Case: 14-17538, 11/18/2016, ID: 10202127, DktEntry: 73-1, Page 1 of 7

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAWAI'I PAPAYA INDUSTRY ASSOCIATION; BIG ISLAND BANANA GROWERS ASSOCIATION; HAWAI'I CATTLEMEN'S COUNCIL, INC.; PACIFIC FLORAL EXCHANGE, INC.; BIOTECHNOLOGY INNOVATION ORGANIZATION;[*] RICHARD HA; JASON MONIZ; GORDON INOUYE; ERIC TANOUYE; HAWAI'I FLORICULTURE AND NURSERY ASSOCIATION, Plaintiffs-Appellees, v. COUNTY OF HAWAII, Defendant-Appellant.	No. 14-17538 D.C. No. 1:14-cv-00267-BMK MEMORANDUM[**]

Appeal from the United States District Court
for the District of Hawaii
Barry M. Kurren, Magistrate Judge, Presiding

Argued and Submitted June 15, 2016
Honolulu, Hawaii

[*] Appellee's unopposed motion to amend the caption is granted.

[**] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: THOMAS, Chief Judge, and CALLAHAN and MURGUIA, Circuit Judges.

In this action, Plaintiffs-Appellees (collectively, the GE Parties) challenge Hawaii County Ordinance 13-121, which regulates genetically engineered (GE) plants. The district court granted summary judgment in Plaintiffs' favor, holding that Ordinance 13-121 is impliedly preempted under state law and expressly preempted, in part, by federal law. Defendant-Appellant County of Hawaii appealed. We affirm.[1]

I.

Our concurrently filed opinion in *Atay v. County of Maui*, Nos. 15-16466, 15-16552, sets forth in greater detail the legal basis that controls this decision. *Atay* involves substantially similar facts in relevant part.

The County of Hawaii's (County) Ordinance bans "open air testing of genetically engineered organisms of any kind" and "open air cultivation, propagation, development, or testing of genetically engineered crops or plants." Haw. Cty. Code (HCC) §§ 14-130, 14-131. The purposes of the Ordinance are to

[1] We also reject Appellant's argument that we should certify the state law issues presented to the Hawaii Supreme Court. As explained in our concurrently filed opinion in *Syngenta Seeds, Inc. v. County of Kauai*, Nos. 14-16833, 14-16848, certification is not merited because the implied state preemption analysis under Hawaii law is well-defined.

prevent cross-pollination from GE plants to non-GE plants and to preserve Hawaii Island's vulnerable ecosystem "while promoting the cultural heritage of indigenous agricultural practices." HCC § 14-128.

The GE Parties challenge the Ordinance on two grounds: (1) the Ordinance is expressly preempted by the Plant Protection Act (PPA), 7 U.S.C. § 7756(b), in its application to plants that the U.S. Animal and Plant Health Inspection Service (APHIS) regulates as plant pests[2]; and (2) the Ordinance is fully preempted under state law. For the reasons more fully set forth in *Atay*, we agree.

A. The Ordinance is expressly preempted by federal law.

Under the PPA, "no State or political subdivision of a State may regulate the movement in interstate commerce of any . . . plant, . . . plant pest, noxious weed, or plant product in order to control . . . , eradicate . . ., or prevent the introduction or dissemination of a . . . plant pest, or noxious weed, if the Secretary has issued a regulation or order to prevent the dissemination of the . . . plant pest, or noxious

[2] The district court rejected Appellees' argument that the Ordinance is preempted on federal implied preemption grounds. Appellees have waived that argument by not raising it as an alternative ground for affirmance in their answering brief on appeal. We therefore decline to reach the issue. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc).

weed within the United States." 7 U.S.C. § 7756(b)(1). The Ordinance is therefore expressly preempted if three conditions are met: (1) the local law must regulate "movement in interstate commerce," (2) it must be intended to "control . . . , eradicate . . . , or prevent the introduction or dissemination of a . . . plant pest, or noxious weed," and (3) APHIS must regulate the plant at issue as a plant pest or noxious weed. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (Congress' intent to preempt state and local law may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose") (internal quotation marks omitted). Each condition is met here.

For the same reasons set forth in *Atay*, the County of Hawaii's Ordinance satisfies all three conditions for express preemption. First, the Ordinance regulates "movement in interstate commerce" because it regulates the dissemination of plants and seeds from fields, which implicates interstate commerce. *See* 7 U.S.C. § 7711(a). Second, the Ordinance was passed in order to "control . . . , eradicate . . . , or prevent the introduction or dissemination of a . . . plant pest, or noxious weed." *Id*. § 7756(b)(1). An express purpose of the Ordinance is to prevent the spread of GE plants, and it implements this charge by banning most planting and testing of GE plants. HCC §§ 14-128, 14-130, 14-131. Third, APHIS has issued regulations

in order to prevent the dissemination of the class of plant pests at issue, GE crops. *See* 7 C.F.R. Part 340.

We conclude that the Ordinance is expressly preempted by the PPA to the extent that it seeks to ban GE plants that APHIS regulates as plant pests.

B. The Ordinance is impliedly preempted by state law.

We have held that federal law preempts the Ordinance in its application to GE plants that APHIS regulates as plant pests, but not in its application to federally deregulated, commercialized GE plants. However, we find that Hawaii state law impliedly preempts the Ordinance in its remaining application to commercialized GE plants.[3]

As explained in *Atay* and *Syngenta Seeds, Inc. v. County of Kauai*, Nos. 14-16833, 14-16848, Hawaii courts apply a "'comprehensive statutory scheme' test" to decide field-preemption claims under HRS § 46-1.5(13), such as that made by the GE Parties here. Under this test, a local law is preempted if "it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the

[3] We agree with the district court in *Syngenta Seeds, Inc. v. County of Kauai*, that the scope of federal preemption delineates the breadth of state field preemption in this case. No. Civ. 14-00014 BMK, 2014 WL 4216022, at *9 n.11 (D. Haw. Aug. 25, 2014).

state." *Richardson v. City & Cty. of Honolulu*, 868 P.2d 1193, 1209 (Haw. 1994). Courts frequently treat this test as involving several overlapping elements, including showings that (1) the state and local laws address the same subject matter; (2) the state law comprehensively regulates that subject matter; and (3) the legislature intended the state law to be uniform and exclusive. However, as is true of our federal preemption analysis, the "critical determination to be made" is "whether the statutory scheme at issue indicate[s] a legislative intention to be the exclusive legislation applicable to the relevant subject matter." *Pac. Int'l Servs. Corp. v. Hurip*, 873 P.2d 88, 94 (Haw. 1994) (internal quotation marks omitted).

As explained in *Atay*, Hawaii has established a comprehensive, uniform, and exclusive statutory scheme to address the threat posed by introduced, potentially harmful plants, and has delegated authority to the Hawaii Department of Agriculture (DOA) to enact rules to that end. By banning commercialized GE plants, the Ordinance impermissibly intrudes into this area of exclusive State

regulation and thus is beyond the County's authority under HRS § 46-1.5(13) and preempted.[4] *See Atay*, Nos. 15-16466, 15-16552.

II.

We hold that the County's Ordinance banning the cultivation and testing of GE plants is preempted by the Plant Protection Act's express preemption clause in its application to GE plants regulated by APHIS as plant pests. We further hold that the Ordinance is impliedly preempted by Hawaii law in its application to federally deregulated, commercialized GE plants.

The district court's summary judgment in favor of the GE Parties is **AFFIRMED**.

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[4] For the reasons set forth in our concurrently filed opinion in *Syngenta*, we also reject Appellant's argument that the Hawaii Constitution's conservation clause, Article XI, § 1, alters the preemption analysis where local laws aimed at conserving and protecting the environment are at issue. Counties lack inherent authority under the Hawaii Constitution. *Haw. Gov't Employees' Ass'n v. Maui*, 576 P.2d 1029, 1038 (Haw. 1978); *In re Application of Anamizu*, 481 P.2d 116, 118 (Haw. 1971). Accordingly, counties have no power to conserve the public trust unless the State has delegated to them the authority to do so. Because Hawaii law under HRS § 46-1.5(13) does not permit counties to enact ordinances that conflict with state law or intrude upon areas expressly or impliedly reserved for state regulation, the determinative question is whether the Ordinance is impliedly preempted by state law.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
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Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

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I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk