hawai'i's uniquely-sensitive island environment makes these harms more significant. Despite the dangers, no tests or studies are conducted in Maui County, and there are no federal or state laws that protect against these specific GE crop harms. 7ER1778.

The people of Maui County decided this activity was not in their best interest. Its residents want to have their agricultural lands devoted to local food production not to open air chemical experiments and production of GE seeds. In order to afford its farmers, the general population, and environment greater protection, in November 2014, Maui citizens voted into law, via citizen initiative, a county ordinance placing a temporary moratorium on growing and testing GE crops until a safety study is completed demonstrating that these activities are not harmful ("Ordinance"). 2ER199-210.

Thirteen days after the Ordinance was approved, county officials, who had campaigned against the Ordinance, joined the Chemical Companies in agreeing to not certify the election results. 3ER 480-499. Within seven months the district court invalidated the Ordinance. In doing so, the district court made three fundamental errors.

First, the district court erred in overriding the strong presumption against federal preemption by ruling that the Ordinance was preempted by the PPA. The PPA addresses harms to agriculture caused by "plant pests" and "noxious weeds." The PPA includes a narrowly drafted preemption provision with conditions and exceptions. There is no express preemption under this statute because: (1) counties are allowed to regulate agricultural crops for purposes other than preventing the spread of "plant pests" and "noxious weeds"; (2) the USDA does not consider GE crops to be "plant pests" or "noxious weeds," which is the limit for preemption under the PPA; (3) the Ordinance does not involve movement "in interstate commerce"; and (4) the Ordinance falls within the preemption exceptions. The district court also misinterpreted the PPA by failing to distinguish between "regulated articles" (GE crops subject to field trials), and commercial GE crops (the majority of GE crops growing in the U.S.).

Second, the district court erred in misapplying state law to find that the Ordinance was preempted by a "comprehensive statewide scheme." The Hawai‘i Constitution and state law recognize that the counties have broad powers to protect health, safety, and the natural environment. There are no state laws or regulations that even mention GE crops. The creation of the HDOA and state laws dealing with "noxious weeds" do not constitute a comprehensive scheme or express legislative intent to preempt county regulation of GE crops.

Finally, the district court erred in rushing to decide this case without discovery when it should have remanded Appellants' lawsuit, certified state law issues to the Hawai‘i Supreme Court, and allowed discovery.

By its ruling, the lower court overrode the rights guaranteed under the Hawai‘i State Constitution and invalidated the election results of county residents trying to protect themselves from unique harms affecting health, safety, the environment, natural resources, as well as Native Hawaiian rights. The Ninth Circuit should reverse the district court's decision in its entirety.

IV. STATEMENT OF RELEVANT FACTS

A. Genetically Engineered Crop Operations In Maui County

Chemical companies that produce genetically engineered crops and related pesticides have made Hawai‘i the epicenter of their GE seed research and development because of its long growing seasons. These operations involve a particularly intense type of agricultural use that creates serious harmful environmental and human health impacts. 7ER1768-1780. The practice involves the use of high levels and combinations of repeated pesticide spraying, and use of a disproportionately small portion of the land, leaving large areas barren and more susceptible to environmental damage. 7ER1770. The operations involve the use of over 80 different chemicals, which are combined together to create chemical cocktails with unknown environmental and health impacts. 7ER1771; 10ER2495.

These activities are being performed in Hawai‘i with greater frequency than anywhere else in the United States.[4] Since 1987, Hawai‘i has hosted 3,243 field trials, more than any other state.[5] In 2014 alone, Hawai‘i was the site of 178 field tests, conducted over 1,381 different sites in Hawai‘i.[6] Due to Hawai‘i’s small size, it has a higher concentration of people living in close proximity to field test sites than other states. 7ER1774.

While GE crop practices involve a more severe use of the land and increased uses of pesticides, there have been no studies to evaluate their impacts to the environment or human health. 7ER1778; 10ER2495. Studies performed elsewhere on commercial GE crop farming have directly linked the exposure to pesticides to severe health problems including cancer, leukemia, brain tumors, and birth defects, among other documented adverse side-effects. 7ER1775-1778. The impacts have not yet been studied in Hawai‘i, but health complaints have been observed first hand in Maui County in areas located near GE crop fields. 10ER2380-81; 10ER 2387-88; 10ER2484; 10ER2495; 10ER2503. *See also*

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[4] Daylin-Rose Gibson, Remembering the “Big Five”: Hawai’i’s Constitutional Obligation to Regulate the Genetic Engineering Industry, 15 Asian-Pacific L. & Pol’y J. 213, 232 (Fall 2013).

[5] Freese et al., *Hawaii 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.

[6] Freese et al., Hawaii Ctr. for Food Safety, *Pesticides in Paradise: Hawai`i’s Health and Environment at Risk* 22 (MAY 2015), http://www.centerforfoodsafety.org/files/pesticidereportfull_86476.pdf.

Christopher Pala, Pesticides in paradise: Hawaii's spike in birth defects puts focus on GM crops, The Guardian, Aug. 23, 2015 (the rate of "severe heart malformation" was 10-times the national rate in Waimea on the Island of Kauai, an area plagued with GE operations).[7] GE operations also impede the use and enjoyment of surrounding areas by Maui residents. 8ER1844-76.

Testing and production of GE crops can also harm Maui County's farmers who grow conventional or organic crops and the surrounding environment through transgenic contamination. 10ER2490; 10ER2499. Open air field trials and commercial planting of GE crops have caused the unintended presence of transgenic material in traditional crops and sexually compatible wild plants. Contamination can also occur in many other ways. *See Geertson Seed Farms v. Johanns*, No. C 06–01075 CRB, 2007 U.S. Dist. LEXIS 14533, at *13-14 (N.D. Cal. Feb. 13, 2007) ("Biological contamination can occur through pollination of non-genetically engineered plants by genetically engineered plants or by the mixing of genetically engineered seed with natural, or non-genetically engineered seed."). Some genetically engineered plants are designed to produce powerful drugs within the plant's cells. *See Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d

[7] *Available at* http://www.theguardian.com/us-news/2015/aug/23/hawaii-birth-defects-pesticides-gmo (last visited November 24, 2015). Appellants seek judicial notice of publicly available facts appearing in newspapers. *Crowder v. Kitagawa*, 81 F.3d 1480, 1492 n.10 (9th Cir. 1996).

1165, 1170, 1183, 1186 (D. Haw. 2006) (USDA violated federal environmental laws in permitting companies to perform open-air field trials in Hawai‘i of plants engineered to produce hormones, vaccines, and other biologically active proteins). Cross-pollination by such plants would render the recipient plant unfit for human or wildlife consumption. Such pharmaceutical crops have escaped field trials and grown amid commercial crops heading for market.[8]

More commonly, crops are genetically engineered to resist herbicides or produce pesticides. *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 836 (9th Cir. 2013) ("*Vilsack*"). These plants can cause substantial harm to public health, the environment, and other farmers. *Id.* at 832, 841. Herbicide-resistance is the most frequently tested trait in GE crop field tests in Hawai‘i over the past five years.[9] One example is Monsanto's "Round-up Ready" crops, which are resistant to high levels of the herbicide glyphosate. Glyphosate has been linked to "significant chronic kidney deficiencies," "liver congestions and necrosis," "tumors," kidney

[8] U.S. Gov't Accountability Office, GAO-09-60, *Genetically Engineered Crops: Agencies are Proposing Changes to Improve Oversight, but Could Take Additional Steps to Enhance Coordination and Monitoring* 14-16, 91-92 (2008), http://www.gao.gov/products/GAO-09-60. Appellants ask the Court to take judicial notice of governmental documents and published data cited as matters of public record. *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001).

[9] Freese et al., *supra* note 4.

disturbances and failure,[10] and other environmental hazards. 7ER1772-75. In 2015, the World Health Organization and the American Cancer Association concluded that glyphosate is a probable carcinogen,[11] and California has recently filed its "notice of intent to list" glyphosate as a known cancer agent.[12] New research has also linked ultra-low doses of glyphosate to liver and kidney damage.[13] Glyphosate and other chemicals were found in stream sediments throughout Maui. 8ER1969. There are also many restricted use pesticides ("RUPs") that are used in GE crop field trials, such as chlorphyrifos, which are not available for sale to the general public due to their toxicity.[14]

These crops have also directly harmed farmers. For example, "[i]n August of 2006, it was revealed that the United States long-grain rice supply was

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[10] Séralini et al., *Republished study: long-term toxicity of a Roundup herbicide and a Roundup-tolerant genetically modified maize*, Environmental Sciences Europe, June 24, 2014, *available at* http://www.enveurope.com/content/26/1/14#sec5.
[11] *See e.g.* Kathryn Z. Guyton et al., *Carcinogenicity of tetrachlorvinphos, parathion, malathion, diazinon, and glyphosate*, Lancet Oncology, March 20, 2015, http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(15)70134-8/abstract; American Cancer Society, Known and Probable Human Carcinogens, http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/known-and-probable-human-carcinogens.
[12] Proposition 65, *Notice of Intent to List Chemicals by the Labor Code Mechanism: Tetrachlorvinphos, Parathion, Malathion, Glyphosate*, http://oehha.ca.gov/prop65/CRNR_notices/admin_listing/intent_to_list/090415LCset27.html.
[13] *See* Robin Mesnage et al., *Transcriptome profile analysis reflects rat liver and kidney damage following chronic ultra-low dose Roundup exposure*, Environmental Health, August 25, 2015, http://www.ehjournal.net/content/14/1/70.
[14] Freese et al., *supra* note 5.

contaminated with LLRICE 601, and the price of rice dropped dramatically. The market for American rice suffered significantly, in part because of the European aversion to any genetically modified foods." *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2007 U.S. Dist. LEXIS 76435, at *5 (E.D. Mo. Oct. 15, 2007).[15] Other genetically engineered plants, like bentgrass and canola, have escaped from experimental or commercial fields and established themselves in the wild, where they may alter ecosystems, harm wildlife, and cross-pollinate conventional crops. *See, e.g.*, *Int'l Ctr. for Tech. Assessment v. Johanns*, 473 F.Supp.2d 9, 21 (D.D.C. 2007) (describing contamination of national grassland by escaped experimental GE grasses).

According to expert testimony submitted to the district court, there is an "urgent need" to conduct studies on the impact of GE crop operations on Maui, as there are "potentially serious health and environmental impacts that to date have not been evaluated." 7ER1778.

B. The Ordinance

In November 2014, in order to address these problems, Maui County voters adopted into law, via citizen initiative, a county ordinance placing a temporary moratorium on growing and testing of GE crops until a safety study is

[15] *See also* Gretchen Vogel, *Tracing the Transatlantic Spread of GM Rice*, Science, Sept. 22, 2006, http://www.cof.orst.edu/cof/teach/agbiotox/Readings%202008/SpreadGMRice-ScienceMag-2006.pdf.

completed demonstrating that these activities are not harmful ("Ordinance"). 2ER199-210. The Ordinance was adopted pursuant to the County's authority under the Hawai'i Constitution to conserve public trust resources and its police powers under Hawaii Revised Statutes ("HRS") § 46-1.5(13) to protect residents' health, life, and property.

The Ordinance's express purpose is to address the following environmental and health issues that federal and state law do not address: (1) transgenic contamination; (2) economic impacts to organic farming; (3) increased pesticide use; (4) health-related issues; (5) preservation of public trust resources, defined in the Hawai'i Constitution as Hawai'i's natural beauty and all natural resources; and (6) the cultural heritage of Native Hawaiians. 2ER204.

The Chemical Companies (Monsanto and Dow AgroSciences) reportedly spent roughly $8 million in an advertising campaign to prevent this law's adoption.[16] This amount was well in excess of the Chemical Companies' own estimate of completing the study required under the Ordinance of about $1.4 million.[17] In addition, Maui County officials publicly and strenuously opposed the

[16] Keoki Kerr, *Pro-GMO companies spend $8 million to fight Maui initiative*, Hawaii News Now, October 28, 2014, http://www.hawaiinewsnow.com/story/27106705/pro-gmo-companies-spend-8-million-to-fight-maui-initiative.

[17] 2ER 182 (Chemical Companies' Complaint ¶ 51) (comparing the cost of the study required under the Ordinance to Environmental Impact Statements required

law's adoption. 3ER566-568. Despite this, Maui citizens approved the Ordinance into law. The County and Chemical Companies' response was to reach an agreement to not certify the election results and to not implement the law that the voters had approved.

V. STATEMENT OF RELEVANT PROCEDURAL HISTORY

A. Appellants File An Action In State Court To Declare The Ordinance Valid Under State Law And To Compel The County To Enforce The Ordinance

Following the adoption of the law, Appellants immediately filed a declaratory judgment action in state court seeking to compel the County to implement the Ordinance and to declare that the Ordinance was not preempted under state law. 6ER1262-1447. Appellants named the Chemical Companies and the County as co-defendants in the case. *Id.* Appellants did not assert any federal claims. *Id.*

B. The Chemical Companies File An Action In Federal Court To Declare The Ordinance Invalid And Stipulate With The County To Not Enforce The Law

The day after Appellants filed the State Court Action, the Chemical Companies filed a separate lawsuit in federal court seeking to invalidate the law under federal and state preemption. 2ER150-198. The same day, the Chemical Companies entered into a stipulation with the County of Maui to enjoin certifying

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under NEPA, in which DOE data showed the median EIS contractor costs from 2003-2012 was $1.4 million).

the election results and enforcing the Ordinance, and to expedite the briefing so that the case could be decided within six months. 3ER480-499. No hearing was conducted to establish whether an injunction was appropriate or warranted.[18]

Subsequently, Appellants were allowed to intervene in the Federal Court Action. 5ER1064.

On November 21, 2014, Appellants filed a motion to dismiss or stay the case. 3ER569. In this motion, Appellants requested that the district court stay or dismiss the Federal Court Action to allow the State Court Action to proceed first because it was filed first, and there were critical disputed issues of state law that warranted abstention and comity. At the time of this filing, the State Court Action had not yet been removed to federal court.

On December 17, 2014, the Chemical Companies filed a motion for partial summary judgment to invalidate the law. 5ER1082. Appellants opposed the motion, requested that the district court certify state law issues to Hawaii Supreme Court, and requested a Rule 56(d) continuance as no discovery had commenced. 7ER1691.

[18] In Appeal No. 15-15641, Appellants challenged the district court's decision to continue a stipulated injunction without holding a hearing on the balance of the harms. While this appeal was dismissed as moot because the district court made its final ruling, the court's errors as explained in the prior briefing are significant in that it refused to hear evidence; ruled that purely economic harms to the Chemical Companies outweighed the potential health impacts and damage to the environment caused by the operations; and extended a stipulated injunction that was not in the public interest.

C. The State Court Action Is Improperly Removed To Federal Court And Remand Is Denied

On December 30, 2014, the Chemical Companies removed the State Court action to federal court claiming federal question jurisdiction when in fact the complaint was exclusively based upon state law. 6ER1238. On January 15, 2015, Appellants filed a motion to remand. 7ER1491.

On January 15, 2015, the County filed a motion to dismiss Appellants' complaint in the State Court Action seeking a dismissal of the case based on ripeness and other grounds. 6ER 1476. On April 15, 2015, the district court ruled that Appellants' claims were ripe, and stated that it would rule on the substance of the motion to dismiss at the same time it decided the motion for partial summary judgment in the Federal Court Action. 1ER136. The district court also denied the motion to remand. 1ER145.

D. The District Court Erroneously Grants Summary Judgment Without Discovery

On June 15, 2015, the district court held the hearing on (1) the Chemical Companies' motion for partial summary judgment; (2) Appellants' motion to dismiss or for judgment on the pleadings with respect to the Federal Court Action; and (3) the County's motion to dismiss the State Court Action. 10ER2548. On June 30, 2015, the district court issued its Order Determining That

The County of Maui GMO Ordinance Is Preempted And Exceeds The County's Authority ("Final Order"). 1ER009; 1ER073. In its Final Order:

a. The district court denied Appellants' request for 56(d) discovery as to the alleged and undisclosed federal and state oversight on GE operations in Maui. 1ER023; 1ER087.

b. The district court denied Appellants' request to certify the state law issues to the Hawai‘i Supreme Court. 1ER047; 1ER111

c. The district court denied Appellants' request to stay based on ripeness. 1ER027; 1ER091.

d. The district court ruled that the State of Hawai‘i had a "comprehensive state statutory scheme" based on several statutes regulating noxious plants and weeds even though there is no express preemption and no laws regulating GE crops. 1ER047-58; 1ER111-22

e. The district court ruled that the penalty provisions exceeded the penalties allowed under the Maui County Charter. 1ER059-62; 1ER123-26

f. The district court ruled that the Ordinance was expressly preempted by the Plant Protection Act. 1ER027-43; 1ER093-107.

g. The district court ruled that the Ordinance is subject to implied conflict preemption. 1ER043-46; 1ER107-110.

Based on the above, the district court granted summary judgment in favor of the Chemical Companies with respect to Counts I, II, and IV of the complaint. 1ER62; 1ER126. The district court also denied Appellants' motion to dismiss or stay the case based on abstention, finding the issues moot, and granted the remaining portions of the County's motion to dismiss in the State Court Action. 1ER062-63; 1ER126-27.

Final judgments were entered and this appeal followed. 1ER007; 1ER071.

VI. SUMMARY OF ARGUMENT

A. The Plant Protection Act Does Not Preempt The Ordinance

Congress adopted the PPA to address and protect against harms to agriculture, the environment and the United States economy by "prohibit[ing] or restrict[ing] … movement in interstate commerce" of "plant pests" and "noxious weeds." 7 U.S.C. §§ 7701, 7754. The PPA is a cooperative statute with a narrowly drafted express preemption provision that only applies if: (1) a local law is adopted in order to control a plant pest or noxious weed; (2) the USDA has issued a regulation or order to prevent the dissemination of these organisms that the state or county wish to regulate; and (3) the local law involves movement "in interstate commerce." 7 U.S.C. § 7756(b)(1). There are also two exceptions: (1) the PPA allows local regulations of plant pests or noxious weeds that are consistent

and do not exceed the federal regulations; and (2) counties or states may petition the USDA for a special needs exemption. *Id.* § 7756(b)(2). Here, the three requirements for preemption are not met, and the two exceptions apply.

First, the Ordinance does not seek to control a plant pest or noxious weed. Rather, the Ordinance addresses separate harms, in particular, transgenic contamination and increased pesticide use, harms that this Court has held are not problems regulated under the PPA. *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 839-41 (9th Cir. 2013). These are harms that may be regulated by local government under traditional police powers.

Second, the USDA has not issued any regulations on GE crops that would preempt the Ordinance. The USDA has never found GE crops to be either a plant pest or noxious weed. *See* 7 C.F.R. §§ 340.2, 360.200. Under 7 C.F.R. § 340, the USDA through the Animal and Plant Health Inspection Service ("APHIS") regulates experimental GE crops as "regulated articles" because they are engineered with genes that the USDA classifies as plant pests, and are therefore being evaluated to determine whether they pose a plant pest risk. *Vilsack*, 718 F.3d at 835. The express preemption provision is narrowly drafted to only include regulations on "plant pests" and "noxious weeds," not the broader category of "regulated articles," which includes GE organisms that only may pose a plant pest risk.

Third, the Ordinance does not regulate movement "in interstate commerce." The district court failed to draw the distinction between the broader category of "affecting commerce," which is the scope of the PPA, and "in commerce," which is the narrower term used in the preemption provision. GE field trials are by definition not in commerce, and experimental GE crops are prohibited from entering commerce until the USDA "deregulates" them. *See* 7 C.F.R. §§ 340.0, 340.1, 340.6.

The Ordinance also falls within the preemption exceptions. The Ordinance does not conflict with or exceed the PPA or its regulations because it addresses different harms. The district court should have also allowed the County to petition the USDA for a special needs exemption pursuant to section 7756(b)(2)(B) of the statute even if there was a conflict.

Finally, the district court erred in failing to distinguish between regulated articles (subject to field trials under the PPA) and commercial GE crops (not subject to regulations).

B. The Ordinance Is Not Preempted By State Law And Does Not Violate The County Charter

There is no "comprehensive statutory scheme" disclosing legislative intent that regulations of GE crops be exclusively left to the state. In fact, no state laws regulate GE crops or protect against transgenic contamination. The County of Maui has express authority under the Hawai‘i Constitution and state law to protect

Hawai‘i’s unique environmental resources and to use its police powers to protect health, life, and property. The Ordinance is a proper exercise of these powers.

The State Legislature’s creation of the HDOA and regulations involving restricted plants or “noxious weeds” do not constitute a comprehensive statutory scheme, nor do these statutes demonstrate a legislative intent to prevent county regulations on GE crops. Instead, state law recognizes dual authority on the part of state and county agencies to protect agricultural interests and the environment.

The Ordinance’s penalty provision is also not in conflict with the County Charter as the County is permitted to impose specific penalties that are greater, and the penalty provision is severable from the main purpose of the Ordinance.

C. The District Court Erred In Not Allowing A State Court To Decide State Law And In Denying Discovery

First, the district court misapplied the coercive action doctrine as stated in *Janakes v. United States Postal Serv.*, 768 F.2d 1091 (9th Cir. 1985), when it denied remand in the State Court Action. Under the coercive action doctrine, federal courts have jurisdiction over declaratory judgment actions in which the declaratory judgment *defendant* has federal rights that it could assert against the declaratory judgment *plaintiff*. There are no adverse claims between the Chemical Companies and Appellants here. Further, the coercive action

doctrine is not properly applied to removal cases like this, which originate in state court under a state's declaratory judgment statute.

Second, the district court erred in refusing to certify the state law issues to the Hawai'i Supreme Court. There is no controlling precedent on the preemptive scope of laws creating the HDOA, nor are there any laws relating to the scope of the Maui County Charter.

Finally, there were critical factual issues concerning the scope of federal and state regulations and whether the Ordinance conflicted with these laws. The district court should have at a minimum allowed limited discovery before reaching the merits of preemption.

VII. STANDARD OF REVIEW

A. Federal preemption and statutory interpretation are reviewed *de novo*. *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

B. Interpretation of state law is reviewed *de novo*. *Vasquez v. N. Cnty. Transit Dist.*, 292 F.3d 1049, 1054 (9th Cir. 2002).

C. Denial of a motion to remand to state court for lack of removal jurisdiction is reviewed *de novo*. *United Computer Sys. v. At&T Info. Sys.*, 298 F.3d 756, 760 (9th Cir. 2002). Certification to the state supreme court and denial of 56(d) discovery are reviewed for abuse of discretion. *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009); *Burlington N. Santa Fe*

R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 773 (9th Cir. 2003).

VIII. ARGUMENT

A. The Strong Presumption Against Federal Preemption

1. Local Ordinances Are Presumed Valid And Enforceable

Under the Supremacy Clause, state laws are valid so long as they do not interfere or conflict with federal law. U.S. Const. art. VI, cl. 2; *see also Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). "For the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Id.* at 713.

Preemption analysis is guided by two fundamental principles. "First, 'the purpose of Congress is the ultimate touchstone in every preemption case.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted)). Second, courts begin with the "assumption that the historic police powers of the States" are not to be preempted by a federal statute "unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal quotation marks and citations omitted). The presumption against preemption applies to whether Congress intended any preemption at all, and if so, to "the scope of its intended invalidation[.]" *Id.* The presumption applies to express preemption arguments, *Wyeth*, 555 U.S. at 556 &

n.3, and with "equal force to conflict preemption" arguments. *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015).

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (U.S. 2004). Even if a preemption clause is susceptible to multiple interpretations, a court "[h]as a duty to accept the reading that disfavors preemption." *Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005). Additionally, the executive branch has issued an order that makes clear that "[a]ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated." Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 4, 1999).

2. Heightened Deference Is Warranted Given That The Ordinance Is A Voter Initiative Protecting Public Health, Safety, The Environment And Native Hawaiian Interests

The presumption against preemption "applies with particular force when Congress has legislated in a field traditionally occupied by the States." *McClellan*, 776 F.3d at 1039; *Exxon Mobil Corp. v. United States EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000). The Supreme Court has stated "we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the **clear and manifest purpose** of

Congress'." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995) (emphasis added); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Therefore, the presumption again preemption applies even more heavily in this case.

First, this Ordinance is the result of a voter initiative that was adopted because of the potentially serious harms to the community caused by unregulated GE operations and their related and unprecedented pesticide use. Health and safety are traditional areas of state concern. *Medtronic*, 518 U.S. at 475.

Secondly, the Ordinance is explicitly concerned with protecting the environment and Native Hawaiian cultural resources. The findings section of the Ordinance states, "the lands of Maui County and the water surrounding it have cultural and spiritual significance to the indigenous people of Hawai‘i who "will suffer irreparable harm if the natural environment of Maui County is contaminated by GE Operations and Practices." Ordinance §2.1, 2ER199. A primary purpose of the Ordinance is "to preserve Maui County's Environmental and Public Trust Resources (with its unique and vulnerable ecosystems), while promoting the cultural heritage of the indigenous peoples of Maui and indigenous agricultural Operations and Practices." *Id.* § 4.5. Environmental regulation is a matter of traditional state control. *Exxon Mobil*, 217 F.3d at 1255; *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 668, 673 (9th Cir. 2003). Similarly, Native Hawaiian

interests have a unique status under Hawai‘i law. *See* Haw. Const. art. XI, §§ 1, 9, art. XII, § 7; *Ka Pa'Akai O Ka'Aina v. Land Use Comm'n*, 7 P.3d 1068, 1082-83 (Haw. 2000); *Blake v. Cnty. of Kaua'i Planning Comm'n*, 315 P.3d 749, 761 (Haw. 2013).[19] Accordingly, federal courts cannot find preemption without a finding of a "clear and manifest purpose" to supplant state regulation in these areas. *Exxon Mobil Corp*, 217 F.3d at 1255; *Rice*, 331 U.S. at 230.

B. The Plant Protection Act's Preemption Provision Does Not Preempt Local Regulations Of GE Crops

Congress enacted the PPA to address and protect against harms to agriculture, the environment and the United States economy by "prohibit[ing] or restrict[ing] … movement in interstate commerce" of "plant pests" and "noxious weeds." 7 U.S.C. §§ 7701, 7754. Congress's purpose in enacting the PPA, and hence the "touchstone" for preemption analysis, *Wyeth*, 555 U.S. at 565, is protecting the environment and the U.S. agricultural economy by regulating the interstate movement of plant pests and noxious weeds. *See* 7 U.S.C. §§ 7701, 7754. A plant pest is defined as any of eight types of listed organisms that "can directly or indirectly injure, cause damage to, or cause disease in any plant or plant

[19] Congress has also recognized the significance of Native Hawaiian interests. In 1993, Congress adopted, and the President signed, the Apology Resolution recognizing "the illegal overthrow of the Hawaiian Monarchy," the special relationship that Native Hawaiians have with the land, and the need for restitution. Public Law 103-150, S.J. Res. 19, 103d Cong. (1993).

product . . .". *Id.* § 7702(14). A noxious weed is defined as "any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry or other interests or agriculture, irrigation, navigation, the natural resource of the United States, the public health, or the environment." *Id*. § 7702(10).

The PPA contains a limited express preemption provision. 7 U.S.C. § 7756. It provides:

> [N]o State or political subdivision of a State may regulate *the movement in interstate commerce* of any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product *in order to control a plant pest or noxious weed*, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed, if the Secretary has issued a regulation or order *to prevent the dissemination of the biological control organism, plant pest, or noxious weed* within the United States.

Id. § 7756(b)(1) (emphases added). Thus, there are several prerequisites for the limited provision to apply. First, the provision only applies to state or county regulation seeking to control "plant pests" or "noxious weeds." Second, it only applies if the USDA has already acted to prevent the dissemination of that plant pest or noxious weed. Third, the provision only applies to state or county regulation "in interstate commerce." Making the provision even narrower, there are also exceptions to the preemption provision under the PPA, which allows local regulations that are consistent with and do not exceed regulations adopted under

the PPA, and the USDA can issue a special needs exemption based on need. 7 U.S.C. § 7756(b)(2).

The subject of this case—genetically engineered crops—is not mentioned anywhere in the PPA's preemption clause, nor anywhere else in its statutory language, nor in its purposes, nor in its legislative history. However, pursuant to the PPA's implementing regulations, the USDA does regulate some GE crops during experimental trials. *See* 7 C.F.R. Part 340. These regulations pre-date the PPA, enacted in 2000, and instead were promulgated by the USDA in the 1990s, pursuant to a predecessor statute, the Federal Plant Pest Act of 1957.[20] Further, the decision for the USDA to regulate GE plants under existing authority was not made by Congress in the PPA or otherwise, but instead made by a 1986 Executive branch policy statement. *Vilsack*, 718 F.3d at 833 (citing Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302, 23,302 (June 26, 1986)).

Pursuant to the 7 C.F.R. Part 340 regulations, the USDA does not regulate GE crops simply because they are genetically engineered. Rather, the USDA regulates experimental GE crops that "might pose a risk as a plant pest," because they are genetically engineered using transgenic constructs from a plant

[20] Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There is Reason To Believe Are Plant Pests, 52 Fed. Reg. 22,908 (June 16, 1987).

pest such that APHIS, the Animal and Plant Health Inspection Service, which has jurisdiction to enforce the PPA, believes they might create a plant pest risk. 7 C.F.R. § 340.1. Importantly, these GE crops are classified not as plant pests but as "regulated articles." *See* 7 C.F.R. §§ 340.1, 340.2 (*compare* "regulated article" definition *with* "plant pest" definition); *Vilsack*, 718 F.3d at 835.

Regulated articles may only be experimentally planted or transported under specific permits or notification. *See* 7 C.F.R. §§ 340.3, 340.4; *Vilsack*, 636 F.3d at 1169. Developers who want to commercialize a GE plant must petition the USDA for non-regulated status, or deregulation. *Id.* § 340.6. The USDA then determines whether the GE crop is a plant pest; if it concludes that it is not, it grants the petition and grants the crop "deregulated" status, after which it can be commercialized and the USDA ceases to have jurisdiction over the article. *Vilsack*, 718 F.3d at 835. Thus, there are two separate classes of GE crops at issue, experimental "regulated articles," and deregulated GE crops planted commercially. The Part 340 regulations only cover regulated articles; commercial GE crops are not regulated by the federal government at all. *Id.*

As explained below, the PPA and the regulations do not preempt the County's ability to adopt the Ordinance regulating GE crops.

1. The Ordinance Was Not Enacted To Prevent The Introduction Or Dissemination Of Plant Pests And Noxious Weeds

The express preemption language of the PPA is limited to state or local regulations that are adopted "*in order to control a plant pest or noxious weed*, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination" of a plant pest or noxious weed. 7 U.S.C. § 7756(b)(1) (emphasis added). However, as its findings explain, the Ordinance was passed in order to address the harms of GE crops (harms not addressed under the PPA), *not* to control plant pests or noxious weeds. Therefore, preemption does not apply.

This Court has affirmed the USDA's statutory interpretation that the harms GE crops cause, and the harms that the Ordinance are intended to address, are not "plant pest" harms within the meaning of the statute. *Vilsack*, 718 F.3d at 840-41. The Court has further confirmed that the PPA's "noxious weed" provisions do not come into the USDA regulatory analysis for GE crops, and instead must be regulated through a specific petition to list any plant, including a GE crop, as a noxious weed. *Id.* at 843 (citing 7 C.F.R. Part 360). The USDA has never determined any GE crop to be a noxious weed. *See* 7 C.F.R. Part 360. As the preemption language limits its application to harms from "plant pests," and the Ordinance is adopted for another regulatory purpose and function, the Ordinance is not expressly preempted.

Consistent with recognizing that the PPA does not preempt the Ordinance's regulation of harms caused by GE crops, the Supreme Court held that a moratorium on new nuclear plants was not preempted by federal law because the purpose of the state law was to address the economic feasibility of new plants, whereas the federal objective was to regulate the safety of nuclear facilities. *Pac. Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 222-23 (1983). As the Supreme Court stated: "It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments." *Id.* at 207-08.

In this case, the Ordinance addresses a local problem that is not addressed by the PPA. Section 4 of the Ordinance sets forth its purpose, which is to protect Maui County's environment and public trust resources, promote the economic integrity of organic and non-GE markets, and to protect the cultural heritage of Native Hawaiians. Ordinance § 4, 2ER204. The PPA does not regulate in any of these areas. *Vilsack*, 718 F.3d at 841. In fact, the PPA does not once mention the words "genetically engineered," either in its purposes or legislative history, evincing that Congress had no intent to regulate GE crops, to prevent these harms, let alone an intent to preempt states and local governments from addressing them.

The district court was incorrect when it concluded that *Pacific Gas* was distinguishable because the Ordinance overlaps with the PPA's objective to protect "agricultural interests, natural resources, public health, and the environment." 1ER042; 1ER106. To the extent APHIS regulates GE crops it is narrowly focused on "plant pest harms," which includes "widespread physical damage or destruction of plants" and "plant disease, injury or damage." *Vilsack*, 718 F.3d at 839-40. Conversely, the agency does not regulate "transgenic contamination" and "increased herbicide use" even though "these alleged harms may well be adverse environmental and economic effects." *Id.* at 840. As this Court stated in *Vilsack*, "[t]he job of updating Title 7 of the United States Code to address the potential harms caused by genetic modification (including transgenic contamination and increased herbicide use) is a job for Congress, not this court, to undertake." *Id.* at 841.

Finally, APHIS's regulations do not figure in the express preemption analysis, which is statutory. The regulations lack any express preemption provision. Further, the regulations do not even supplementally evince any Congressional intent in the PPA, since the regulations pre-date the PPA. *See supra*. Finally, even if the regulations were relevant, they cannot be interpreted to have preemptive effect beyond the scope of the statute. *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1, 18 (2002) ("[A]n agency literally has no power to

act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").

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

The preemption provision further specifies that preemption only applies where "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." 7 U.S.C. § 7756(b)(1). Plant Pests are listed under 7 C.F.R. § 330, and noxious weeds are listed under § 360. APHIS has never found a GE crop to be either a plant pest or a noxious weed.

Instead, APHIS regulates experimental GE crops under 7 C.F.R. § 340 as "regulated articles." § 340.1 (Definitions). As explained above, regulated articles are not plant pests; rather they are classified as "regulated articles" because they are engineered with genes from an agrobacterium that the USDA classifies as a plant pest, which only establishes a presumption that they may create a plant pest risk. *Vilsack*, 718 F.3d at 835; 73 Fed. Reg. 60008, 60009 (October 9, 2008) (USDA explaining that "regulated articles are essentially GE organisms which might pose a risk as a plant pest"). The only actual plant pests that are being regulated are certain agrobacterium that the USDA has declared plant pests under 7 C.F.R. Part 330.

The broad "regulated article" classification covers GE organisms that may present a plant pest risk, allowing APHIS to control their dissemination while their impact is evaluated through field trials. That is what the field trials are designed to determine. The PPA grants APHIS authority over not just plant pests and noxious weeds, but over "any plant, plant product, biological control organism, noxious weed, article, or means of conveyance" that the Secretary determines is necessary to prevent introduction or dissemination of a plant pest or noxious weed. 7 U.S.C. § 7712. Hence, if APHIS has reason to believe a GE plant might cause a future plant pest risk, it can restrict it as a regulated article until it determines whether it does. That is what APHIS has done in Part 340. However, in contrast to the USDA's overall authority to regulate "regulated articles," the preemption provision is narrowly tailored to address *actual* plant pests and noxious weeds, and not this broader category.[21]

As GE crops are not plant pests, the district court incorrectly concluded that the express preemption provision applies to the Ordinance. *Vilsack*,

[21] As this Court explained, the USDA does not normally make a "plant pest-no plant pest" decision until the later petition for deregulation, or commercialization stage. *Vilsack*, 718 F.3d at 835 ("When such a [deregulation] petition is filed, the agency determines whether a presumptive plant pest is an actual plant pest within the meaning of the term in the PPA"). APHIS's record is telling: the agency has *never* determined that a GE crop is a plant pest; of the 117 applications for deregulation since 1992, APHIS has granted all of them, finding that none were plant pests. *See* USDA, *Petitions for Determinations of Nonregulated Status*, https://www.aphis.usda.gov/biotechnology/petitions_table_pending.shtml.

718 F.3d at 834 (holding that GE crops such as genetically engineered alfalfa, do not fall within the definition of "plant pests" because they do not "physically damage plants[.]").

3. The Ordinance Does Not Involve Interstate Commerce

The Ordinance is not regulating "movement in interstate commerce" under 7 U.S.C. § 7756. The Ordinance is an intra-county moratorium on GE operations solely within Maui County. A temporary moratorium does not involve commerce, let alone constitute "movement in interstate commerce." *Id.* *See also* 7 U.S.C. § 7702(7) (definition of "interstate commerce"). Further, field trials under the PPA by definition involve "regulated articles," which are excluded from being "in commerce." *See* 7 C.F.R. §§340.0, 340.1, 340.6. "Regulated articles" are prohibited from being placed in commerce unless and until the USDA "deregulates" them. *See* 7 C.F.R. §§ 340.0, 340.1, 340.6. Indeed, regulated articles' mere *escape* into interstate commerce has caused U.S. farmers billions of dollars in economic losses. *See In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2007 U.S. Dist. LEXIS 76435, at *5.[22] Accordingly, as these field trials are by definition *not* in commerce, additional local regulations are not preempted by the PPA.

[22] *See, e.g.*, Andrew Harris & David Beasley, *Bayer Agrees to Pay $750 Million to End Lawsuits over Gene-Modified Rice*, Bloomberg News, July 1, 2011, http://www.bloomberg.com/news/2011-07-01/bayer-to-pay-750-million-to-end-lawsuits-over-genetically-modified-rice.html.

The district court erred in conflating the distinction between "in commerce" and "affecting" interstate commerce. 1 ER042; 1ER106 ("Nor is the court persuaded by [Appellants'] argument that, because the Ordinance governs GE organisms only in Maui County, interstate commerce is not affected."). The terms are not the same. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) (explaining that the words "in commerce" have a narrower meaning than "affecting commerce" or "involving commerce"). The PPA grants APHIS authority over activities both "in or affecting interstate commerce," 7 U.S.C. § 7701(9), but the preemption clause is intentionally narrower, covering only activities "in interstate commerce." *Id.* 7756(b)(1). *See, e.g.*, *Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and alterations omitted). *See also Lohr*, 518 U.S. at 485 (the presumption against preemption also applies to the scope of preemption); *Bates*, 544 U.S. at 449 (courts have a duty to accept the reading of an express provision that disfavors preemption). While GE crop field trial experiments in Maui County may indirectly affect interstate commerce, the presumption clause only applies to activities in, not affecting, interstate commerce,

and hence the Ordinance's application does not fall within the preemption provision.

4. The Ordinance Is Authorized Based On The Exceptions To The Preemption Provision

The Ordinance also falls within the exceptions under 7 U.S.C. § 7756(b)(2)(A) and (B).

i. The Ordinance Is Consistent With And Does Not Exceed The Regulations Issued By The Secretary

There is no "federal policy against states imposing liability in addition to that imposed by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989). The Supreme Court and Ninth Circuit have consistently recognized that states can provide greater protection where not prohibited. *See California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272, 290-91 (1987) (states can provide greater protection when dealing with Civil Rights); *Goldstein v. California*, 412 U.S. 546, 560 (1973) (federal copyright law does not preempt state copyright law providing greater protection).

In this case, the Ordinance satisfies this exception to the PPA's preemption provision. APHIS's oversight does not address the same harms the Ordinance regulates, such as transgenic contamination or increased pesticide exposures. Nor does the federal government conduct public health studies on GE crop operations other than the limited plant pest analysis under the PPA. Further,

there is nothing that would prevent a developer of a new GE crop from obtaining approval from APHIS for field trials (addressing whether the plant pest causes harm to other plants) while at the same time addressing the local concerns set forth in the Ordinance in order to lift the moratorium. The district court's interpretation of the Ordinance as a "ban" on operations involving GE Crops is incorrect. These two laws are consistent and in no way contradict or defeat the purpose of the other. The Ordinance also does not "exceed" the federal regulations because they each address different interests, protect against different harms, and both the requirements of the PPA and the Ordinance can be satisfied. [23]

ii. There Is A Special Need For Additional Prohibitions Or Restrictions Based On Sound Scientific Data Or A Thorough Risk Assessment

Under the second exception, local government may regulate areas covered by the PPA if they demonstrate to the USDA 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); *see also* Special Need Requests Under the Plant Protection Act, 73 Fed. Reg. 63060 (Oct. 23, 2008). In

[23] The district court's mischaracterization of the Ordinance as a "ban" reflects an improper adoption of the Chemical Companies' false portrayal of the Ordinance's scope. The Ordinance is a moratorium on further open air, genetic engineering experimentation, (using massive quantities of untested and undisclosed chemical pesticides) until adequate independent safety studies can be completed to address the public's concerns. The fact that the Chemical Companies spent millions of dollars, in pre election advertising and post election legal fees, to promote falsehoods in order to avoid independent safety testing, is conclusive.

this case, there is ample evidence based on "sound scientific data" showing the harms associated with operations involving GE crops and the need for further protection. This evidence includes the health risks, the harms to organic and natural farmers, and environmental pollution caused by increased pesticide use and the destructive use of the land. These findings are also included as part of the justification for the Ordinance. *See* Ordinance § 2, 1ER199-203. The district court should have at a minimum ordered the County to petition the Secretary to find a "special need" for this Ordinance given the unique facts of this case. This is part of the relief that Appellants should have been allowed to pursue in their State Court Action.

5. The Ordinance Is Not Preempted By Implied Obstacle Preemption

The district court also erred to the extent the court held that the Ordinance was also preempted via implied conflict "obstacle" preemption.[24] 1ER043; 1ER108. "Obstacle" preemption is a type of implied conflict preemption in which state or local laws can "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Am. Honda*

[24] The Chemical Companies did not argue, nor did the District Court find that Congress had comprehensively "occupied the field" of GE crop regulation, nor that there was a conflict between the Ordinance and federal law such that it was impossible to comply. 1ER045; 1ER109. *McClellan.*, 776 F.3d at 1039 (explaining basic preemption types and principles). Accordingly, the only issue for implied preemption is whether conflict "obstacle" preemption applies.

Motor Co., 529 U.S. 861, 873 (2000) (citations and internal quotation marks omitted). The Supreme Court has warned that the analysis under obstacle preemption does "not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," because "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (internal quotation marks omitted). Rather, the Court's "precedents establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Id.* (internal quotation marks omitted). Congressional intent is the touchstone of all preemption inquiries, including conflict preemption. *McCllellan*, 776 F.3d at 1039. Here, there is no Congressional intent to support a finding of obstacle preemption.

As an initial matter, where, as here, there is an express preemption provision, there is normally no need to infer congressional intent as the express language implies that matters beyond that reach are not preempted. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (express provision's inclusion supports a "reasonable inference" that Congress did not intend to preempt other matters). Congress has already included an express preemption in the PPA. There is no reason to go beyond the reach of carefully construed and narrow express preemption.

However, even if it was appropriate for the district court to evaluate implied "obstacle" preemption, there is no support for the conclusion that the Ordinance stands as an obstacle to the purposes and objectives of the PPA. The only congressional purposes and objectives relevant here are those Congress established in the PPA, which are to protect "the agriculture, environment, and economy of the United States" by preventing the introduction and dissemination of plant pests and noxious weeds. 7 U.S.C. § 7701; *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (explaining that the alleged "obstacle" must be to "the accomplishment and execution of the full purposes and objectives of Congress"). In this case, there is no Congressional intent with regard to GE crops, let alone one that would be allegedly frustrated by the Ordinance. Nowhere does the PPA purport to promote or facilitate GE crop experiments, development or commercialization. In fact, the PPA's purposes and goals are primarily to restrict development and the interstate movement of plant pests, for purposes of preventing agronomic and environmental harms. The Ordinance promotes, rather than obstructs, those goals by facilitating the study of the impacts of GE crops and operations.

Further, GE crops are not plant pests under the PPA or the regulations, and the Ordinance is not regulating in interstate commerce. There is no PPA purpose to prevent state and local regulation. The PPA is a cooperative statute

with a carefully crafted and narrow preemption provision allowing for parallel state regulations. 7 U.S.C. § 7756(b)(2)(A), (B). *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 615 (U.S. 1991) (similar cooperative language supported concluding states and counties are not preempted from local pesticide regulation). The statute's purposes are to control the "spread" and "introduction" of plant pests and noxious weeds between the states, and into, or out of, the United States. *See* 7 U.S.C. §§ 7701(1), (3), (5), (6), (7). The Ordinance does not "run afoul" of the PPA's purpose because the PPA is limited to preventing "plant pest harms," not the GE crop harms the Ordinance regulates, and there is no congressional intent to preempt additional regulations on GE crops, especially intra-county regulation of them.

6. The District Court Erred In Failing To Distinguish Between Regulated Articles and Commercial GE Crops

The district court erred in failing to recognize that there are two classes of GE crops to which the Ordinance applies (regulated articles and commercialized GE crops), and address preemption as to each.[25] *Lohr*, 518 U.S. at 485 (the presumption against preemption also applies to the scope of preemption). The Chemical Companies alleged express preemption *only* with regard to

[25] *Compare with Hawaii Floriculture and Nursery Ass'n et al. v. County of Hawaii*, Civ. No. 14-00267 at *25-26 (November 26, 2014) (distinguishing between experimental field trials of regulated articles and growth of commercial GE crops that have been deregulated).

experimental field trials of GE "regulated articles." 5ER1111-17. As explained above, the district court erred in finding the PPA's express preemption clause applies to regulated articles for several reasons.

The majority of GE crops planted nationally are not field trials, but rather commercialized GE crops, or those crops for which APHIS has granted deregulation. 7 C.F.R. § 340.6. As to these GE crops, the Chemical Companies raised only implied preemption arguments, no express preemption arguments. 5ER1126-27. This is because commercialized GE crops are not regulated under APHIS and the crops are not subject to any federal restriction or oversight. *See Vilsack*, 718 F.3d at 835.

While the arguments on implied preemption concerning regulated articles are weak, extending the argument to commercial GE crops is baseless. As explained above, once deregulated, APHIS ceases to monitor or regulate commercial GE crops in any way. *Vilsack*, 718 F.3d at 835. There is no federal law with which the Ordinance could possibly conflict. There is no purpose in the PPA regarding GE crop commercialization to which the Ordinance could possibly be an obstacle. *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("There is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it."). The district court completely ignored these

important differences, erroneously holding the Ordinance was broadly preempted as to all GE crops.

C. The Ordinance Is Not Preempted By State Law Involving The Hawai‘i Department of Agriculture, Nor Does The Ordinance Conflict With The County Charter

It is undisputed that the Hawai‘i legislature has not adopted any law addressing GE crops or preempting County regulation in this area. However, relying on disparate state statutes relating to the duties of the HDOA, the district court incorrectly concluded the legislature had adopted a "comprehensive scheme addressing the same subject matter as the Maui Ordinance." 1ER53; 1ER117.

Under the "comprehensive statutory scheme" test, a municipal ordinance may be preempted if it "covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform through the state." *Richardson v. City & Cnty. of Honolulu*, 868 P.2d 1193, 1209 (1994). Under this test, the court examines whether state law is "so thorough and detailed as to manifest the Legislature's intent to preclude local regulation." *Ruggles v. Yagong*, 353 P.3d 953, 961 (Haw. 2015). The "critical determination" to be made is "whether the statutory scheme at issue indicated a legislative intention to be the exclusive legislation applicable to the relevant subject matter." *Pacific Int'l Servs. Corp. v. Hurip*, 873 P.2d 88, 94 (Haw. 1994) (internal quotation marks and citation omitted). The Hawai‘i

Supreme Court has emphasized that even if the first two elements are established, there still is no implied preemption unless it also is shown that the legislature intended the comprehensive state scheme to be the exclusive law governing the subject matter. *Hurip*, 873 P.2d at 94-95. The State's intent to preempt must be "clear." *Hawaii Gov't Emps.' Ass'n v. Maui*, 576 P.2d 1029, 1038 (Haw. 1978). The party claiming that general law preempts a local ordinance has the burden of demonstrating preemption. *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 136 P.3d. 821, 827 (Cal. 2006).

In this case, the three prerequisites for preemption have not been met. First, there is no statute addressing GE crops or their related harms. Second, because there is no statute addressing GE crops, there is no uniform state scheme addressing GE harms. Finally, even considering the statutes relied upon by the district court, these statutes are not intended to be exclusive or to preempt the counties' rights to regulate in the areas of public health and the environment.

1. The County Has Express Authority To Adopt The Ordinance Under The Hawai‘i Constitution And Hawaii Revised Statutes § 46-1.5 to Regulate in the Areas of Public Health and the Environment

Under Hawai‘i law, counties have traditionally exercised dual regulatory authority with the State in the area of environmental protection and public health. First, the Hawai‘i Constitution authorizes counties to exercise "home rule" by providing that each county may adopt a charter for its own self-

government subject only to "general laws" adopted by the state legislature. *Marsland v. First Hawaiian Bank*, 764 P.2d 1228, 1232 (Haw. 1988) (citing Haw. Const. art. VIII, § 2). *See also Lockhart v. United States*, 460 U.S. 125, 127 (1983) ("[A] home-rule city has authority to do whatever is not specifically prohibited by the State.").

Second, the Hawai'i Constitution expressly includes the public trust doctrine as a "fundamental principle" of constitutional law. *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i*, 324 P.3d 951, 981 (2014) (citation omitted). Under the public trust doctrine, "the State **and** [the counties]" are obligated to "conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals, energy sources, and all natural resources[.]" Haw. Const. art. XI, § 1 (emphasis added).

Third, the Hawaii Legislature expressly delegates to the counties the power to "enact and enforce ordinances" to protect "health, life, and property," and to "remove public nuisances[.]" HRS § 46-1.5(12)-(13). The Hawai'i Supreme Court has emphasized that counties have authority to enact ordinances on "any subject or matter" the county deems necessary to protect health, life, or property, absent preemption. *Hurip*, 873 P.2d at 93 n.8. The scope of the County's powers are "broad" and extends to all matters within the county's police powers. *State v. Ewing*, 914 P.2d 549, 557 (Haw. App. 1986).

The Ordinance is a local regulation that protects the environment against harms delegated to the County under the Hawai‘i Constitution. Moreover, the Ordinance was adopted in order to protect health, life, and property and to protect against nuisances. This right was expressly delegated to the counties through the public trust doctrine and HRS § 46-1.5.

2. There Is No Comprehensive State Statutory Scheme Regulating GE Organisms

There is no implied preemption unless a state law exists that is both "comprehensive" and covers the "same subject matter" as the local ordinance. *Richardson*, 868 P.2d at 1209. The two are interrelated; although a law addressing the same subject matter might expressly preempt—which it is undisputed has not occurred here—it cannot impliedly preempt unless it also is a comprehensive scheme that occupies a field that includes the ordinance's subject matter. *Id.* No Hawai‘i court has ever concluded a statutory scheme concerns the "same subject matter" as an ordinance, or comprehensively occupies the field where, as here, the statute does not even mention the local law's subject matter.

The district court erred in finding that the Ordinance covers the same subject matter as state law because (1) no state statutes regulate GE crops; and (2) the statutes that the district court relied on are specific to different areas of agricultural use. As there are no state laws that regulate in this area, the County is entitled to adopt ordinances to protect against harms that the State does not.

Second, consistent with the above constitutional and statutory provisions, both the State and counties regulate agriculture and environmental protection, allowing both the State and the counties to adopt regulations. The statutes that the district court relied on are limited in their application and do not overlap with the Ordinance. HRS Chapter 141 simply creates the HDOA with authority to adopt rules addressing issues of agriculture. HRS Chapter 150A is the Hawai‘i Plant & Animal Quarantine Law that addresses the importation, exportation, and possession of restricted plants and animals that are introduced into the state. As the state regulates all ports of entry into the state, it is only logical that the State regulate plant and animal importation. HRS Chapter 152 authorizes the HDOA to establish rules of procedure for designating and eradicating "noxious weeds." GE crops are not "weeds" that are regulated by HRS Chapter 152, but are products created to be intentionally and commercially cultivated and are intellectual property of the producer. *See Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1769 (2013). As discussed below, no GE crop has ever been declared a noxious weed in Hawai‘i or elsewhere.

Like the federal PPA discussed below, none of these statutes mention GE crops, nor do their legislative histories. Moreover, the HDOA has not adopted any regulations that address GE crops and the associated harms. There is not any legislative history that reveals an intention to regulate GE crops, let alone to

preclude county regulation. No agency rule implementing any of these statutes purports to regulate GE crops, nor mention them. It is undisputed that no state agency has regulated the subject matter of the Ordinance.

Consequently, these statutes do not address the harms that are specific to GE crops, including transgenic contamination, increased pesticide use, the creation of "super weeds," and dangers to organic farmers. None of the statutes that the district court cites cover the same subject matter or a comprehensive scheme regulating GE crops. The district court erred by concluding otherwise.

3. There Is No Legislative Intent That the State Have "Exclusive" Control Over Regulation of GE Crops

In addition, the district court incorrectly found that the statutory scheme "disclos[ed] an express or implied intent to be exclusive and uniform throughout the state" with respect to the regulation of GE crops. 1ER056; 1ER120 (citing *Richardson*, 868 P.2d at 1209). Nothing in these chapters expresses a legislative intent to eliminate county regulations on agriculture and environmental protection involving GE crops.

To the contrary, a review of various statutes illustrates legislative intent vesting the counties with broad authority to regulate agriculture and to protect the environment. For example, pursuant to Hawai'i's land use structure, the state land use commission has the power to establish the boundaries of the districts in each county, "giving consideration to the master plan or general plan of

the county." HRS § 205-2. In order to effectuate the policies in favor of agriculture use and development, the State relies on the counties' local plans and zoning "to guide the overall future development of the county[,]" including "[t]he areas in which particular uses may be subjected to special restrictions[.]" HRS § 46-4(a).

Consistent with this dual authority, the Maui Countywide Policy Plan ("County Plan") provides a comprehensive agricultural regulatory scheme for Maui County, giving the County the power to enhance local efforts to monitor and regulate important agricultural issues. County of Maui, 2030 General Plan, Countywide Policy Plan at p. 61.[26] Under the County Plan, the County promotes diversified and sustainable agriculture by, among other things (1) "monitor[ing] and regulat[ing] important agricultural issues"; (2) "maintain[ing] the genetic integrity of existing food crops"; and (3) "monitoring and controlling genetically modified crops to prevent adverse effects." *Id*.

Similarly, with respect to invasive species, the state legislature created the invasive species council for the special purpose of providing "policy level direction, coordination, and planning among state departments, federal agencies, and ***local initiatives*** for the control and eradication of harmful and invasive species infestation throughout the state[.]" HRS § 194-2(a) (emphasis added). In

[26] *Available at* http://www.co.maui.hi.us/DocumentCenter/Home/View/11132.

recognition of county autonomy, this agency is required to "coordinate with the counties in the fight against invasive species to increase resources and funding and to address county-sponsored activities that involve invasive species[.]" *Id.* (a)(12). In 2005 when there were problems with coqui frogs, the state legislature appropriated $300,000 to be paid directly to the counties, not the HDOA, for each county's invasive species committee to control or eradicate the coqui frog. 2005 Haw. Sess. Laws, Act 51, § 2, effective July 1, 2005. Had the legislature believed that the HDOA had exclusive jurisdiction over invasive species, these funds should have been appropriated to the HDOA and not each county.

The state legislature has also refused to overturn county regulations that reach the same area as the Ordinance. Since 2009, the Maui County Code has prohibited the testing, cultivation, and growing of genetically engineered kalo (taro). Maui Cnty. Code §§ 20-38-010 to -060. So has Hawai'i County. *See* Hawai'i Cnty. Code § 14-92 ("It shall be unlawful for any person to test, propagate, cultivate, raise, plant, grow, introduce or release genetically engineered (transgenic) or recombinant DNA taro (kalo).)"; *id.* § 14-93 (same, for coffee). The state legislature has never attempted to prevent the local regulation of genetically engineered kalo or other crops even though Maui County has been regulating GE kalo since 2009. Moreover, the State Legislature has declined on

multiple occasions to pass legislation that would prevent local ordinances such as the prohibition on GE kalo.[27]

Applying the Hawai‘i Supreme Court's approach, it cannot be assumed that the legislature intended that the state has exclusive regulatory control where state law does not address the harms the Ordinance addresses, or its mechanism, and there is nothing expressing an intent to preclude counties from providing any protections. *See Richardson*, 868 P.2d at 1209. Because there is no comprehensive statutory scheme that precludes counties from enforcing their police powers, the County has the authority to regulate operations involving GE crops, as such practices can have potentially devastating effects on Maui's land and agricultural production.

4. The Ordinance Does Not Exceed The Authority Delegated To Maui County Under The Charter

The district court also erred in finding that the civil fine provisions exceeded the County's authority.

First, there is no conflict between the penalties provided by the Ordinance and the penalty provision in the County Charter. The Charter states that

[27] H.B. 2506, 27th Leg. (Haw. 2014) ("No law, ordinance, or resolution of any unit of local government shall be enacted that abridges the right of farmers and ranchers to employ agriculture technology…"); S.B. 3058, 27th Leg. (Haw. 2014) (same); S.B. 590, 27th Leg. (Haw. 2013) (same) available at http://www.capital.hawaii.gov. The State Legislature declined to pass each of these bills.

the Council may by ordinance provide for punishment of violations of ordinances and rules, but no penalty shall exceed the amount of $1,000 or one (1) year's imprisonment, or both. Maui Cnty. Charter art. 13, § 13-10. This provision does not prohibit the County from adopting Ordinances that set greater penalties. As a general rule of statutory construction, the more specific provisions prevail over the more general. *Richardson*, 868 P.2d at 1202. Where statutes overlap, effect will be given to both if possible, "as repeal by implication is disfavored." *Id.* As there is nothing that prohibits the County from adopting greater penalties for specific violations that are deemed more significant, there is no conflict. Tellingly, the County does have another ordinance that provide for greater penalties beyond the general limitations in the Charter. Maui County Code Chapter 8.28 regulates against accidents associated with nuclear materials, and provides for penalties of $10,000 for each offense. Maui Cnty. Code § 8.28.070. As the County can impose more specific and greater penalties, there is no conflict that would prevent enforcement of this Ordinance.

Second, the penalty provision of the Ordinance is severable. It is well established in Hawai‘i that where a provision in a statute is stricken, the remaining portions of the statute *must* be enforced if it is capable of being executed without the stricken provision. *Territory of Hawai‘i v. Tan*, 36 Haw. 32, 41 (1942); *State v. Bloss*, 613 P.2d 354, 358 (1980). In this case, the main purpose of the Ordinance is

to require a safety study to be completed before further GE operations continue. *See* Ordinance, § 1, 2ER199 ("[T]he citizens of Maui County call for a suspension of all GE Operations and Practices … [a study] of the impacts stemming from GE Operations and Practices and their associated Pesticide use is provided and reviewed by County Council.") The Ordinance sets forth the procedures on how the study will be conducted and completed. *Id.* § 7, 2ER206. Further, the County may obtain an injunction for individuals that violate the provisions of the Ordinance. *Id.* § 8.4, 2ER208. The penalty provision is only an option for enforcement, but it is not necessary to implement the Ordinance. Under Hawai'i law, the Ordinance must be enforceable irrespective of whether the separate penalty provisions are enforced.

D. The District Court Erred In Not Allowing A State Court To Decide State Law And By Denying Discovery

1. The District Court Erred In Refusing To Remand The State Court Action

There is a "strong presumption" against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The removal statute is strictly construed against federal court jurisdiction and requires that the removing party (the Chemical Companies) bear the burden of establishing that removal is proper. *Id.* Any doubts should be decided in favor of remand, as it is well established that the plaintiffs (Appellants) are the "master of [their] complaint" and can avoid

federal jurisdiction by solely pleading state law claims. *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1075 (9th Cir. 2005). A case may not be removed to federal court on the basis of a federal defense, including a claim of preemption, even if the defense is anticipated in the complaint. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust.*, 463 U.S. 1, 14 (1983).

Normally, federal question jurisdiction is determined by the four corners of the plaintiff's complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Appellees relied on the coercive action doctrine, which was developed for lawsuits filed pursuant to the Federal Declaratory Judgment Act, and does not apply in this case. Under this doctrine, federal courts may take jurisdiction over declaratory judgment suits where the declaratory judgment plaintiff brings suit in federal court in anticipation of "coercive claims" that the declaratory judgment defendant could bring under federal law. *Janakes*, 768 F.2d at 1093. *Janakes* requires the Court to look at coercive claims that the *defendant* could bring against the *plaintiff*, not claims that the defendant could bring against another defendant in the case. *Id.*

In this case, the Chemical Companies have never identified any hypothetical causes of action against Appellants arising under federal law. In a case with a similar fact pattern, this Court held that it did not have jurisdiction over a federal declaratory judgment action brought by Shell Gulf against public-interest

law groups because the private parties did not have any "adverse legal interests." *Shell Gulf of Mex. Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 636 (9th Cir. 2014). As in *Shell Gulf*, the private parties here do not have any "adverse legal interests." The Chemical Companies' preemption claims can only be asserted against Maui County. *See Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 544 (9th Cir. 2011). Accordingly, the coercive action doctrine does not apply.

Further, the practice of reviewing at the declaratory judgment defendants' potential causes of actions was developed to delineate the *limits* of federal court jurisdiction, not expand it. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). In *Public Service Com. v. Wycoff Co.*, a case relied upon by this Court in *Janakes*, the Supreme Court explained that "***Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.***" 344 U.S. 237, 248 (1952) (emphasis added). Other courts have not expanded this rule to cases originally brought in state court seeking state remedies. *See La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 344-45 (3d Cir. 1974) (holding that the coercive action rule did not apply to the removal of a state declaratory judgment proceeding, and instead found that the court applies the well-pleaded complaint rule); *Chronologic Simulation v.*

Sanguinetti, 892 F. Supp. 318, 320 (D. Mass. 1995) (holding that the coercive action rule did not apply to removal jurisdiction because the "federal status of the plaintiff's claim" was not "readily ascertainable from the face of the complaint").

In this case, it would be a misapplication of the coercive action doctrine to use the Federal Court Action to override the well pleaded complaint rule. The Chemical Companies do not have any federal claims against Appellants that would trigger application of the coercive action rule. The State Court Action was brought in state court and asserted only state law claims. The fact that the Chemical Companies may have a defense to the claims arising under federal law is not sufficient to override the well pleaded complaint rule. *See Franchise Tax Bd.*, 463 U.S. at 14 ("[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."). The district court thus violated well-established limits on federal court jurisdiction when it used the Federal Court Action to justify removal to federal court.

2. The District Court Should Have Certified The State Law Issues To The Hawai‘i Supreme Court

The Supreme Court has articulated that certification is appropriate where the case involves a question of state law that is both unclear under state legal

precedent and would be determinative in the case. *Richardson v. City & Cnty. of Honolulu*, 802 F. Supp. 326, 344 (D. Haw. 1992) (citations omitted). Federal courts exercise great restraint in construing a novel state law that the state's highest court has not yet been reviewed to avoid "friction-generating error." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997).

In this case, both elements for certification are present. A ruling on whether state law preempts the ordinance is determinative of the case and has broader implications throughout the state. There is also no clear controlling precedent on whether the Ordinance is preempted by state law or conflicts with the County Charter. The main case relied on by the district court for state preemption was *Richardson*, 868 P.2d at 1198, which involved a completely unrelated issue about residential condominium leasehold conversion, and was an issue that the district court certified to the Hawai‘i Supreme Court. There are no Hawai‘i cases discussing the limits of state law governing agriculture and environmental protection, nor the state's preemptive impact on county ordinances seeking to regulate in these areas. Likewise, there are no relevant Hawai‘i cases discussing conflicts with the Maui County Charter. These issues should have been certified to the Hawai‘i Supreme Court.

3. The District Court Abused Its Discretion In Denying Limited Discovery Before Ruling On Summary Judgment

While Rule 56(d) facially gives judges the discretion to disallow discovery when the non-moving party is unable to submit evidence to support its opposition, the Supreme Court has restated the rule as *requiring*, rather than permitting, discovery "'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Metabolife Int'l v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (citation omitted).

The district court relied on disputed factual issues to support summary judgment. First, the district court states, without citation to authority, that the PPA "is expressly concerned with protecting agricultural interests, natural resources, public health, and the environment." 1ER042; 1ER106. While the PPA addresses these interests, it does so only with respect to regulations that involve the prevention or restriction of plant pests and noxious weeds. *See* 7 U.S.C. § 7701(1). These harms are very different from the harms that the Ordinance addresses, and discovery relating to this distinction and lack of federal regulations should have been allowed.

On state preemption, the district court similarly concluded that state statutes and regulations "reaches GE organisms" even though there is no mention of them in any statute. 1ER055; 1ER119. Likewise, Appellants demonstrated that

no state laws "reach" GE organisms and that this is an area of state law where there are no regulations, i.e., no comprehensive scheme which regulates GE crops.

This case was decided in seven months with no discovery allowed. At the very least, the district court should have allowed limited discovery before quickly deciding these factually intensive preemption issues that threaten health and safety of Maui citizens. There was no reason for this short timeline where the fundamental rights of counties to protect health, life and property were at stake.

VIII. CONCLUSION

This case involves one of the most fundamental rights of citizens, the right to adopt laws to protect public health and the environment. These rights are rooted in both the U.S. and Hawai'i constitutions. A majority of Maui residents exercised this right by voting in favor of this Ordinance. The largest chemical companies in the world spent millions of dollars to try and convince Maui voters that they did not need the Ordinance. County officials joined the chemical companies in publicly campaigning against the Ordinance's adoption. All of these efforts failed. Instead, Maui voters demanded that the Ordinance be adopted to protect themselves from the chemical companies' activities irrespective of what the chemical companies and county officials claimed.

While the difficulties in adopting an ordinance via ballot initiative should have ended there, the chemical companies, with the aid of county officials,

were able to persuade a federal court to invalidate the Ordinance in seven months. In doing so, they convinced the federal district court to: (1) enforce an injunction conceived by County officials and the Chemical Companies without any of the safeguards that federal law requires; (2) deny a state court from deciding unresolved issues of state law; and (3) refuse to allow any discovery on the scope of the Ordinance's impact in relation to federal and state law. Ultimately, the chemical companies were able to convince a federal court to disregard rights guaranteed under the Hawai'i Constitution and instead find preemption based on various laws that do not even mention GE crops, let alone regulate against any of the harms that the Ordinance sought to protect. The District Court's decision was wrong and leaves Maui County at risk of irreparable harms. For these reasons, this Court should reverse the decision in its entirety.

DATED: Honolulu, Hawaii, November 30, 2015.

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STATEMENT OF RELATED CASES

This is a consolidated appeal from final judgment entered in two district court cases, Civ. No. 1:14-CV-00582-SOM-BMK ("Appeal No. 15-16466") and Civ. No. 1:14-CV-00511-SOM-BMK (Appeal No. 15-16552).

This consolidated appeal was assigned to the same panel hearing Appeal Number 15-15246, an appeal from Civ. No. 1:14-CV-00582-SOM-BMK, challenging the district court's order denying Intervenor-Defendant-Appellants' Motion to Intervene.

Defendants Intervenors-Appellants also filed an appeal from the Final Order entered in Civ. No. 1:14-CV-00511-SOM-BMK, which was numbered Appeal No. 15-16486. Appeal No. 15-16486 raises identical issues as Appeal No. 15-16552. Additionally, Defendants Intervenors-Appellants filed an interlocutory appeal from the preliminary injunction in Civ. No. 1:14-CV-00511-SOM-BMK, which was numbered Appeal No. 15-15641. Appeal No.15-15641 was dismissed as moot by judgment of this Court entered on October 23, 2015.

DATED: Honolulu, Hawaii, November 30, 2015.

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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 13,959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: Honolulu, Hawaii, November 30, 2015.

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