Of Counsel:

BAYS LUNG ROSE & HOLMA

KARIN L. HOLMA 5207-0
kholma@legalhawaii.com
Attorney at Law
A Law Corporation
MICHAEL C. CARROLL 7583-0
mcarroll@legalhawaii.com
Attorney at Law
A Law Corporation
SHARON A. LIM 10142-0
slim@legalhawaii.com
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813
Telephone: (808) 523-9000
Facsimile: (808) 533-4184

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

TRUCKING AND SERVICES; and HIKIOLA COOPERATIVE,	)	RULE 56(D) REQUEST FOR CONTINUANCE; DECLARATION OF MICHAEL C. CARROLL; EXHIBITS A-___; CERTIFICATE OF SERVICE
Plaintiffs,	)	
vs.	)	
COUNTY OF MAUI; ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT,	)	
Defendants.	)	

INTERVENOR-DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON CLAIMS 1, 2, AND 4 [DKT #70] AND RULE 56(D) REQUEST FOR CONTINUANCE

I. INTRODUCTION

In November 2014, the residents of Maui approved a voter initiative to place a temporary moratorium on further testing and cultivation of genetically modified crops. Maui voters adopted this law because of the harm to public health and the environmental, the lack of any studies conducted on these activities, and the lack of federal or state regulation and control.

Hawaii is known as ground zero for the development and testing of genetically modified organisms ("GMOs"). GMO companies like Monsanto conduct more testing on GMO crops in Hawaii than anywhere else in the world. The agribusinesses use of the land is different and more destructive than any other commercial agricultural operation performed throughout the world. It results in

the high risks of pollution and health problems to the community. Notwithstanding, there are no laws on the federal or state levels to protect against these harms or to address Maui's unique interests. Neither have any tests been performed to demonstrate that these activities are safe.

The Monsanto Plaintiffs seek to invalidate this law based on the opposite premise in which Maui voters demanded that this law be passed. Despite Plaintiffs' arguments that there is some broad federal and state regulations, there are none, and Maui County is entitled to protect its natural resources and its population.

First, there is no basis for federal preemption. There are no federal laws adopted that regulate GMO farming. Instead, the executive branch adopted a policy of regulating certain aspects of GMOs through a policy statement they called the "coordinated framework." This is not an act of Congress, and does not have any preemptive effect.

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

expressly allows local municipalities to place more restrictive on pesticides even if this law did apply.

The Plant Protection Act regulates the interstate movement of plant pests and noxious weeds. It does preempt a county's ability to protect public health and environmental safety, as these areas fell "within the traditional exercise of the police powers of the state." It also does not assure protection to the environment or human health that this Ordinance seeks to address.

Likewise, there are no state laws that regulate GMOs or seek to protect the harms to human health and the environment by these activities. State Legislature has not carved out the areas of environmental and agricultural regulation exclusively for the State. Rather, dual jurisdiction exists between the County and State in these fields, as provided for in the Hawaii Constitution, various State laws, and various County provisions. Moreover, the Hawaii Department of Agriculture's ("HDOA") regulatory authority does not set forth an exclusive and comprehensive state statutory scheme governing the regulation of all GMO operations and practices and accordingly cannot preempt the Ordinance. Finally, the Ordinance does not conflict with any State laws regarding pesticide use, plant quarantine, and noxious weeds. Accordingly, the Ordinance is not preempted by any State laws.

HDOA's testimony at the hearing on this Ordinance is telling to the lack of oversight. When describing the activities of the HDOA in looking at chemicals in the environment, its representative explained: : "***So we found [chemicals in the environment],frankly, we don't know what it means and no one in, we don't know how to compare that to any kind of health standards. So there's additional work that needs to be done there.*** Id. at p. 50 (emphasis added). This is the reason Maui voters approved this Ordinance. So they know these activities are safe ***before*** the companies go forward and pollute the environment and create health problems to the community. After the fact studies are not effective.

This case presents sensitive issues that are appropriately decided on the state level first. The issues concern the interpretation of Hawaii's Constitution and state law, and the separation of powers between the State of Hawaii and the County of Maui on fundamentally local police powers to protect the natural resources and human health. In particular, the enforceability of this ordinance turns on the authority of the County to protect its public trust resources under the rights recognized in the Hawaii Constitution. For these reasons, Defendants respectfully that the case be stayed pending the related State Court Action or certify the State Law issues to the Hawaii Supreme Court.

Finally, the Monsanto Plaintiffs and the County of Maui entered into an agreement to a preliminary injunction certifying the election results and to expedite the briefing schedule before Defendants were allowed to intervene. There has been no discovery in the case. There are disputed issues of fact as to whether there are any federal or state laws that provide any oversight to the activities, and the harm being caused to Maui County by not enforcing the Ordinance. At the very least, Defendants should be allowed to conduct discovery to establish a record as to why this Ordinance is not preempted and why Maui County needs to enforce the wishes of its voters.

II. FACTUAL BACKGROUND

A. GMO Operations in Maui County

The GMO operations in Maui involve a different type of agricultural use that creates potentially serious harmful environmental and human health impacts that have never been tested, and are not being evaluated on the federal and state level. see Valenzuela Dec. ¶ 5, *infra* Sections II.B. and C. The practice involves the use of high levels and combinations of repeated pesticide application, and use of a disproportionately small portion of the land leaving large areas baron for erosion and contamination of other areas. See Valenzuela Dec. ¶ ___. Id. As discussed below, these practices result in potentially serious environmental and health problems. Id. Moreover, these activities are being performed in greater

frequency than anywhere else in the United States.[1] Hawaii has been the site of over 2,230 field trials to develop new GE crops. Id.

Of particular concern is that many of these field trials involve the development of new GE crops designed to be resistant to high levels and combinations of pesticide spraying. For example, Monsanto has developed "Round-up Ready" crops, which are resistant to high levels of the herbicide glyphosate, the active ingredient in Round-up. The use of glysophate has increased exponentially in the U.S., where 94% of all soybeans, 91% of all cotton, and 89% of all corn grown in the United States in 2014 were genetically engineered to be herbicide-resistant, nearly all resistant to glyphosate.[2] Glysophate has been linked to "significant chronic kidney deficiencies," "liver congestions and necrosis," "tumors," and kidney disturbances and failure.[3] See Valenzuela Dec. ¶ 18. Increased use of glysophate has further contributed to environmental hazards such as the rapid decline in monarch butterfly populations.[4] Glysophate is the

---

[1] Daylin-Rose Gibson, *Remembering the "Big Five": Hawai'i''s Constitutional Obligation to Regulate the Genetic Engineering Industry*, 15 Asian-Pacific L. & Pol'y J. 213, 232 (Fall, 2013) ("Gibson") (citing Robyn Boyd, *Genetically Modified Hawai`i,* SCIENTIFIC AMERICA (Dec. 8, 2008), http://www.scientificamerican.com/article/genetically-modified-hawaii//.

[2] See *Adoption of Genetically Engineered Crops in the United States: 1996-2014,* U.S. Dep't of Agric., http://www.ers.usda.gov/media/185551/biotechcrops_d.html (last visited January 23, 2015) (showing entries for HT [herbicide-tolerant] soybeans, cotton and corn).

[3] See *Republished study: long-term toxicity of a Roundup herbicide and a Roundup-tolerant genetically modified maize,* Environmental Sciences Europe, http://www.enveurope.com/content/26/1/14#sec5 (last visited January 23, 2015)

[4] *After 90 Percent Decline, Federal Protection Sought for Monarch Butterfly,* Ctr. For Food Safety (Aug. 26, 2014), http://www.centerforfoodsafety.org/press-releases/3418/after-90-percent-decline-federal-protection-sought-for-monarch-butterfly (last visited January 23, 2015).

leading offender of pesticide drift,[5] and is responsible for the creation of "superweeds" that are resistant to the high applications of the herbicide.[6] The use of genetically engineered crops has increased pesticide use exponentially, with an extra 527 million pounds of herbicides being used from 1997 to 2011.[7] Notably, the U.S. Fish and Wildlife Service has recently announced that it intends to phase-out the planting of any additional GMO crops on any National Wildlife Refuges. Valenzuela Dec. ¶ 15.

Despite the industry's claim (without citation to authority) that the use of GE crops has increased yields, See Memorandum in Support of Motion at pp. 3-4, there have been no independent studies to substantiate this claim.[8] Moreover, in side-by-side comparisons between organic and chemical agriculture, organic systems have shown to match or surpass chemical agriculture.[9] See also

---

[5] Assoc. of Am. Pesticide Control Officials, *2005 Pesticide Drift Enforcement Survey Report*, http://www.aapco.org/documents/surveys/DriftEnforce05Rpt.html (last visited January 23, 2015).

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

[7] Id.

[8] See Kimbrell at p. 353 (citing DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, FAILURE TO YIELD: EVALUATING THE PERFORMANCE OF GENETICALLY ENGINEERED CROPS 1–5 (Apr. 2009), *available at* http://www.ucsusa.org/sites/default/files/legacy/assets/documents/food_and_agriculture/failure-to-yield.pdf.

[9] See http://rodaleinstitute.org/our-work/farming-systems-trial/ (last visited on January 24, 2015).

Valenzuela Dec. ¶ 20 ("The greatest yield advances continue to be made through methods of traditional and classical breeding.").

Dr. Hector Valenzuela is a Professor and Vegetable Crops Extension Specialist with the Department of Plant and Environmental Protection Sciences, at the University of Hawaii at Manoa. See Valenzuela Dec. ¶ 2 and Ex. A. For the past 24 years as a Crop Production Specialist, he has had statewide responsibility to assist commercial farmers, and has studied the production of food crops, sustainable farming, and analyses of conventional and ecological farming systems. Id. He is the only UH Crop Production Specialist in the State. Id.

In Dr. Valenzuela's Declaration, he explains that the GMO practice in Maui includes spraying the fields with a high frequency and combinations of pesticides. Id. ¶¶ 6-7. This process is repeated 4 to 5 times more frequently than in other areas of the United States. On any given day, multiple pesticide applications may be sprayed on the GMO farms, with a number of different pesticides, resulting in the possible off-site movement of many of these chemical combinations. Id. ¶ 7. The constant trade winds that are typical in Hawaii for large parts of the year, along with the occasional storm, and wind gusts, further exacerbate the potential for the off-site movement of drift of GMO plant residues, and of pesticide combinations, beyond the borders of the farm. Id. These

operations in Hawaii are using between 80-90 different chemical formulations. Id. This is far greater than those used in commercial GMO operations. Id.

While Hawaii involves a more severe use of the land as compared to conventional GMO farming, there have been no studies to evaluate whether these practices are safe. Id. ¶ 7. No studies have been performed to evaluate the environmental impacts or the impacts to human health. Id. There have, however, been epidemiological studies conducted in Latin America concerning the impacts of conventional GM farming. Id. ¶ 16. These studies have directly linked the exposure to pesticides on farm workers, their families, and residents from nearby communities to severe respiratory problems (sneezing, coughing, bronchospasm, etc.), dermatological and/or mucocutaneous disorders (skin and eye itching, tearing, pigmentation, etc.), digestive problems (vomiting), and neurological problems (headache and dizziness). Id. ¶ 17. Further, the epidemiological studies link the exposure of pesticides from these operations to high levels of DNA damage resulting in cancer, lymphocytic leukemia, brain tumors, developmental disorders, physical birth defects, and fetal death, among other documented adverse side-effects. Id. Other studies have similarly linked pesticide exposure to brain tumors in children and other neurological disorders prompting the American Academy of Pediatrics to publish a position paper making a call for more research,

disclosure, and buffer-zones to better protect children from exposure to pesticides. Id. ¶ 18 (citation omitted).

These harmful impacts have also been observed first hand. For example, one of Monsanto's testing fields in Maui, Monsanto Mokulele Fields, is located approximately 500 yards away from a neighborhood called Hale Piilani. Stewman Dec. ¶ __. Residents in this small community report that you can taste the chemicals on your mouth as frequently as once a week. Stokes Dec. ¶ 8. These residents report the same health problems noted in the studies performed in Latin America: vitamin deficiencies, respiratory problems, central nervous system issues, and seizures. See Stokes Dec. ¶ __, and Stewman Dec. ¶ __.

The more severe health problems have also been observed first hand in Hawaii. Kathryn Xian is the Executive Director for the Pacific Alliance to Stop Slavery ("PASS"), a non-profit whose mission is to stop human trafficking. Xian Dec. ¶ 3. Ms. Xian works closely with migrant workers that have worked as pesticide sprayers on GMO farms on Oahu. Id. ¶ 7. Based on her discussions with multiple farm workers, when these migrant workers develop health problems, they are sent back to their home country, or they are coerced to suppress the information in exchange for monetary consideration. Id. Ms. Xian has worked with at least 4 migrant workers that have developed severe medical conditions as a result of being exposed to abnormally high and dangerous quantities of pesticides. Id. ¶8. The

health problems reported include: severe mobility and respiratory problems, hair loss, severe skin problems, pituitary and brain tumors, cirrhosis of the liver, and Stage 4 liver cancer. Id. ¶¶ 9-11. Attached hereto as Exhibits C-E are photographs of one of these field workers that show the severe skin problems he developed working as a pesticide sprayer.

While these reports have not been scientifically evaluated, according to Dr. Valenzuela, there is an "urgent need" to conduct studies on the impact of GMO operations on Maui as there are "potentially serious health and environmental impacts that to date have not been evaluated." ¶ 19. Further, as discussed in the following section, there is no Federal or State oversight, and no testing or evaluations being conducted to evaluate the health and environmental impacts of these practices in Maui County.

B. The Federal Coordinated Framework—An Executive Branch Policy Statement Regulating All Aspects Of GMO Operations

There are no federal statutes that regulate farming operations concerning genetically modified crops. Instead, in 1986, the White House's Office of Science and Technology Policy adopted a policy statement called the "Federal Coordinated Framework" to address aspects of genetically modified crops without seeking legislation. See Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302 (June 26, 1986). Under the Federal Coordinated Framework, the White House recognized that certain areas involving genetically modified

plants could be regulated by three agencies based on the executive branch's interpretation of the legislation: (1) the Food and Drug Administration ("FDA"); (2) the Environmental Protection Agency ("EPA"), and (3) the United States Department of Agriculture, through the Animal and Plant Health Inspection Service ("APHIS"). In the nearly 30-years since the executive branch adopted this policy statement, Congress has never recognized any regulatory authority over GMO farming operations through legislation.

1. The FDA

The FDA is the primary Federal agency responsible for ensuring the safety of commercial food and food additives, except for meat and poultry products. 57 Fed. Reg. 22,984 (May 29, 1992). The FDA's primary statutory authority is the Federal Food, Drug, and Cosmetic Act ("FFDCA"), 21 U.S.C. §§ 301–399f. "The FDA's authority is limited to removing adulterated food from the national food supply, which could include food from genetically modified plants." Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 833 (9th Cir. 2013). There are no provisions in the FFDCA that addresses genetically modified plants. Id.

In 1992, the FDA adopted a policy statement where it stated that its role is to regulate the characteristics of the genetically modified crops, and it did not have a role in the development or the manner in which the crop is created. Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg.

22,984 (May 29, 1992). Instead, the FDA stated that ultimately, it is the food producer who is responsible for safety, not the FDA. Id. According to the FDA, premarket review of any GMO is entirely voluntary. Id.

2. The EPA

The EPA's regulatory authority arises under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. FIFRA governs the use, sale, and labeling of herbicides. See Bates v. Dow Agrosciences LLC, 544 U.S. 431, 437 (2005). A herbicide manufacturer is required to register a herbicide with the EPA before it can be distributed or sold in the United States. 7 U.S.C. §§ 136a(a),136j(a)(2)(F). The EPA involvement with genetically modified plants is limited because the FIFRA deals with chemicals, not plants. The EPA has only been able to regulate GMOs by adopting C.F.R.s that treat as herbicides, certain plants that have been genetically modified to produce pesticides, which the EPA has termed "plant-incorporated protectants" ("PIPs"). See 40 C.F.R. §§ 152.3, 152.42, 174.1, 174.3. Pursuant to C.F.R.s adopted by the EPA, the EPA approves field tests under the auspices of 7 U.S.C. § 136c for "Experimental Use Permits" to register certain crops as PIPs. See 40 C.F.R. §§ 152.3, 152.42.

Under 7 U.S.C. 136v, a state may also regulate the sale or use of any federally registered pesticide or device in the State so long as "the regulation does not permit any sale or use prohibited" by the FIFRA. The U.S. Supreme Court has

held that the FIFRA does not preempt a local municipality from regulating the use of pesticides. Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 616 (1991). Accordingly, Plaintiffs do not argue express preemption with respect to the FIFRA.

In line with the lack of any Congressional mandate, the EPA has not provided any oversight on any GMO operations in Maui County. According to testimony presented before the Maui City Council concerning the Ordinance, in the last 5 years, the EPA has not conducted any inspections or investigations in Maui County. See Minutes for Policy and Intergovernmental Affairs Committee, Council of the County of Maui, July 1, 2014 at pp. 23-24 (testimony of Pamela Cooper, Manager, Pesticides Office, US EPA Region 9 San Francisco Office). Moreover, the EPA also does not conduct any studies or tests with respect to any of the activities in Maui County. Id. at p. 29 (testimony of William Jordan, Deputy Director for Programs, Office of Pesticides Programs, US EPA Headquarters). Instead, the EPA relies entirely on industry reports and studies published in scientific journals. Id.

3. The USDA Through APHIS

The USDA has regulatory authority through the Animal and Plant Health Inspection Service ("APHIS") over the interstate movement of plant pests and noxious weeds under the Plant Protection Act ("PPA"). 7 U.S.C. §§ 7701, 7754. A "plant pest" is defined under the PPA as a number of organisms that can

"directly or indirectly injure, cause damage to, or cause disease in any plant or plant product." See 7 U.S.C. § 7702(14). The statute does not include genetically modified organisms.

Through administrative regulations, APHIS has regulated certain GMO crops as plant pests if the plant is created using an organism that is itself a plant pest. 7 C.F.R. § 340.1 (defining a regulated article under APHIS's plant pest regulations as "[a]ny organism which has been altered or produced through genetic engineering, if the donor organism . . . or vector or vector agent belongs to any genera or taxa designated in § 340.2 and meets the definition of plant pest"). APHIS authorizes field trials of GMOs that fall within its definition of a plant pest before the plant can be given "non-regulated status." 7 C.F.R. §§ 340.0-340.6.

APHIS can authorize the release through a notification or permitting process. 7 C.F.R. §§ 340.3-4. Only 1% of all new GE crops proceeds through the permitting process.[10] Instead, the vast majority of GE crops are released based solely on notification from the developer of the product.[11] For notification, APHIS only requires the developer to perform a risk evaluation on whether the plant may

---

[10] Gibson at p. 235; Maria R. Lee-Muramoto, *Reforming The "Uncoordinated" Framework for Regulation of Biotechnology,* 17 Drake J. Agric. L. 311, 318 (Summer, 2012) ("Lee-Muramoto") (citing COUNCIL ON ENVTL. QUALITY & OFFICE OF SCI. & TECH. POLICY, CASE STUDY NO. III: HERBICIDE-TOLERANT SOYBEAN 4 (2001), available at http://www.whitehouse.gov/files/documents/ostp/Issues/ceqostpstudy4.pdf.)

[11] Id.

be a plant pest.[12] No other considerations of risks are considered, such as human health or environmental impacts.[13] With respect to the 1% that proceeds to the permitting process, the primary emphasis is on confinement of the test field to avoid cross-contamination with other plants and release into the environment of the potential plant pest.[14] No other environmental or human health impacts are considered.[15]

C. State Regulations

There are no state statutes that regulate GMO operations. There are only two state statute that mentions GMOs. HRS § 321-11.6 requires that a copy of the federal notification or permit application for field testing of GMOs to be submitted to the DOH. Under this statute, the state does not even request or get access to the "Confidential Business Information" regarding the details of the testing eliminating a full picture of the testing being conducted.[16] GMOs are also mentioned in HRS Chapter 209E which allows the Department of Business, Economic Development, and Tourism to create enterprise zones to attract private

---

[12] See Lee-Muramoto at pp. 318-319; see also 7 C.F.R. 340.3; Int'l Ctr. for Tech. Assessment v. Johanns, 473 F. Supp. 2d 9, 27, 2007 U.S. Dist. LEXIS 7773, 43, 37 ELR 20044 (D.D.C. 2007) (stating that a plant meets the notification requirements and can be introduced if it meets certain "weediness criterion, which mandates that the organism or product "(1) not be listed as a noxious weed under APHIS's PPA regulations and (2) 'is not considered by the Administrator to be a weed in the area of release into the environment'").

[13] Id.

[14] See Lee-Muramoto at p. 319 (citing C.F.R. 340.4).

[15] Id.

[16] See Gibson at p. 241 (citing MICHAEL R. TAYLOR, JODY S. TICK, & DIANE M. SHERMAN, PEW INITIATIVE, TENDING THE FIELDS: STATE & FEDERAL ROLES IN THE OVERSIGHT OF GENETICALLY MODIFIED CROPS 80 (2004))

investors by, among other things, "assisting counties in obtaining the reduction of rules within enterprise zones[.]" HRS §§ 209E-2, 3.

Nothing in this legislation indicates that the State Congress intended to preempt counties from regulating GMOs. Plaintiffs do not cite or argue that these limited statutes have any preemptive effect on the County's ability to regulate GMOs to protect public health and the environment. Instead, the Plaintiffs rely on two State laws concerning pesticides and noxious plants that are administered through the State Department of Agriculture.

First, the Hawai'i Pesticide Law, which is codified in HRS Chapter 149A and administered by the HDOA, regulates pesticide users and distributors, imposing restrictions on the sale and use of pesticides other than those provided for in Federal law. Second, the Hawai'i Plant Quarantine Law ("HPQL") addresses the importation, exportation, and possession of restricted plants and organisms that are introduced into the State. See generally HRS 150A. Under HRS § 150A-6.1, the Board of Agriculture is required to maintain a list of "restricted plants" that require a permit for entry into the State. The HDOA is required to designate, by rule, as restricted plants "specific plants [including noxious weeds] that may be detrimental or potentially harmful to agriculture, horticulture, the environment, or animal or public health." HRS §§ 150A-6.1, 152-1.

The State DOA has one person responsible for inspecting any operation concerning pesticide use throughout Maui County, this includes inspecting all stores that sell pesticides (i.e., Home Depot and grocery stores), pest control companies, golf courses, seed locations, and agricultural operations such as Monsanto. Id. at p. 55 (testimony of Thomas K. Matsuda, Branch Chief, Pesticides Branch, State Department of Agriculture). According to the State DOA's testimony during the public hearing on this Ordinance, there are no statutes, rules, or guidelines of any kind provided by the Federal Government, the EPA, or the State of Hawaii that regulates the amount of pesticide contamination, and the State DOA admittedly does not know how to evaluate the information. Id. at p. 50. According to the testimony from State DOA:

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

Id. at p.50 (emphasis added).

D. The Ordinance

On November 4, 2014, Maui voters approved the Maui County ordinance entitled "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms" (the "Ordinance"), which establishes a temporary

moratorium on the growth, testing, and cultivation of genetically modified or engineered crops ("GMOs") until an industry funded and independently administered Environmental and Public Health Impacts Study ("EPHIS") analyzing the key environmental and health effects of GMO operations and practices is completed. See Exhibit __. Intervening Defendants were the original drafters and proponents of the Ordinance, and engaged in extensive community outreach to educate the community about the Ordinance before the election.

III. STANDARD OF REVIEW

Summary judgment must be granted only if the moving party "shows that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. ("FRCP") Rule 56(a). The moving party has the initial burden of demonstrating the absence of any genuine issue of material fact.[17] A genuine issue of material fact exists if there is sufficient evidence present such that a reasonable fact finder could decide the question in favor of the non-moving party.[18]

If the moving party meets its initial burden, then "the non-moving party must show that there are genuine factual issues that properly can be resolved

[17] Makin v. Hawaii, 114 F. Supp. 2d 1017, 1023-24 (D. Haw. 1999) (citations omitted); see also T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).
[18] Makin, 114 F. Supp. 2d at 1024.

only by a finder of fact because they may reasonably be in favor of either party."[19] The court must view the evidence in the light most favorable to the non-moving party, and where there is conflicting evidence, the court "must assume the truth of the evidence set forth by the nonmoving party with respect to that fact."[20] Inferences, disputed or undisputed, must be drawn in the light most favorable to the non-moving party.[21]

IV. THIS COURT SHOULD ABSTAIN OR CERTIFY THE ISSUE OF STATE PREEMPTION TO THE HAWAII SUPREME COURT

Defendants have filed a motion to dismiss or to stay the proceeding based on abstention grounds ("Motion to Dismiss"). See [DKT No. 39]. The hearing on the Motion to Dismiss is set concurrently with this Motion for Partial Summary Judgment. In the interest of avoiding duplicative briefing, Defendants incorporate by this reference the memoranda and exhibits submitted in support of abstention as set forth in the related motion.

In the event the Court is not inclined to abstain, this Court should certify the issues concerning state law to the Hawaii Supreme Court. The U.S. Supreme Court has consistently used certification when a federal court case involves an important question of state law that is both unclear and would be

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

determinative in the case. See Richardson v. City & Cnty. of Honolulu, 802 F. Supp. 326, 344 (D. Haw. 1992) (citations omitted). The District Court may certify a question on state law to the Hawaii Supreme Court where (1) the question concerns an area of state law that is determinative of the cause, and (2) there is no clear controlling precedent in Hawaii. Hawaii Rules of Appellate Procedure Rule 13. In Richardson, this District Court certified the question of whether a local ordinance that imposed a ceiling on renegotiated lease rents was preempted by State law. Richardson, 802 F. Supp. at 346. In finding that certification was appropriate, the District Court recognized that it was appropriate for the Hawaii Supreme Court to decide the issue because preemption raised broader issues concerning the various county's authority to enact legislation in areas occupied, or partially occupied. Id. at 345. Further, the issue was of significant importance to both counties and the state that transcended the boundaries of the case. Id.

In this case, it is appropriate for this Court to certify the state law preemption issues to the Hawaii Supreme Court. A ruling on whether state law preempts the ordinance is determinative of the case. In fact, Syngenta Seeds, Inc. v. County of Kauai, 2014 U.S. Dist. LEXIS 117820 (D. Haw. Aug. 25, 2014) and Hawai`i Floriculture & Nursery Ass'n v. County of Haw., 2014 U.S. Dist. LEXIS 165970 (D. Haw. Nov. 26, 2014) were both decided principally on state law grounds. There is also no clear controlling precedent on whether this Ordinance

(imposing a moratorium on GMO operations) is preempted by the Hawai‘i Pesticide Law, HRS Chapter 149A, and the Hawai‘i Plant Quarantine Law, HRS Chapter 150A. This issue also has broader implications than this case as counties in this State have demonstrated the need to adopt local ordinances to address GMO operations that are causing potentially serious environmental and health problems in the community. Moreover, the issues involve the State's obligations under the Hawaii Constitution to protect the natural environment, as well as the police power delegated to the County. These issues are appropriately decided by the Hawaii Supreme Court, and it is likely that if this case is appealed to the Ninth Circuit, the Ninth Circuit will certify the question on state law to the Hawaii Supreme Court.

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

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

essential to its opposition.'" Metabolife Int'l v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986)).

As set forth in detail in this brief, there are no federal or state laws that preempt the Ordinance. On the federal level, Plaintiffs rely on the "Coordinated Framework," which is a policy statement adopted by the Executive Branch to regulate in an area that Congress has not addressed through legislation. In order to argue that there is preemption, Plaintiffs make the bold *factual* claim that the Federal Government has provided broad regulatory oversight with detailed "scientific safety standards", and the federal government conducts detailed "evaluations" and "federal scientific review." See Memorandum in Support [DKT No. 70-1] at p. 5. On state preemption, Plaintiffs likewise argue that there is a "statewide regulatory scheme" where the State of Hawaii provides broad oversight on the "danger to other plants and the environment ***and*** pesticides." Id. at p. 9. These are material facts that are disputed.

To rebut Plaintiffs' argument, Defendants are left to prove the negative: (1) that these regulations do not preempt Maui from adopting the Ordinance, (2) that the federal and state government do not provide broad legislation in these areas, (3) the mechanism in which these agencies enforce these regulations do not regulate or provide oversight to address the local interest in protecting the environment and public health; and (4) the federal and state agencies

do not interpret or follow federal legislation in a manner that regulates the activities addressed in the Ordinance. The areas needed to establish this negative are as follows:

- The studies and approvals that Plaintiffs represent were performed and/or obtained in connection with Federal and State oversight of GMO operations being conducted in Maui County;
- The details concerning Plaintiffs' GMO operations;
- The health and environmental impacts associated with these operations; and
- The Federal and State oversight that is allegedly being carried out on Plaintiffs' GMO operations.

To date, no discovery has been exchanged. On January 9, 2015, Defendants served the following discovery requests: (1) First Request for Answers to Interrogatories to Agrigenetics, Inc.; (2) First Request for Answers to Interrogatories to Monsanto Company; (3) First Request for Production of Documents to Defendant County of Maui; (4) First Request for Production of Documents to Plaintiffs; and (5) Request for Inspection of Plaintiffs' Property. See Exhibit _ to _.

Once these discovery responses are provided, Defendants intend to conduct depositions of representatives of the following entities pursuant to FRCP Rule 30(b)(6): (1) Monsanto Company; (2) Agrigenetics, Inc.; (3) the EPA; (4) the FDA; (5) the USDA/APHIS; (6) State of Hawaii, DOA; and (7) the County of Maui. See generally Carroll Dec. At the very least, Defendants should be allowed an opportunity to conduct discovery before this Court rules on this Motion to set

forth the factual bases for their defense. Id. Accordingly, Defendants respectfully request that the Court defer considering this Motion until this discovery is completed.

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

The Federal Court's jurisdiction is limited under Article III of the U.S. Constitution to cases and controversies in which the plaintiff has standing and the matter is ripe for adjudication. Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Com., 659 F.2d 903, 915 (9th Cir. 1981) The doctrines of standing and ripeness may overlap, and both are intended to "prevent courts from becoming enmeshed in abstract questions which have not concretely affected the parties." Id. (citation omitted). Both standing and ripeness requires that there be a constitutional "'case or controversy,'" and that the issues presented are "'definite, concrete, not hypothetical or abstract.'" Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000).

Ripeness supplements the standing doctrine by not only considering whether there has been an "injury in fact," but also evaluating whether the injury has "matured sufficiently to warrant judicial intervention." Pacific Legal Foundation, 659 F.2d at 915. Neither the mere existence of a proscriptive law nor a generalized threat of prosecution is sufficient to establish that a challenge to a

law is ripe for review. Thomas, 220 F.3d at 1139. In order for a case to be ripe, the plaintiff must show: (1) that the issue is fit for judicial decision; and (2) there is no undue harm if the court were to withhold consideration. Id. at 915. Where a better factual record would illuminate the issue of preemption, the challenged statute is not ripe for review until it has actually been applied. Id. See also Pence v. Andrus, 586 F.2d 733, 738 n.12 (9th Cir. 1978) (where the parties dispute whether the question is "purely legal," the court "will be in a significantly better position to confront the question of validity of the regulation after the factual development which will occur through application of the regulation.")

In Pacific Legal Foundation, the 9th Circuit held that the certification requirement in a California law that placed a moratorium on the construction of new nuclear plants was not ripe for review. 659 F.2d at 916. The law required a state commission to approve, i.e., "certify", the site and the proposed nuclear plant before the plant could be built. In finding that the challenge was not ripe for review, the 9th Circuit reasoned that the record was not sufficiently developed. It was not clear what type of information the commission would be requesting, or ultimately its reasons for denying certification. Id. at 916. Thus, factual development was necessary to avoid the court having to decide the issue "in the abstract." Id. Moreover, a delay in deciding the case did not cause undue hardship because the certification scheme did not have an "immediate and substantial

impact on the plaintiffs." Id. The plaintiffs did not have a certification pending and "the threat that procedural burdens might someday be imposed or that certification might someday be denied for failure to meet [the commission's] standards is remote at best." Id.

In this case, the issue of whether the Ordinance is preempted is not ripe for the Court's review. The Ordinance has not yet been certified and has not yet been implemented. Before the Ordinance can be implemented, the County needs to adopt rules and regulations as to the procedures it will follow in implementing the law. The Ordinance also requires that a Joint Fact Finding Group (JFFG) convene to determine the "scope and design" of the Environmental and Public Health Study (EPHIS) that is required under the ordinance to lift the moratorium. See Ordinance § 7.3. There is no evidence that any information that will be requested as part of the EPHIS will in any way overlap with any federal or state regulation.

In addition, Plaintiffs cannot demonstrate that they will suffer any undue hardship. The Ordinance expressly exempts any GE Organisms that are in mid-growth cycle when the chapter is enacted. See Ordinance § 5.2.(B). The threat that Plaintiffs may need to go through procedural hurdles to continue their operations after this initial cycle does not arise to an "immediate and substantial" impact sufficient to make the controversy ripe. Pacific Legal Foundation, 659 F.2d

at 916 ("the threat that procedural burdens might someday be imposed or that certification might someday be denied for failure to meet [the state commission] standards is remote at best").

Other than generalized statements that Plaintiffs are testing GMO crops, Plaintiffs do not disclose what testing is being conducted, and how this ordinance would impact ongoing testing. Notably, on Monsanto's web page, they state that in countries where GMOs are outlawed, they simply substitute conventional seeds with GMOs. There is nothing preventing these companies from making this change here before the necessary study is completed. There is no undue hardship in comparison to the threat to human health and the environment that the Ordinance seeks to address. Accordingly, Plaintiffs claims are not ripe, and this Court should first allow the ordinance to be implemented before ruling on preemption.

VII. THE ORDINANCE IS VALID AND ENFORCEABLE

For the reasons set forth below, the Ordinance is valid and enforceable as a matter of law, as it is not preempted by federal or state law, and it does not violate the Maui County Charter and other state law provisions. As a preliminary matter, Plaintiffs' argue both state and federal preemption. This argument is inconsistent. It cannot be the case that the field of GMO regulation is fully

occupied by state statutory law, and at the same time that the Federal Coordinated Framework simultaneously preempts State's from any regulatory authority.

A. THE ORDINANCE IS NOT PREEMPTED BY FEDERAL LAW

Under the Supremacy Clause of the United States Constitution, state laws are valid so long as they do not interfere or conflict with federal law. U.S. Const., art. VI, cl. 2.[22] "For the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."[23] Nevertheless, "preemption analysis begins with the presumption that Congress does not intend to supplant state law."[24] There is a presumption of constitutional validity when a state exercises its legitimate police powers, and this presumption against preemption is especially strong when a state seeks to protect the public health and safety.[25]

While Congress has the authority to preempt state and local laws, and may do so either expressly—through clear statutory language—or implicitly—through field or conflict preemption,[26] Congress must "manifest its intent that federal law shall be controlling."[27] Express preemption occurs only when a federal

---

[22] See also Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).
[23] Id. at 713.
[24] Tillison v. Gregoire, 424 F.3d 1093, 1098 (9th Cir. 2005).
[25] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960).
[26] See Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 667-68 (9th Cir. 2003); see also Whistler Invs., Inc. v. Depository Trust & Clearing Corp., 539 F.3d 1159, 1164 (9th Cir. 2008) (internal citation omitted).
[27] Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

statute explicitly confirms Congress' intention to preempt state or local law. See English v. General Elec. Co., 496 U.S. 72 (1990). "If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."[28]

In the absence of explicit statutory language, Congress' intent to preempt state or local law only be inferred in two ways: field preemption or conflict preemption.[29] Under the doctrine of field preemption, a state or local law may be preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.[30] Under the doctrine of conflict preemption, a state or local law is preempted "to the extent that it actually conflicts with federal law," such that "compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[31] The determination of whether preemptive conflict exists "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[32] Even if the court finds congressional intent, it

---

[28] Altria Group v. Good, 555 U.S. 70, 76 (2008).
[29] See Oxygenated Fuels Ass'n, 331 F.3d at 667-68.
[30] English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).
[31] Hillsborough, 471 U.S. at 713 (internal quotations omitted).
[32] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).

must only invalidate state or local law to the extent of the preemption, and not beyond that scope.[33]

Ultimately, preemption analysis is guided by two fundamental principles. "First, 'the purpose of Congress is the ultimate touchstone in every preemption case.'"[34] Second, courts begin with the "assumptions 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."[35] This presumption against preemption applies in the context of the Ordinance in this case, because Ordinance's temporary moratorium provision addresses public health and safety concerns specific to Maui County.[36] Even assuming the presumption can be overcome, if a preemption clause is susceptible to multiple interpretations, a court "[h]as a duty to accept the reading that disfavors preemption."[37] As set forth below, the Ordinance is neither expressly nor impliedly preempted by federal law, and the Court should accordingly reject Plaintiffs' arguments.

---

[33] Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571, 679 (7th Cir. 1982); see Pac. Legal Found. v. State Energy Res. Conservation & Dev. Com., 659 F.2d 903, 919 (9th Cir. 1981).
[34] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (citation omitted)).
[35] Medtronic, Inc., 518 U.S. at 485 (internal quotation marks and citations omitted).
[36] See, e.g., Hillsborough, 471 U.S. at 716 (noting "the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation."); see also Plumley v. Massachusetts, 155 U.S. 461, 472 (1894) ("Health and safety issues have traditionally fallen within the province of state regulation.").
[37] Bates v. Dow Agrosciences, 544 U.S. 431, 449 (2005); see also Riegel v. Medtronic, Inc., 552 U.S. 312, 335 (2008) (quoting Bates, 544 U.S. at 432) (holding that the courts ordinarily disfavor preemption)).

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

Federal preemption begins with the "presumption against pre-emption[.]"[38] Any conclusion of full or partial preemption requires a finding that preemption of state or local legislation was Congress' "clear and manifest purpose."[39] When determining whether an agency has the authority to preempt state law, "the agency is powerless to clarify congressional intent."[40] The Supreme Court has never looked to an agency's interpretation of congressional intent to preempt state law when determining agency preemption. Id. While an agency's interpretation may be given some deference where Congress' intent is unclear, " "such deference does not extend to an agency's interpretation of its own power to preempt state law when Congress has not expressly stated its intent to delegate such power to the agency." Id.

Plaintiffs and Amicus Curiae Biotechnology Industry Organization heavily rely on the Coordinated Framework as a fundamental basis for federal preemption of the Ordinance. Plaintiffs' argument that the Coordinated Framework provides a uniform regulatory framework and that Congress could not have intended counties and local governments to regulate in this field is flawed.

---

[38] Lohr, 518 U.S. 485; Hillsborough, 471 U.S. 707, 715 (1985); see also P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1998) ("There is no federal pre-emption in vucuo, without a constitutional text or a federal statute to assert it.").

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

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

First, the Coordinated Framework is not a "regulatory scheme" or "federal law" resulting from Congress; thus it cannot be a source of preemption. It was not established by, nor does it represent, any congressional purpose or directive. It is an executive branch policy document, as noted in the Federal Register notice,[41] that operates as a policy framework to address aspects of genetically modified crops without seeking legislation.[42] As a policy document, it carries neither the force of law nor purports to set statutory or regulatory standards.[43] Because the Coordinated Framework was not issued pursuant to any congressional delegation of authority, it is not entitled to deference in a preemption analysis.[44] Further, all FDA, EPA, and USDA regulations cited by Plaintiffs relating to GMOs were made pursuant to the Coordinated Framework. If this Court agrees with Intervenor-Defendants' analysis that the Coordinated Framework has no preemptive force, the Court's analysis of Plaintiffs' federal preemption arguments should stop here.

Even if this Court were to find that the Coordinated Framework holds preemptive value, it leaves many holes in the oversight of GMOs; thus, the

---

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

Coordinated Framework is incapable of comprehensively and exclusively regulating in the area of GMOs. In the nearly 30 years since the executive branch adopted the Coordinated Framework, Congress has never recognized any federal regulatory authority over GMO operations and practices.

None of the federal agencies within the Coordinated Framework regulate the manner in which GMOs are developed and created, nor do these regulations coherently address the potential environmental and health risks posed by GMO operations and activities. The FDA is responsible for ensuring the safety of commercial food and food additives. The EPA regulates chemicals and approves chemicals, which the EPA has expanded to include PIPs.[45] The USDA through APHIS regulates the interstate movement of plant pests and noxious weeds. These agencies do not address environmental and health problems created by GMO operations. They do not conduct any tests or studies to determine whether these practices are harming local communities. As such, the gaps in regulation within the Coordinated Framework demonstrate that the federal government has not manifested an intent to occupy this field of GMO regulation.

2. The Ordinance Is Not Expressly Preempted By Federal Law

Plaintiffs' sole express federal preemption challenge to the Ordinance is pursuant to the Plant Protection Act ("PPA"), 7 U.S.C. § 7701 *et seq*. The

[45] See 40 C.F.R. §§ 152.3, 152.42, 174.1, 174.3.

PPA's preemption provision, however, is inapplicable for several reasons. First, the PPA does not regulate the health and safety risks of GMO operations and practices; thus, the Ordinance does not conflict with the PPA, and the preemption provision is inapplicable. Next, even if the PPA were relevant to a preemption analysis, the Ordinance does not fall within the scope of the express preemption provision of the PPA requiring "movement in interstate commerce." Finally, even if the Court found that the provisions of the Ordinance constituted "movement in interstate commerce," the Ordinance's purposes fall within the stated exception to the preemption provision. Thus, the PPA does not preempt the Ordinance.

a. The Ordinance Does Not Conflict With The Goals and Purposes of the PPA

The purpose of the PPA is to prevent the spread of parasitic, diseased, and invasive plants and organisms through regulations of "plant pests" and "noxious weeds." Ctr. for Food Safety, 718 F.3d at 834. Congress' purpose in enacting the PPA was to protect agriculture and the environment by regulating the interstate movement of plant pests and noxious weeds. See 7.U.S.C. § 7701, 7754. The PPA contains a limited express preemption provision which explains, among other things, when states and political subdivisions of states may not regulate in interstate commerce.[46]

[46] (b) Regulation of interstate commerce.
(1) In general.

Where a state or municipality adopts a local law to protect public health and environmental safety that is not being addressed on the federal level, the law is not preempted, expressly or implicitly, by federal law. In Oxygenated Fuels Association v. Davis, the Ninth Circuit found that a California state ban on the use of a gasoline additive was not expressly or impliedly preempted by the Clean Air Act.[47] The Clean Air Act contained an express preemption provision regarding the regulation of oxygenate fuel additives. Id. at 668. The Court found that in enacting the Clean Air Act, Congress left the states substantial authority to enact legislation governing matters of public health and environmental safety, as these

---

> Except as provided in paragraph (2), no State or political subdivision of a State may regulate the movement in interstate commerce of any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed, if the Secretary has issued a regulation or order to prevent the dissemination of the biological control organism, plant pest, or noxious weed within the United States.
>
> (2) Exceptions.
>
> (A) Regulations consistent with Federal regulations. A State or a political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, biological control organisms, plant pests, noxious weeds, or plant products that are consistent with and do not exceed the regulations or orders issued by the Secretary.
>
> (B) Special need. A State or political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, plant products, biological control organisms, plant pests, or noxious weeds that are in addition to the prohibitions or restrictions imposed by the Secretary, if the State or political subdivision of a State demonstrates to the Secretary and the Secretary finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.

7 U.S.C. § 7756(b).

[47] 331 F.3d 665 (9th Cir. 2003).

areas fell "within the traditional exercise of the police powers of the state." Id. at 673. The Court concluded that the ban was neither expressly nor impliedly preempted, because it did not conflict with the goals and purposes of the Clean Air Act. Id..

Additionally, in Pacific. Gas & Electric Company v. State Energy Resources Conservation & Development Commission, the United States Supreme Court addressed a similar state law placing a moratorium on the construction of nuclear power plants. The energy companies challenged the moratorium, arguing that it was preempted by the Atomic Energy Act. The Atomic Energy Act also contained a preemption provision.[48] The Court held that the California 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, where the federal objective was to regulate the safety of nuclear facilities.[49]

Similarly, the Ordinance in this case addresses a local concern that is not addressed by the PPA or any other federal law. The Ordinance expressly addresses harms that are not being addressed by the PPA. Congress did not intend to preempt local laws regulating GMO operations and associated health and safety risks. Specifically, section 4 of the Ordinance sets forth its purpose, which is to

---

[48] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983).
[49] Id.

protect Maui County's environment and public trust resources, promote the economic integrity of organic and non GE markets, and to protect the cultural heritage of the indigenous people. The PPA does not protect these interests.[50] The PPA does not once mention the words "genetically engineered," either in its purposes or legislative history, evincing that Congress had not intent to regulate GMO crops, let alone an intent to preempt states and local governments from acting to address these harms. "The job of updating Title 7 of the United States Code to address the potential harms caused by genetic modification (including transgenic contamination and increased herbicide use) is a job for Congress, not this court, to undertake."[51] Thus, the Ordinance is not expressly preempted by the PPA.

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

Even if the Court found that the PPA and the Ordinance were in conflict, Plaintiffs' express preemption argument still fails. The PPA's narrow express preemption provision has several necessary elements, none of which are present in this case. The provision requires that in order for preemption to apply, a state or county must be attempting to regulate the "movement in interstate

[50] Ctr. for Food Safety, 718 F.3d at 841.
[51] Id.

commerce" of an article "in order to control it as a plant pest or noxious weed[.]" Id. § 7756(b)(1).

The Ordinance does not regulate the articles prohibited under the narrow preemption provision, because GMOs that are the subject of experimental field trials are not "in interstate commerce." The Ordinance is an intra-county moratorium on GMO operations and practices solely within Maui County. Moreover, the Ordinance seeks to regulate GMO operations and practices, not GMO crops or products. Since GMO crop testing involves regulated articles excluded from being "in commerce," the PPA's narrow preemption provision, which applies only to laws regulating "movement in interstate commerce," cannot preempt the Ordinance.

The PPA's preemption provision also requires that state or local regulation be regulating certain articles that are moving in interstate commerce. 7 U.S.C. § 7756(b)(1). The Ordinance does not regulate their "*movement* in interstate commerce." The Ordinance seeks a temporary moratorium on GMO operations and practices in Maui County. The Ordinance does not regulate the movement of any article. Its measures strictly govern Maui County operations and practices in a static location, and it does not touch upon the transporting of GMO articles within the State or between States.

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

Further, the scope of the PPA's limited express preemption provision does not preempt the Ordinance because the Ordinance satisfies an exception to the PPA's preemption provision. Under the exceptions to preemption, the states or municipalities may regulate the interstate movement of plant pests if the regulation is consistent with and does not exceed the regulations or orders issued by the Secretary.

This Ordinance falls within this exception. The PPA does not regulate the manner in which these farming activities are conducted. The PPA does not conduct any environmental or public health studies. farming operations concerning genetically modified crops. There is nothing in the PPA addressing GMO operations. Thus, Ordinance's purpose of addressing the creation and development of GMOs as well as the health and safety risks involved with such practices is consistent with existing federal law.

3. The Ordinance Is Not Impliedly Preempted By Federal Law

Plaintiffs also contend that the federal government comprehensively regulates GMOs, thereby impliedly preempting state or county regulation in the area. Plaintiffs argue that the Ordinance is impliedly preempted through conflict preemption in three ways.[52] Mem. in Supp. p. 32. First, Plaintiffs argue that the

[52] Plaintiffs do not appear to assert a field preemption argument, for the presumed reason that furthering such an argument would go squarely against Plaintiffs' additional proposition that

Ordinance interferes with and frustrates the objective of the Coordinated Framework. Second, Plaintiffs argue that the Ordinance is impliedly preempted as to field testing. Third, Plaintiffs argue that the Ordinance is impliedly preempted as to the cultivation of deregulated GMO crops. All three of Plaintiffs' arguments fail for various reasons.

Under the doctrine of conflict preemption, "state law is nullified to the extent that it actually conflicts with federal law," such that "compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[53] In determining whether a state or local law is impliedly preempted because it creates a conflict with federal law, the Court is "required to presume that Congress did not intend to preempt areas of law that fall within the traditional exercise of the police powers of the states."[54] Environmental regulation traditionally has been a matter of state authority.[55] Only where there is "clear evidence" that Congress meant to preempt state action should this Court find federal preemption. Geier, 529 U.S. at 885.

---

field preemption exists on the State level. To the extent that Plaintiffs and Amicus Curiae Biotechnology Industry Organization may argue that the Ordinance is invalid based on implied field preemption through the Coordinated Framework, the arguments set forth in Part VII, Section A, subsection 1 are incorporated herein.

[53] Hillsborough, 471 U.S. at 713 (internal quotations omitted).

[54] Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 673 (9th Cir. 2003); see also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[55] Oxygenated Fuels Ass'n v. Davis, 331 F.3d at 673; see also Exxon Mobil Corp. v. EPA, 217 F.3d 1246, 125 (9th Cir. 2000).

As discussed in section VII, subsection A, part 1, the Coordinated Framework does not hold any preemptive authority, as it is not federal law. Nevertheless, even when analyzing the Coordinated Framework's scope for preemption purposes, the Ordinance does not conflict with the objectives of the Coordinated Framework. The Coordinated Framework does not regulate the manner in which GMO crops are created, nor does it address the potential environmental and health risks posed by GMO operations and practices. The Coordinated Framework focuses on the products rather than the process of genetic engineering and modification. As such, there is no "physical impossibility" in complying with both the Ordinance and the Coordinated Framework. Moreover, the Ordinance does not stand as an obstacle to the execution of Congress' objectives. Congress has not expressed in federal law that it intends to regulate the health and safety risks resulting from GMO operations and practices and prevent states or municipalities from doing the same. It follows, then, that the Ordinance cannot stand as an obstacle to Congress' objective, when such an objective is non-existent. Thus, Plaintiffs first implied conflict preemption argument fails.

Second, Plaintiffs' argument that the Ordinance is impliedly preempted as to GMO crop testing is also without merit. Mem. in Supp. p. 35. Plaintiffs rely on the APHIS and the EPA's regulatory programs as its basis for implied preemption. As noted above, the APHIS and EPA regulatory programs

stem from the Coordinated Framework, which has no independent preemptive authority. Moreover, the Ordinance does not conflict with either testing programs. If Plaintiffs can demonstrate through the Ordinance's EPHIS testing that the practices are not harmful, the Plaintiffs can continue these practices. The Ordinance is not an obstacle to any of these tests. It addresses different interests that are particular to Maui County.

Plaintiffs' final argument in support of implied conflict preemption underscores Plaintiffs' misunderstanding or mischaracterization of the Ordinance. Plaintiffs admit that the objective of the "federal regulatory program" is "to provide a uniform national regulatory process regarding certain GE crops and related pesticide uses." Memo. in Supp. p. 38. This is quite different from the objectives of the Ordinance. The Ordinance does not directly conflict with or frustrate the objectives of the federal regulatory program for GMO crops, because the Ordinance does not seek to regulate GMO crops. The Ordinance seeks to regulate the *process*, and the federal government intends to regulate the *products*. There are no federal laws or regulations addressing the potential public health and environmental harms and safety risks involved with GMO *operations and practices*, not GMO *products*. Plaintiffs have provided no evidence of congressional intent to preempt state and local regulation in this area related to the health and safety risks of GMO operations and practices.

In sum, the federal programs cited by Plaintiffs do not preempt the Ordinance, either individually, or collectively as a Coordinated Framework. Neither the text nor the legislative history of these federal regulations provide clear evidence that the Ordinance's moratorium provision conflicts with a congressional goal of addressing the health and safety risks of GMO operations and practices.[56]

B. THE ORDINANCE IS NOT PREEMPTED BY STATE LAW

Hawaii's preemption doctrine is rooted in Article VIII, section 6 of the Hawaii Constitution, which states that the Article granting counties various powers shall not "limit the power of the legislature to enact laws of statewide concern." Haw. Const. art. VII, § 6; see also Richardson v. City & Cnty. of Honolulu, 76 Hawaii 46, 66, 868 P.2d 1193, 1213 (1994).

The Hawaii Supreme Court has set forth the general framework for determining when state law preempts local law. In Richardson v. City and County of Honolulu, the Hawaii Supreme Court concluded that "a municipal ordinance may be preempted pursuant to HRS § 46-1.5(13) if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform through the state or (2) it conflicts with state law." Id. at 60, 868 P.2d at 1209.

1. The County Possesses The Authority To Enact The Ordinance

[56] See Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 672 (9th Cir. 2003).

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

To conserve and protect Hawaii's environment and natural resources, the Hawaii Constitution expressly includes the Public Trust Doctrine as a "fundamental principle" of constitutional law. Kauai Springs, Inc. v. Planning Comm'n of Kaua'i, 133 Hawai'i 141, 171, 324 P.3d 951, 981 (2014) (citation omitted). The Public Trust Doctrine provides:

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

Haw. Const. art. XI, § 1 (emphasis added). The Hawaii Constitution further provides that the legislature shall create counties, and each county shall have and exercise such powers as shall be conferred under "general laws." Haw. Const. art. VIII, § 1. This autonomy of counties to enact legislation and make decisions in their jurisdiction is often referred to as the "Home Rule." In accord with the Public

Trust Doctrine and the Home Rule provision, the State Legislature expressly delegates certain other powers to each county:

> Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute, where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State.

Haw. Rev. Stat. § 46-1.5(13).

Based on the County's authority to conserve and protect Maui's environment and natural resources, Maui County has adopted a comprehensive regulatory scheme in the Maui County Code (the "County Code"), addressing, in relevant part, environmental and agricultural concerns. Notably, since 2009, the County Code has prohibited the testing, cultivation, and growing of genetically engineered kalo (taro). See County Code §§ 20-38-010-060. The County Code regulates the following environmental issues, among others:

- County Code §§ 20.38.010-060 – making it unlawful for any person to test, propagate, cultivate, raise, plant, grow, introduce, transport, or release genetically engineered kalo. The ordinance is predicated on findings that: (1) kalo has cultural significance to the indigenous people of Hawaii; (2) adequate safeguards do not exist to prevent contamination of non-genetically engineered kalo with genetically engineered organisms; (3) there is no legal recourse for kalo farmers who cultivate non-genetically engineered kalo if their kalo is contaminated by genetically engineered organisms; and (4) there is no requirement to label genetically engineered kalo.

- County Code §§ 20.04.020 – declaring it a public nuisance and unlawful for any person to cause, permit, or allow to escape into the open air, smoke,

soot, poisonous gases, dirt, dust or debris of any kind from any smokestack, chimney, flue, or incinerator, or any opening of any building.

- County Code §§ 20.08.010-400 – regulating soil erosion and sedimentation control to "safeguard life and limb, protect property, and promote public welfare, and to preserve and enhance the natural environment, including but not limited to water quality," by regulating and controlling grubbing and grading operations within the County.

Consistent with the Hawaii Constitution, the State Legislature has adopted legislation recognizing that both the County and State share dual jurisdiction over regulating zoning and agricultural issues. In particular, the State creates a statewide scheme, while the counties address specific measures that affect the individual counties differently. Hawaii's land use structure consists of four principal components: a state plan, a statewide zoning system, local plans, and local zoning. A 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). Zoning powers delegated to the counties are liberally construed in favor of the county exercising them. See id. In fact, this Court found that the County possesses the authority to regulate in the area of agriculture, noting that "[t]he fact that the state

Constitution declares agriculture to be of statewide concern, does not by itself preclude all county regulation in the entire field of agriculture, or trigger a requirement that the State must expressly grant the counties specific authority in the area of agriculture." Syngenta Seeds, Inc. v. County of Kauai, 2014 U.S. Dist. LEXIS 117820, *11 (D. Haw. Aug. 25, 2014).

Consistent with this dual authority and under the authority vested in the counties under HRS Chapter 501, the County Plan provides a comprehensive zoning regulatory scheme for the County, giving the County the power to enhance County efforts to monitor and regulate important agricultural issues. See County Plan at p. 61. Further, Title 19 of the County Code states that the purpose of the comprehensive zoning code is to "promote and protect the health, safety and welfare of the people of the County," and §19.04.040 provides for agricultural regulation. County Code 19.04.015.

Based on the existence of dual jurisdiction between the County and State in areas of zoning and agriculture, the County has the authority to regulate GMO operations and practices, as such practices can have potentially devastating effects on Maui's land and agricultural production. The Ordinance does not conflict with the State's objectives and authority to regulate environmental and agricultural concerns. The provisions cited by Plaintiffs neither limit the County's general police powers as set out in HRS § 46-1.5(13), nor divest the County of the

authority to enact ordinances allowing for a temporary moratorium to determine the potential health and safety impacts of GMO operations and practices.

The County has the authority and an affirmative duty to implement such laws that it deems to be consistent with safe GMO operations and practices under the Maui General Plan, in order to avoid adverse effects on the public health, the environment, and natural resources unique to Maui County. Mayer Dec., ¶ 12. The temporary moratorium on GMO operations and practices that was approved by Maui County voters is a regulation that the County has both the obligation and authority to properly implement based on its ability to regulate and monitor GMO operations and practices in Maui County "to prevent adverse effects" (Maui Countywide Policy Plan). Id.

2. The Ordinance Does Not Cover The Same Subject Matter Embraced Within A Comprehensive State Statutory Scheme Disclosing An Express Or Implied Intent To Be Exclusive And Uniform Throughout The State

Plaintiffs assert that the State Legislature has enacted a comprehensive state statutory scheme governing the regulation of both plants that allegedly pose a danger to other plants and the environment and pesticides and has delegated such regulatory authority over this field solely to the HDOA. Plaintiffs argue that through this comprehensive statewide regulatory scheme, the State has exclusive regulatory authority over the regulation of GMO operations and practices.

Plaintiffs initially rely on tenuous comparisons to the Court's holdings in Hawaii Floriculture[57] and Syngenta Seeds[58] as their primary basis for arguing state preemption of the Ordinance. These holdings, however, do not "squarely apply" to the Ordinance, in large measure due to Plaintiffs' mischaracterization of the Ordinance and its provisions. The Hawaii County law sought an outright ban on the cultivation, propagation, development, or open-air testing of GMO crops or plants, with limited exceptions. The Ordinance in this case does not create an absolute ban, but rather a temporary moratorium subject to a requirement that an industry funded and independently administered Environmental and Public Health Impacts Study ("EPHIS") be conducted. This temporary moratorium can be lifted once the EPHIS has been completed, and the local interests are addressed. Moreover, the stated purpose of the Hawaii County ordinance was to "prevent the transfer and uncontrolled spread of genetically engineered organisms on to private property, public lands, and waterways." Hawaii County Code 14-128. The Ordinance in this case, however, seeks to address the harms to the environment and public health, an area not regulated by federal or state law. Additionally, the Ordinance does not seek to impose additional regulations and obligations concerning the distribution and use of pesticides, the pre- and post-application

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

disclosure requirements, buffer zone provisions, or an annual GMO notification provision, as set forth in the Kauai law. Id. at *23-*24.

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

a. A Comprehensive State Statutory Scheme Does Not Exist

Plaintiffs argue that the HDOA's regulatory authority sets forth a comprehensive statewide framework addressing concerns surrounding GMO operations and practices that preempts all locally enacted ordinances. Plaintiffs also argue that the HDOA possesses exclusive regulatory authority over agriculture and farming, and that the Ordinance cannot seek to supplement these existing laws. Plaintiffs argue that "[t]he State Legislature has enacted a comprehensive statutory scheme governing agriculture, and delegated regulatory authority over this field to the [HDOA]." DKT #70-1, p. 8. Plaintiffs argument, however, is flawed.

As previously noted, HRS § 46-1.5(13) confers upon the counties the general power to enact ordinances in furtherance of protecting health, life, and property of its citizens. Moreover, Article XI, section 1 of the Hawaii Constitution confers upon both the state and the counties a duty to "conserve and protect

Hawaii's . . . natural resources." More globally, the HDOA's regulatory authority as outlined in HRS Chapters 141 and 147 are procedural in nature. It prescribes the mechanical steps that must be followed. Thus, the statutory scheme circumscribed by the HDOA statutes is not comprehensive, because although it controls the mechanics of agricultural process, it does not expressly or impliedly addresses the preliminary subject of the rights of counties and their citizens to temporarily halt GMO operations and practices via the mechanism of the counties' police powers and the Public Trust Doctrine. The Ordinance does not seek to alter the HDOA's procedural mechanisms, but rather seeks to address an area in which the HDOA has no regulatory authority. Accordingly, there is no comprehensive state statutory scheme regulating GMOS, and Ordinance does not cover the same subject matter as the HDOA.

b. The HDOA's Authority Does Not Demonstrate Its Intent To Be Exclusive And Uniform Throughout The State

Furthermore, there is no evidence of an intent for the HDOA's authority to be exclusive and uniform. The HDOA has one person responsible for inspecting any operation concerning pesticide use throughout Maui County, including all stores that sell pesticides, pest control companies, golf courses, seed locations, and agricultural operations such as Monsanto Company. See. Ex. _ at p. 55 (testimony of Thomas K. Matsuda, Branch Chief, Pesticides Branch, State Department of Agriculture). There are no standards for determining environmental

contamination, and the HDOA admitted during hearings on this Ordinance that: "ccording to the testimony of an HDOA agent at the public hearing regarding the Ordinance: "***So we found [chemicals in the environment],frankly, we don't know what it means and no one in, we don't know how to compare that to any kind of health standards. So there's additional work that needs to be done there.*** Id. at p. 50 (emphasis added).

There are no statutes, rules, or guidelines of any kind provided by the State that regulate the amount of pesticide contamination, and the HDOA admittedly does not know how to evaluate this information.

3. The Ordinance Does Not Conflict With State Law On The Basis That It Enters An Area Fully Occupied Thereby Or That Is Duplicative With Respect Thereto

Plaintiffs also rely on two State Laws, the Hawaii Pesticide Law and Hawaii Plant Quarantine Law in arguing that the Ordinance enters an area fully occupied by state law and is duplicative. Plaintiffs are mistaken on both counts.

a. The Ordinance Does Not Enter An Area Fully Occupied By State Law

Plaintiffs rely on two State laws concerning pesticides and noxious plants to support their argument that the Ordinance conflicts with State law. First, the Hawaii Pesticide Law, which is codified in HRS Chapter 149A and administered by the HDOA, regulates pesticide users and distributors, imposing restrictions on the sale and use of pesticides other than those provided for in

Federal law. Second, the Hawaii Plant Quarantine Law ("HPQL") addresses the importation, exportation, and possession of restricted plants and organisms that are introduced into the State. See generally HRS 150A. Under HRS § 150A-6.1, the Board of Agriculture is required to maintain a list of "restricted plants" that require a permit for entry into the State. The HDOA is required to designate, by rule, as restricted plants "specific plants [including noxious weeds] that may be detrimental or potentially harmful to agriculture, horticulture, the environment, or animal or public health." HRS §§ 150A-6.1, 152-1.

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

There is also no conflict between the HPQL and the Ordinance. The HPQL regulates the importation, exportation and possession of restricted plants introduced into the State. The Ordinance, on the other hand, seeks a temporary

moratorium on a specific activity, i.e., the development, testing, and growth of GMOs that are harmful to Maui County. While the former addresses importation of plants into the State that is a concern to the State as a whole, warranting statewide regulation, the latter addresses a specific local concern regarding activities performed in the County, which Maui voters have determined to be hazardous to Maui's environmental resources.

b. The Ordinance Is Not Duplicative With Respect To State Laws

Moreover, the Ordinance does not cover the same subject matter as those in the State statutes cited by Plaintiffs. The Ordinance is an exercise of the County's preliminary right to determine the potentially irreversible harms that GMO operations and practices threaten to impose on agricultural business, the public health, and the unique environment and natural resources within Maui County.

The Ordinance does not duplicate any State laws regarding pesticide use, plant quarantine, and noxious weeds, as the Ordinance does not seek to regulate pesticide use in any fashion. Instead, the Ordinance seeks a temporary moratorium on GMO operations and practices, and there are no State statutes that address whether local governments in Hawaii are authorized to regulate in this area. Ordinance seeks to address health and safety risks stemming from GMO operations.

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

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

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

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

Plaintiffs argue that Section 6 of the Ordinance is invalid because it imposes additional requirements on the County Council's repeal powers. [Mem. in Supp. of Motion at 54-57.] However, Section 6 of the Ordinance provides, in pertinent part: "The temporary moratorium provided in Section 6 shall remain in

effect until amended or repealed by the Maui County Council as described in subsection 2 of this Section, **or as otherwise authorized by law**." Ordinance § 6.1 (emphasis added). Thus, the Ordinance does not prevent the County Council from exercising its amendment and repeal powers under Section 11-8 of the Maui County Charter.

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

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

Plaintiffs argument that the funding mechanism under the EPHIS constitutes a tax is flawed. The funding mechanism is a proper "regulatory fee" that the Council has the authority to set. The funding for the EPHIS is not a tax because it will not be put into a general fund, nor spent for the benefit of the entire community. See Haw. Insurers Council v. Lingle, 120 Hawai'i 51, 59-60, 201 P.3d 564, 572-73 (2008) ("Taxes are generally defined as burdens or charges imposed by legislative authority on persons or property to raise money for public purposes, or, more briefly, an imposition for the supply of the public treasury." (citation omitted)). The funding also cannot be characterized as a user fee because

it is not based on "based on the rights of the entity as a proprietor of the instrumentalities used." See id. at 60, 201 P.3d at 573 (citations and internal quotation marks omitted).

The Hawaii Supreme Court has stated:

By contrast,

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

Id. at 60, 201 P.3d at 573 (quoting San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992)). "[A] regulatory fee is authorized by the state's police power to prescribe regulations for the promotion of public safety, health, and welfare." Id. at 62, 201 P.3d at 575. As Plaintiffs note, in determining whether an assessment is a regulatory fee, the court considers whether:

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

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

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

The EPHIS funding mechanism, however, already satisfies the third prong. The funding provided for the EPHIS is not necessarily used for a general purpose, but rather to defray the expenses generated in specialized investigations, hiring professional and expert services, and the acquisition of equipment needed for the EPHIS. See id. at 65, 201 P.3d at 578. Thus, the Court should not find that the EPHIS funding mechanism is invalid or inconsistent with the Maui County Charter, nor the Hawai‘i State Constitution.

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

3. The Ordinance Does Not Violate Separation Of Powers

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

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

Haw. Const. art. VIII, § 2. The Maui County Charter provides, in pertinent part:

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

Maui County Charter, § 3-6.1., 6.3 (emphasis added).

As discussed in subsection 2 above, the EPHIS funding mechanism constitutes a regulatory fee, which the Maui County Charter provides is a subject upon which the Council may legislate, regardless of the fact that the Ordinance

was enacted by voter initiative. Thus, the County Council has the power to conduct investigations of regulatory fees, which are, at the very least, incidental to its authority to legislate the same. See Lingle, 120 Hawai‘i at 70, 201 P.3d at 583. Accordingly, the Ordinance does not violate the separation of powers doctrine.

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

Plaintiffs argue that the Ordinance improperly delegates the legislative authority to the Joint Fact Finding Group ("JFFG") and an unbiased professional consultant (collectively, "EPHIS panel"). [Mem. in Supp. of Motion at 61-64.] However, Plaintiffs mischaracterize the role of the EPHIS panel by asserting that the panel will regulate GE Operations and Practices through its design and scope of the EPHIS process. Under the Ordinance, however, does not confer regulatory authority on the EPHIS panel. Rather, the EPHIS panel's function is to conduct design and conduct the EPHIS to determine whether GE Operations and Practices have detrimental impacts on Maui County. Section 7.3 of the Ordinance sets forth items that that the EPHIS panel must include in conducting the EPHIS. Contrary to Plaintiffs' assertions, the Ordinance does not give the EPHIS panel the ability to determine exemptions from the Ordinance. [Id. at 61.] When the EPHIS is complete, "[t]he EPHIS **may make recommendations** that include, but are not limited to, possible actions the County may take . . . ." Ordinance § 7.4 (emphasis added). Further, Section 8 of the Ordinance provides: "If necessary the

Department of Environmental Management or other appropriate County Department may enact and enforce regulations to implement this chapter . . . ." Thus, the Ordinance is not an improper delegation of the City Council's legislative authority.

5. Penalties Are Not Inconsistent

Plaintiffs argue that the penalties set forth in Section 9.2 of the Ordinance exceed the amounts purportedly allowed under the Maui County Charter which limits penalties to $1,000.00 per violation, or one year imprisonment. Maui County Charter, Section 13-10. The Ordinance does not violate this provision. Instead, the Ordinance delegates to the Department of Environmental Management the duty to determine the maximum civil monetary penalty for a violation, or to the prosecutor's office to pursue misdemeanor charges. The Council is not setting the maximum penalty in violation of the Maui County Charter. Further, administrative rules have not yet been implemented. These rules can address the maximum penalty allowed by law. This issue is also not ripe, as no person has been assessed any penalties.

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

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

Maui County Charter, Section 11-1.1, 1.3. Based on this language, Section 11-1 does not restrict initiative power from adopting ordinances that provide penalties for violations of the Maui County Code.

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

In support of their argument that HRS § 46-1.5(24)(A) applies when a county seeks to impose civil fines, Plaintiffs cite State v. Bereday, 120 Hawai‘i 486, 210 P.3d 9 (Ct. App. 2009). [Mem. in Supp. of Motion at 54]. In Bereday, the defendant was convicted of two violations of Section 7-7.2 of the Revised Ordinances of Honolulu ("ROH"), which made "it a crime for a dog owner to negligently fail to control a dangerous dog." Id. at 489-90, 492, 210 P.3d at 12-13, 15. The penalty provision set forth in ROH § 7-7.2(c) did not expressly state the right to notice and the right to cure. Id. at 489 n.3, 210 P.3d at 13 n.3 (alterations in Bereday) (citing ROH§ 7-7.2).

Bereday argued that, pursuant to HRS § 46-1.5(24)(A), the City and County of Honolulu was required to first provide her with "reasonable notice and the opportunity to correct or cease the alleged violation before charging her with violating ROH § 7-7.2." Id. at 495, 210 P.3d at 18. The Hawaii Intermediate Court of Appeals ("ICA") rejected Bereday's argument, stating that "the plaint language of HRS § 46-1.5(24)(A) establishes that its notice requirements apply under circumstances in which a county seeks to impose civil fines." Id. The ICA did not take issue with the fact that ROH § 7-7.2, like Section 9 of the Ordinance, does not expressly state that notice and an opportunity to cure the alleged violation must be provided as a condition precedent to imposing a civil fine. Rather, the issue before the ICA was whether the City and County of Honolulu was first

required to provide Bereday with notice and an opportunity to cure her violation before imposing civil penalties. Thus, in this case, HRS § 46-1.5(24)(A) only requires the Maui County to provide parties with notice and an opportunity to cure the alleged violation of the Ordinance before imposing the civil penalties set forth in Section 9.

The purpose of the Ordinance is to protect and preserve Maui County lands and its residents. See Ordinance § 4. The penalties listed in Section 9.2 are intended to be deterrence factors in furtherance of such purpose, not punitive. Thus, even assuming that Section 9.2 of the Ordinance is invalid, it can be severed without affecting the remainder of the Ordinance.

VIII. CONCLUSION

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

DATED: Honolulu, Hawaii, _____, 2015.

_____
KARIN L. HOLMA
MICHAEL C. CARROLL

SHARON A. LIM

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF COMMERCE; MONSANTO COMPANY; AGRIGENETICS, INC.; CONCERNED CITIZENS OF MOLOKAI AND MAUI; FRIENDLY ISLE AUTO PARTS & SUPPLIES, INC.; NEW HORIZON ENTERPRISES, INC. DBA MAKOA TRUCKING AND SERVICES; and HIKIOLA COOPERATIVE, Plaintiffs, vs. COUNTY OF MAUI; ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT, Defendants.	CIVIL NO. 14-00511 SOM-BMK DECLARATION OF MICHAEL C. CARROLL

DECLARATION OF MICHAEL C. CARROLL

I, MICHAEL C. CARROLL, state that:

1. I am a partner with the law firm of Bays Lung Rose & Holma, attorneys for Intervenor-Defendants Alika Atay, Lorrin Pang, Mark Sheehan,

Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement (collectively, "Intervenor-Defendants").

2. I am competent to testify as to the matters set forth herein, and I make this declaration based upon personal knowledge and information, and submit the same in support of Intervenor-Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment on Claims 1, 2, and 4 [DKT #70].

I, MICHAEL C. CARROLL, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawaii, January ___, 2015.

_____

MICHAEL C. CARROLL

Of Counsel:

BAYS LUNG ROSE & HOLMA

KARIN L. HOLMA 5207-0
kholma@legalhawaii.com
Attorney at Law
A Law Corporation
MICHAEL C. CARROLL 7583-0
mcarroll@legalhawaii.com
Attorney at Law
A Law Corporation
SHARON A. LIM 10142-0
slim@legalhawaii.com
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813
Telephone: (808) 523-9000
Facsimile: (808) 533-4184

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF COMMERCE; MONSANTO COMPANY; AGRIGENETICS, INC.; CONCERNED CITIZENS OF MOLOKAI AND MAUI; FRIENDLY ISLE AUTO PARTS & SUPPLIES, INC.; NEW HORIZON ENTERPRISES, INC. DBA MAKOA	) CIVIL NO. 14-00511 SOM-BMK)) DECLARATION OF MICHAEL C.) CARROLL PURSUANT TO FRCP) RULE 56(d)))))) [*caption continued on next page*])

TRUCKING AND SERVICES; and HIKIOLA COOPERATIVE,	)
Plaintiffs,	)
vs.	)
COUNTY OF MAUI; ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT,	)
Defendants.	)

DECLARATION OF MICHAEL C. CARROLL
PURSUANT TO FRCP RULE 56(d)

I, MICHAEL C. CARROLL, declare as follows:

1. I am a partner with the law firm of Bays Lung Rose & Holma, attorneys for Defendants Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement (collectively, "Defendants").

2. I am competent to testify as to the matters set forth herein, and I make this declaration based upon personal knowledge and information, and submit the same in support of Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, and pursuant to Federal Rules of Civil Procedure Rule 56(d).

3. Plaintiffs have argued in their Memorandum in Support of Motion for Partial Summary Judgment [DKT No. 71-1] that the "Coordinated

Framework," preempts the Ordinance that is the subject matter of this lawsuit. Plaintiffs have asserted that the Federal Government has provided broad regulatory oversight with detailed "scientific safety standards", and the federal government conducts detailed "evaluations" and "federal scientific review." See Memorandum in Support [DKT No. 70-1] at p. 5. On state preemption, Plaintiffs likewise argue that there is a "statewide regulatory scheme" where the State of Hawaii provides broad oversight on the "danger to other plants and the environment ***and*** pesticides." Id. at p. 9. These are material facts that are disputed. Defendants should be allowed an opportunity to present evidence demonstrating that Plaintiffs' premise for preemption is false.

4. To rebut these factual arguments, discovery is needed on the following topics:

- The studies and approvals that Plaintiffs represent were performed and/or obtained in connection with Federal and State oversight of GMO operations and practices being conducted in Maui County;
- The details concerning Plaintiffs' GMO operations;
- The health and environmental impacts associated with these operations and practices; and
- The Federal and State oversight that is allegedly being carried out on Plaintiffs' GMO operations and practices.

5. To date, no discovery has been exchanged.

6. The Court permitted Defendants to intervene in this action on December 15, 2014. See [DKT No. 63].

7. On January 9, 2015, Defendants served the following discovery requests on Plaintiffs: (1) First Request for Answers to Interrogatories to Agrigenetics, Inc.; (2) First Request for Answers to Interrogatories to Monsanto Company; (3) First Request for Production of Documents to Defendant County of Maui; (4) First Request for Production of Documents to Plaintiffs; and (5) Request for Inspection of Plaintiffs' Property. Attached hereto as Exhibits __ to ___ are true and correct copies of the above described discovery requests.

8. Once these discovery responses are provided, Defendants intend to conduct the following depositions under FRCP Rule 30(b)(6) of representatives of the following: (1) Monsanto Company; (2) Agrigenetics, Inc.; (3) the EPA; (4) the FDA; (5) the USDA/APHIS; (6) State of Hawaii, DOA; and (7) the County of Maui. Defendants should be allowed to conduct this discovery before the Court rules on this Motion. Accordingly, Defendants respectfully request that the Court defer considering this Motion until this discovery is completed.

9. While the topics for discovery present the key issues, given that discovery has not yet commenced, Defendants anticipate that further discovery may reveal additional issues of fact that could be relevant to the disposition of this

Motion. In that event, Defendants would expect to investigate those issues as well and may need to conduct discovery on those areas.

10. All of the discovery outlined above is anticipated to support and/or uncover disputed factual issues that are material to allow Defendants to present facts essential to justify their opposition.

I, MICHAEL C. CARROLL, do declare under penalty of perjury that the foregoing is true and correct.

DATED: _____, Hawai‘i, _____.

_____
MICHAEL C. CARROLL

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF COMMERCE; MONSANTO COMPANY; AGRIGENETICS, INC.; CONCERNED CITIZENS OF MOLOKAI AND MAUI; FRIENDLY ISLE AUTO PARTS & SUPPLES, INC.; NEW HORIZON ENTERPRISES, INC. DBA MAKOA TRUCKING AND SERVICES; and HIKIOLA COOPERATIVE,	)	CIVIL NO. 14-00511 SOM-BMK
	)	CERTIFICATE OF SERVICE
Plaintiffs,	)	
vs.	)	
COUNTY OF MAUI; ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served on the following parties by CM/ECF, on _____, 2015, addressed as follows:

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

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

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

and

PHILIP PERRY, ESQ. (*pro hac vice*)
ANDREW D. PRINS, ESQ. (*pro hac vice*)
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004

Attorneys for Plaintiffs
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

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

Attorneys for Defendant
COUNTY OF MAUI

DATED: Honolulu, Hawaii, _____, 2015.

_____
KARIN L. HOLMA
MICHAEL C. CARROLL
SHARON A. LIM

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