LAURA B. MURPHY (*Pro Hac Vice*)
Environmental & Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, Vermont 05068
T: (802) 831-1123/ F: (802) 831-1631
Email: Lmurphy@vermontlaw.edu

TERESA TICO (# 1952)
PO Box 220
Hanalei, Hawaii 96714
T: (808) 639-9080
Email: tico@aloha.net

Counsel for Proposed Amici:

Kaua‘i Kunana, Inc.,
Kawailoa Farm,
Mohala Farms,
Moloa‘a Organica‘a,
National Save the Family Farm Coalition (National Family Farm Coalition),
Northeast Organic Farming Association of Vermont,
Organic Seed Alliance,
Our Family Farms Coalition,
Charles Reppun,
Paul Rappun, and
Western Organization of Resource Councils

in Support of Defendant & Intervenor-Defendants

EXHIBIT “A”

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

SYNGENTA SEEDS *et al.*,
Plaintiffs,

v.

COUNTY OF KAUA‘I,
Defendant,

and

KA MAKANI HO OPON‘O, CENTER FOR FOOD SAFETY, PESTICIDE ACTION NETWORK NORTH AMERICA, and SURFRIDER FOUNDATION
Intervenor-Defendants

Case No. 1:14-cv-00014-BMK

Amended Proposed Brief *Amicus Curiae* in Support of Defendant and Intervenor-Defendants in Summary Judgment

Hearing

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Judge: Honorable Barry M. Kurren

Amici oral argument not requested.

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STATEMENT OF IDENTITY, INTEREST, & AUTHORITY

Proposed Amici are Kaua‘i Kunana, Inc., Kawailoa Farm, Mohala Farms, Moloa‘a Organica‘a, the National Family Farm Coalition, the Northeast Organic Farming Association of Vermont, Our Family Farms Coalition, Organic Seed Alliance, Charles Reppun, Paul Rappun, and the Western Organization of Resource Councils. As explained in the attached Motion and incorporated herein by reference, Proposed Amici have an interest in protecting agriculture and the environment from transgenic contamination and the harmful effects of pesticides.

The source of Proposed Amici's authority to file this proposed *amicus curiae* brief arises from the Court's discretion to grant Proposed Amici's Motion for Leave to File. Fed. R. Civ. P. 7(b)(1) (providing that requests for court orders shall be made by motion); *In re Roxford Foods Litigation*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) (noting court's discretion to admit *amicus curiae* brief) (citation omitted).

STATEMENT OF AUTHORSHIP & FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part and no person—other than Proposed Amici or their counsel—contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. Transgenic contamination is a threat to non-genetically engineered and organic agriculture and other jurisdictions have already taken action to prevent it.

Ordinance 960 was passed to address local concerns about transgenic contamination and the harmful effects of pesticides on human health and the environment. Ord. § 22-22.1. With regard to genetically engineered (GE) crops specifically, the Ordinance states:

> Genetically modified plants could potentially disperse into the environment of the County of Kaua'i through pollen drift, seed commingling, and inadvertent transfer of seeds by humans, animals, weather events, and other means. This could have environmental and economic impacts.

Id. § 22-22.1(f).

This concern is well-founded and the threat of transgenic contamination is real. In 2008, the Government Accountability Office warned that "[u]nauthorized releases of GE crops into food, animal feed, or the environment beyond farm fields have occurred, and it is likely that such incidents will occur again." GAO, *Genetically Engineered Crops: Agencies Are Proposing Changes to Improve Oversight, but Could Take Additional Steps to Enhance Coordination & Monitoring* 2 of PDF (2008), *available at* www.gao.gov/assets/290/283060.pdf. Contamination can occur through cross-pollination, commingling after harvest, misidentified seed, and uncontrolled volunteers. *Id.* at 15. Cross-pollination is

especially intractable because pollen can be carried "long distances by either wind or pollinators." Michelle Marvier & Rene C. Van Acker, *Can Crop Transgenes Be Kept on a Leash?,* 3(2) Frontiers Ecology & Env't 99, 100 (2005), *available at* www.oacc.info/DOCs/ResearchPapers/res_transgenes_leash.pdf.

A report on GE incidents in 2007 found that there had been at least 165 instances of transgenic contamination within the previous decade, and that "contamination incidents from field trials occur on a regular basis." *See* Greenpeace Int'l, *GM Contamination Register Report 2007* 5, 11 (2008), *available at* www.greenpeace.org/international/en/publications/reports/gm-contamination-register-2007/. An earlier report by the Union of Concerned Scientists found that "seeds of traditional varieties of corn, soybeans, and canola are pervasively contaminated with low levels of DNA sequences derived from transgenic varieties." Margaret Mellon & Jane Rissler, *Gone to Seed: Transgenic Contaminants in the Traditional Seed Supply* 1 (2004), *available at* www.ucsusa.org/assets/documents/food_and_agriculture/seedreport_fullreport.pdf.

This type of injury—transgenic contamination—"has an environmental as well as an economic component." *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010). GE contamination of organic or conventional crops puts those markets at risk. *See, e.g.,* Carey Gillam, *U.S. Organic Food Industry Fears GMO Contamination,* Reuters, Mar. 12, 2008, *available at* www.reuters.com/

article/idUSN12162508200803l2 (noting organic farmers' concerns regarding contamination); K.L. Hewett & G.S.E. Azeez, *The Economic Impacts of GM Contamination Incidents on the Organic Sector* 1 (2008) (reviewing fifteen GE-contamination incidents and finding that "financial losses incurred by organic farmers and food companies" were "considerable"), *available at* http://orgprints.org/12027/1/The_Economic_Impacts_of_GM_Contamination_Incidents_on_the_Organic_Sector.pdf; Stuart Smyth et al., *Liabilities & Economics of Transgenic Crops*, 20 Nature Biotechnology 537, 537 (2002) ("The liability cost of genes from GM crops 'escaping and going rogue,' or co-mingling and adversely affecting quality of other plant-based products, is significant"), *available at* www.dnai.org/media/bioinformatics/ccli/CD/readings/smythetal2002.pdf.

In a recent example, when GE wheat that had not been approved for human consumption was found in a farmer's field in Oregon, South Korea and Japan stopped accepting United States shipments of wheat for a time. Suzanne Goldenberg, *Washington State Alfalfa Crop May Be Contaminated with Genetic Modification,* The Guardian, Sept. 12, 2013, *available at* www.theguardian.com/environment/2013/sep/12/gm-crop-contamination-alfalfa-monsanto. In another example reported in 2013, a farmer's alfalfa shipments were rejected for export after they tested positive for genetic modification. *Id.* Other examples include the StarLink corn and Liberty Link rice episodes. In the

StarLink case, genetically engineered corn not approved for human consumption was found in food products which resulted in a class action lawsuit, a $110 million settlement, and a "worldwide drop in corn prices." Kevin O'Hanlon, U.S.A. Today, *StarLink Corn Settlement also to Include Interest,* Aug. 23, 2004, *available at* http://usatoday30.usatoday.com/tech/news/techpolicy/business/2004-08-23-starlink-snafu_x.htm. In the Liberty Link case, about 11,000 farmers brought suits after rice supplies were contaminated with experimental GE rice, which the farmers explained "tainted crops and ruined their export value." Andrew Harris & David Beasley, *Bayer Agrees to Pay $750 Million to End Lawsuits over Gene-Modified Rice*, Bloomberg News, July 1, 2011, www.bloomberg.com/news/2011-07-01/bayer-to-pay-750-million-to-end-lawsuits-over-genetically-modified-rice.html.

As courts have recognized, these types of contamination harms are irreparable and result in a critical loss of choice for farmers and, ultimately, consumers. *See, e.g.*, *Geertson Seed Farms v. Johanns,* 2007 WL 518624, at *9 (N.D. Cal. 2004) ("For those farmers who choose to grow non-genetically engineered alfalfa, the possibility that their crops will be infected with the engineered gene is tantamount to the elimination of all alfalfa; they cannot grow their chosen crop."); *see also Ctr. for Food Safety v. Vilsack,* 2009 WL 3047227, at *9 (N.D. Cal. 2009) (noting the "potential elimination of farmer's choice to grow

non-genetically engineered crops, or a consumer's choice to eat non-genetically engineered food"). Transgenic contamination has the potential to seriously reduce or even entirely eliminate "the availability of a particular plant." *Id.* Scientists agree:

> Ongoing contamination of the commercial seed supply could gradually undermine the quality of our communal genetic storehouse. Nothing is more fundamental to the future of our agriculture and food system than a continued supply of safe, high-quality seed.

Mellon & Rissler, *supra*, at 47-48.

Recognizing this threat of unwanted contamination, several localities across the United States have already placed actual bans on the planting of GE crops, including in Hawai'i.[1] *See, e.g.,* Mendocino County, Cal., Code tit. 10A, ch. 10A.15 (protecting agriculture from "genetic pollution"); Marin County, Cal., Code tit. 6, ch. 6.92 (finding an "irreversible danger of contaminating and thereby reducing the value of neighboring crops by genetically engineered crops"); Trinity County, Cal., Code tit. 8, ch. 8.25 (protecting "agricultural industry" from "contamination"); Santa Cruz County, Cal., Code ch. 7.31 (finding "lack of adequate safeguards" for preventing "genetically engineered contamination"); San Juan County, Wash., Code ch. 8.26 (protecting "agricultural industry"); Hawai'i County, Hi., Code §§ 14-90 – 95 (prohibiting transgenic taro and coffee to protect

[1] Municipal code provisions are available at www.municode.com and www.codepublishing.com. The code for Hawai'i County is available at www.hawaiicounty.gov/lb-countycode/.

those industries and "preserve agriculturally-based practices and cultural traditions"). Most recently, two counties in Oregon voted to ban GE crops in response to concerns about cross-contamination. *See* Shelby Sebens, *Rural Oregon Voters Back Ban on GMO Crops amid US Labeling Uproar,* Reuters, May 21, 2014, www.reuters.com/article/2014/05/21/us-usa-oregon-gmos-idUSBREA4K049 20140521.

Kaua'i County has also responded to this threat. Ordinance 960's requirement for companies to report where they are growing GE crops on Kaua'i can be extremely valuable to farmers, such as Proposed Amici, who need to protect their crops from unwanted contamination by GE seed. *See* Ord. § 22-22.4(b). Neither this information requirement nor the Ordinance's establishment of buffer zones where crops (other than cover crops) may not be grown is preempted by the Plant Protection Act's (PPA's) regulation of GE field trials. Instead, the Ordinance is a valid exercise of police power that falls outside the PPA's limited and very specifically defined preemption sphere.

II. The Plant Protection Act does not preempt Ordinance 960.

It is a long-held principle that any preemption analysis begins "'with the assumption that the historic police powers of the States [are] not to be superseded by ... [a] Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe*

Elevator Corp., 331 U.S. 218, 230 (1947)); *see also Bates v. Dow Agrosciences, LLC,* 544 U.S. 431, 449 (2005) ("in areas of traditional state regulation, [courts] assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest'") (citations omitted). The Ninth Circuit recently affirmed this concept when describing the Supreme Court's "special guidelines" for striking the correct balance between federal and state authority in areas traditionally occupied by the states: "[C]ourts applying the Supremacy Clause are to begin with a presumption against preemption." *Gonzalez v. Arizona,* 677 F.3d 383, 391-92 (9th Cir. 2012) (citations omitted). This same presumption applies to local ordinances—and thus to Ordinance 960—for purposes of federal preemption analysis. *See, e.g., Wis. Public Intervenor v. Mortier,* 501 U.S. 597, 604-05 (1991).

Applying the above guidelines, the Plant Protection Act (PPA) does not preempt Ordinance 960's provisions as they relate to GE field trials because Congress has not expressed a "clear and manifest purpose" to do so. In fact, Congress has expressed an intent to preempt only a narrow set of local action in a narrow set of circumstances—none of which are applicable here.

A. Overview of the Plant Protection Act Regulatory Scheme

The primary purpose of the Plant Protection Act is to protect agriculture in the United States from plant pests and noxious weeds. *See* 7 U.S.C. § 7701. To

that end, the PPA regulates the "movement" in "interstate commerce" of plants and other articles. *Id.* § 7712(a). A plant pest is any "living stage" of specified categories—such as non-human animals, bacteria, and parasitic plants—that can "directly or indirectly injure, cause damage to, or cause disease in any plant or plant product." *Id.* § 7702(14). Examples of plant pests include the Asian Longhorned Beetle, Emerald Ash Borer, and Golden Nematode. USDA APHIS, Plant Pests & Diseases Programs, www.aphis.usda.gov/ (click on Plant Health, then Pests and Diseases, then Pest and Disease Programs) (last modified Mar. 4, 2014). A "noxious weed" is any "plant or plant product" that can "directly or indirectly injure or cause damage to," among other things, crops, agriculture, and the environment; noxious weeds are specifically listed in the regulations. 7 U.S.C. § 7702(10); 7 C.F.R. § 360.200. Examples of noxious weeds include killer algae and lightning weed. 7 C.F.R. § 360.200.

Regulations developed by the Animal and Plant Health Inspection Service (APHIS) division of the United States Department of Agriculture (USDA) establish permitting requirements to implement the Act. 7 C.F.R. Parts 330, 340, 360. Under these requirements, a person must obtain authorization to introduce or move a plant pest, noxious weed, or regulated article. *Id.* §§ 330.200, 340.0, 360.300. A "regulated article" is basically an organism that has been genetically engineered, usually through the use of a plant pest, and is therefore subject to

regulation as a presumed plant pest. *See id.* § 340.1. A person must obtain an individual permit or comply with notification procedures in order to "introduce" a regulated article. *Id.* §§ 340.0(a). Typically, regulated articles are introduced through either "field tests" or "field trials" for experimental purposes. *See id.* §§ 340.3(c)(5)-(6), 340.4(f)(9), 340.6(c)(5).

B. The Plant Protection Act does not expressly preempt Ordinance 960 because none of the three statutorily mandated prerequisites to preemption have been met.

The PPA's express preemption provision provides that a political subdivision of a state may not "regulate the movement in interstate commerce" of any article, plant, etc., "in order to" control, eradicate, or prevent the introduction or dissemination of a plant pest or noxious weed if the USDA has issued a regulation or order to prevent the dissemination of the plant pest or noxious weed within the United States. 7 U.S.C. § 7756(b)(1). As explained below, this provision contains three requirements that must be met before a local law can be preempted. If any one is not met, preemption must fail. Here, none are satisfied and there is no preemption.

1. Ordinance 960 does not regulate in interstate commerce.

The first prerequisite to preemption is that the local law must regulate "in interstate commerce." *See id.* The PPA defines "interstate commerce" as "trade, traffic, or other commerce" between states, between two points within a state but

through a place outside the state, or within listed entities or other territories or possessions of the United States. *Id.* § 7702(7). Based on this language, a local law that affects planting or disclosure of GE crops does not fall under the rubric of "interstate commerce." First, though they may *affect* interstate commerce, the acts of cultivating and disclosing are not themselves *in* "trade, traffic, or other commerce" because they are not in an "interchange," "exchange," or "transportation" of goods. *See* Dictionary.com, http://dictionary.reference.com/ (last visited May 16, 2014) (defining commerce as an "interchange of goods or commodities;" trade as "the act or process of buying, selling, or exchanging commodities," and; "traffic" as "the transportation of goods for the purpose of trade"). The PPA recognizes this distinction in its Findings section, stating that all items regulated under the PPA "are in *or* affect interstate commerce," not necessarily both. *See* 7 U.S.C. § 7701(9) (emphasis added).

Second, though a local law may apply to activities that affect interstate commerce, the law does not actually regulate activities that *are* "interstate" as defined by the PPA. Rather, a law such as Ordinance 960 applies to the cultivation of GE crops *intrastate* and is bounded by the locality's borders. Thus, the law does not regulate activities that occur between "a place in a State and a point in another State" or through "any place outside the State."

Because the cultivation of GE crops is a local, intrastate activity that is not movement "in interstate commerce" as defined in the PPA, Ordinance 960 does not trigger this preemption provision.

2. Ordinance 960 was not passed in order to eradicate or control a plant pest or noxious weed.

The second prerequisite to preemption is that the local law must have been passed in order to eradicate or otherwise control a plant pest or noxious weed. *See id.* § 7756(b)(1). Therefore, if the local regulation is aimed at something other than an actual plant pest or noxious weed, this clause is not satisfied. In a 2011 negligence case involving genetically engineered rice, a federal district court ruled that: "The Plant Protection Act does not preempt plaintiffs' claims in this case because plaintiffs' claims do not attempt to regulate material 'in foreign commerce' *and because Bayer has not shown that its genetically modified rice constitutes a 'plant pest' under the statute*." *In re Genetically Modified Rice Litigation*, 2011 WL 339168, at *2 (E.D. Mo. 2011) (emphasis added). In other words, even though the experimental rice would have been a "regulated article" and a presumptive plant pest, the court found that preemption would not be possible unless the rice were an actual plant pest. Similarly, if a GE plant is not specifically listed as a "noxious weed," then regulation of that item will not be preempted pursuant to the noxious weed portion of this clause.

The regulations for the special needs exception to the preemption provision support this interpretation. *See* 7 C.F.R. §§ 301.1(a)(2), 301.1-2(a) (providing that state may seek exception to preemption provision based on "special need"). The regulations specifically refer to "plant pests," "noxious weeds," and "biological control organisms" as the subjects of any request, which implies that the preemption provision could only apply to actual "plant pests," "noxious weeds," and "biological control organisms" in the first instance. *See id.* § 301.1-2(a).

Thus, if a local law affecting field trials of GE crops does not apply to organisms that are actual plant pests or noxious weeds, it cannot be preempted. Because there is nothing to suggest that Ordinance 960 applies to recognized plant pests or noxious weeds, this preemption provision is not met.

3. The USDA has not issued a regulation or order to prevent the dissemination of a particular plant pest or noxious weed affected by Ordinance 960.

The third prerequisite to preemption is that the Secretary must have issued a regulation or order to "prevent the dissemination" of "the" plant pest or noxious weed. *See* 7 U.S.C. § 7756(b)(1). If the USDA has not issued a regulation or order regarding "the" plant pest or noxious weed in the first instance, or has not issued an order or regulation for the purpose of "preventing" the dissemination of the subject item, then this preemption clause is not met.

For the first requirement, Congress' use of the word "the" indicates that a federal regulation or order cannot have preemptive effect unless it applies to the *particular* plant pest or noxious weed at issue in a local law, and is not a general regulation or order that would apply to all plant pests or noxious weeds. Under this reading, it is only plant-specific orders or regulations such as quarantines that could satisfy this element of the preemption provision.

Additionally, in order to be preemptive, the Secretary's action would have to be for the purpose of "preventing the dissemination" of said plant pest or noxious weed. The preemption provision distinguishes between the types of federal action that can preempt—namely, USDA action to prevent dissemination—and the types of local actions over which the federal action could have preemptive effect—i.e., controlling, eradicating, or preventing the introduction of. In other words, any action by the federal government that was merely to control, eradicate, or prevent the introduction of a plant pest or noxious weed would not have preemptive effect. *See* Read D. Porter & Nina C. Robertson, *Tracking Implementation of the Special Need Request Process under the Plant Protection Act*, 41 Envtl. L. Rep. News & Analysis 11000, 11014 (2011); *see also* Update of Noxious Weed Regulations, 74 Fed. Reg. 27,456-01, 27,457 (June 10, 2009) (proposed rule) (noting that PPA grants agency authority to "take action to prevent the introduction of a noxious weed into the United States *as well as to* prevent the dissemination of a noxious

weed within the United States") (emphasis added). Finally, special need requests have only ever been sought where there was a federal quarantine in place. Porter & Robinson, 41 Envtl. L. Rep. News & Analysis at 11000. Therefore, a locality's potential need to obtain permission to regulate in excess of APHIS appears to arise only when APHIS has actually instituted a pest- or noxious weed-specific quarantine truly aimed at preventing the dissemination of the plant pest or noxious weed at issue.

Because there is nothing to indicate that Ordinance 960 regulates GE field trials for recognized plant pests or noxious weeds that are the subject of specific quarantines or similar orders to prevent—not merely control—dissemination, this final prong of the preemption provision is not satisfied and the Ordinance is not expressly preempted.

C. The Plant Protection Act does not impliedly preempt Ordinance 960 because the Act does not occupy the field of GE plant regulation, and Ordinance 960 does not conflict with the Act.

Ordinance 960 also survives under an implied preemption analysis. As an initial matter, the existence of an express preemption provision itself is evidence that Congress did not intend to otherwise preempt local law. The Supreme Court has held that when "Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue," and that provision provides a "reliable indicium of congressional intent with respect to

state authority," there is "no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." *Cipollone,* 505 U.S. at 517 (citations and internal quotation marks omitted); *cf. Freightliner Corp. v. Myrick,* 514 U.S. 280, 288 (1995) (explaining that, while express preemption clause does not entirely foreclose possibility of implied preemption, it "supports a reasonable inference that Congress did not intend to pre-empt other matters"). In this instance, even putting aside the strong Congressional indication in the PPA's express preemption clause that matters not listed are not otherwise preempted, further analysis shows that Ordinance 960 is not impliedly preempted.

1. The Plant Protection Act does not occupy the field of GE plant regulation.

There is no field preemption because "the scheme of federal regulation" is not "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *See Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (citation omitted). Numerous factors support this conclusion.

First, as explained above, there is a strong presumption in favor of regulations enacted pursuant to the police powers of the state. Second, the PPA itself has no language concerning GE crops and therefore can hardly be said to occupy the field of GE plant regulation. Third, as previously discussed, the language of the PPA's express preemption provision itself leaves room for

localities to pass laws under various circumstances: where the law is local or intrastate, where the law is not aimed at controlling recognized plant pests or noxious weeds, or where the law affects items that the Secretary has not addressed in a particular way. Fourth, the two exceptions to § 7756(b)(1) provide evidence that Congress intended states to retain authority even over items that would ordinarily fall under the preemption provision. *See* 7 U.S.C. § 7756(b)(2). Fifth, the statute calls for cooperation between federal and state governments. *Id.* § 7751. Where Congress recognizes and allows the operation of state law in a field, there should be no field preemption. *See Wyeth v. Levine*, 555 U.S. 555, 575 (2009) ("'The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'") (citation omitted).

Sixth, PPA regulations do not occupy the field of GE plant regulation. The factors described above evidence a Congressional intent to *not* occupy the field of plant pest and noxious weed regulation—much less that of GE crop regulation. As such, the regulations adopted pursuant to the PPA cannot occupy the field. *See Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1984) (preemption by regulations must be "reasonable" and in line with what Congress would have sanctioned) (citation omitted); *see also Hillsborough,* 471 U.S. at 717 (courts are

"even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes"). Further, like the PPA, the regulations are geared toward addressing plant pests and noxious weeds specifically, not the entire realm of genetically engineered crops. *See* 7 C.F.R. Parts 330, 340, 360. Even the sections that address GE provisions apply to products which "are plant pests" or which there is "reason to believe are plant pests. *Id.* Part 340.

Consistent with this, states and localities already have laws on the books that regulate GE crops more stringently than APHIS does. *See, e.g.,* Minn. Stat. Ann. § 18F.07(2)(b) (commissioner may deny GE permit if it "may cause unreasonable adverse effects on the environment"); Ariz. Admin. Code R3-4-901(B)(2) (requiring permit information "[i]n addition to USDA's requirements"); *see also supra* Part I. In fact, the USDA has expressly stated that cross-pollination risks from GE crops "can be addressed by state and local regulations on planting." *Ctr. for Food Safety v. Vilsack,* Brief of Federal Appellees, 2012 WL 2313232, at 29 (9th Cir. 2012). For these reasons, neither the PPA nor its regulations occupy the field of GE crop regulation.

2. Ordinance 960 does not conflict with the Plant Protection Act.

There is also no conflict preemption here. As in *Wyeth v. Levine*, it is not "impossible" for a person to comply with both state and federal law. *See Wyeth,*

555 U.S. at 568-73 (noting that "[i]mpossibility pre-emption is a demanding defense"). The *Wyeth* Court held that, because there was not "clear evidence" that a federal agency would have prohibited a drug label that state tort law required, it was not "impossible" for the drug company to "comply with both federal and state requirements." *Id.* at 571-72. Similarly, in this case, neither law prohibits something that the other law requires; a person may comply with both Ordinance 960 and the PPA's requirement that she obtain a permit if she wishes to cultivate GE crops.[2]

In addition, this local law does not stand as an obstacle to the achievement of the PPA's overriding objective to protect the "agriculture, environment, and economy of the United States" from the ill effects of plant pests and noxious weeds. *See* 7 U.S.C. § 7701(1); *see also, e.g., id.* §§ 7701(2), (3), (6), (7), (8) ("ridding crops and other plants of plant pests and noxious weeds;" "reduce . . . the risk of dissemination of plant pests or noxious weeds;" "export markets could be severely impacted;" "unacceptable risk of introducing or spreading plant pests or noxious weeds;" "threat to crops and other plants"). The PPA's call to "facilitate"

[2] *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54* does not support conflict preemption. In that case, the federal statute at issue granted a collective bargaining right to employees. 468 U.S. 491, 503 (1984); 29 U.S.C. § 157 ("[e]mployees shall have the right"). In this case, the federal law prohibits action unless certain requirements are met. 7 U.S.C. §§ 7711, 7712; 7 C.F.R. §§ 340.0, 360.300. In any case, the *Brown* Court held that the state statute in question did not conflict with federal law and was not preempted. 468 U.S. at 509.

the "smooth movement" of plants does not negate this objective; facilitation is only desired "to the extent possible" in light of the statute's primary goal. *See* 7 U.S.C. 7701(5). Instead, if and to the extent the Ordinance implicated plant pests or noxious weeds, it would promote the federal Act's objective of preventing their ill effects.

Because it is not impossible to comply with both the Ordinance and with the PPA, and because the Ordinance does not stand as an obstacle to the objectives of the PPA, conflict preemption does not apply here.

CONCLUSION

For the foregoing reasons, this Court should hold that Ordinance 960 is not preempted by the Plant Protection Act.

Respectfully submitted,

/s/ Laura B. Murphy
LAURA B. MURPHY (*Pro Hac Vice*)
Environmental & Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, Vermont 05068
T: (802) 831-1123/ F: (802) 831-1631
Email: Lmurphy@vermontlaw.edu

/s/ Teresa Tico
TERESA TICO (#1952)
PO Box 220
Hanalei, Hawaii 96714
T: (808) 639-9080
Email: tico@aloha.net

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.5(e)

This proposed *amicus curiae* brief is typed in 14-point Times New Roman font and contains 4488 words, excluding the parts of the brief exempted by Local Rule 7.5(e).[3]

/s/ Laura B. Murphy
LAURA B. MURPHY (*Pro Hac Vice*)
Environmental & Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, Vermont 05068
T: (802) 831-1123/ F: (802) 831-1631
Email: Lmurphy@vermontlaw.edu

/s/ Teresa Tico
TERESA TICO (#1952)
PO Box 220
Hanalei, Hawaii 96714
T: (808) 639-9080
Email: tico@aloha.net

[3] Local Rule 7.5(a)-(b) specifies that, unless the court orders otherwise, a memorandum of law in support of a motion may not exceed thirty pages or 9,000 words. Fed. R. App. P. 29(d) provides that an *amicus curiae* brief shall be one-half the length of the maximum length authorized for a party's principal brief, not including any extensions.

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

Served Electronically through CM/ECF:

PAUL ALSTON	palston@ahfi.com	June 23, 2014
CLAIRE WONG BLACK	cblack@ahfi.com	June 23, 2014

Attorneys for Plaintiffs
SYNGENTA SEEDS, INC. & SYNGENTA HAWAI'I, LLC

MARGERY S. BRONSTER	mbronster@bhhawaii.net	June 23, 2014
REX Y. FUJICHAKU	rfujichaku@bhhawaii.net	June 23, 2014
DONNA C. MARRON	dmarron@bhhawaii.net	June 23, 2014

Attorneys for Plaintiffs
PIONEER HI-BRED INTERNATIONAL, INC. & AGRIGENETICS, INC.

KENNETH S. ROBBINS	krobbins@ahfi.com	June 23, 2014
JOHN-ANDERSON L.MEYER	ameyer@ahfi.com	June 23, 2014

Attorneys for Plaintiff
BASF PLAN SCIENCE LP

DAVID J. MINKIN	minkin@m4law.com	June 23, 2014
JESSSE J.T. SMITH	smith@m4law.com	June 23, 2014
LAURA S. LUCAS	ucas@m4law.com	June 23, 2014
TROY J.H. ANDRADE	andrade@m4law.com	June 23, 2014

Attorneys for Defendant
COUNTY OF KAUA' I

PAUL H. ACHITOFF	achitoff@earthjustice.org	June 23, 2014
GEORGE A. KIMBRELL	gkimbrell@centerforfoodsafety.org	June 23, 2014
SYLVIA SHIH-WAU YU	swu@centerforfoodsafety.org	June 23, 2014

Attorneys for Defendant-Intervenors
KA MAKANI MO OPONO, CENTER FOR FOOD SAFETY, SURFRIDER FOUNDATION, & PESTICDE ACTION NETWORK NORTH AMERCA

DATED: South Royalton, VT, June 23, 2014.

/s/ Laura B. Murphy
LAURA B. MURPHY (*Pro Hac Vice*)
Environmental & Natural Resources Law Clinic
Vermont Law School
PO Box 96, 164 Chelsea Street
South Royalton, Vermont 05068
T: (802) 831-1123/ F: (802) 831-1631
Email: Lmurphy@vermontlaw.edu