



## CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW

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August 11, 2013

Jay Furfaro  
Chair of the Kaua'i County Council  
[counciltestimony@kauai.gov](mailto:counciltestimony@kauai.gov)

Re: Bill 2491 Relating to Pesticides and Genetically Modified Organisms

Dear Chairman Furfaro and Members of the Council,

I am writing to share with you the willingness of the Center for Human Rights and Constitutional Law ("Center"), without charge to any party, to defend the legality of Bill 2491 in the event it is enacted in substantially its present form and was later subject to judicial review as a result of statutory or constitutional claims presented by opponents of the measure.

If enacted and subsequently challenged in an administrative or court proceeding, the Center is prepared on a *pro bono* basis to vigorously defend each part of the Ordinance as it amends Chapter 22 of the Kaua'i County Code 1987, by adding a new Article 22. Such defense may be undertaken in conjunction with the County's Office of the Prosecuting Attorney or other counsel representing the County, or on behalf of intervening organizations or individuals.

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of vulnerable low-income communities.

Since its incorporation in 1980, the Center has provided a wide range of legal services to vulnerable low-income victims of human and civil rights violations, local, state and federal elected officials, and community-based organizations. The Center has also provided technical support and training to hundreds of legal aid and private attorneys engaged in pro bono work in the areas of constitutional law, international human rights law, and litigation of complex class action cases. The Center has achieved significant victories in class action cases in the courts of the United States and before international bodies that have benefited hundreds of thousands of indigent men, women and children.

We have reviewed and studied the proposed Kauai County Ordinance to Protect Public Safety by Monitoring the Location and Composition of Genetically Engineered Organisms and Assigning Proper Liability for Injury from Genetically Engineered Organisms ("Bill 2491").

We are aware of the opposition to Bill 2491 by many stakeholders including The Hawaii

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Crop Improvement Association, an organization that supports the development of the seed industry, agriculture and agricultural sciences in Hawaii. We are also aware of the positions of the proponents of Bill 2491. Our focus has been on the legal rather than the policy issues raised by the proposed Ordinance.

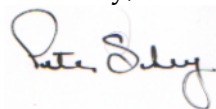
We have successfully litigated several class action cases involving preemption issues. Counties clearly may not legislate in areas that are preempted by State or Federal law. While several Federal and State agencies play a role in regulating pesticide issues under a range of national and state laws intended to improve the safety of citizens in the areas of pesticide and genetically modified organisms, neither the U.S. nor the Hawaii constitution, nor the various pesticide laws in place, preempt enactment and implementation of Bill 2491. The proposed Ordinance would only be preempted if the subjects covered in the Ordinance are already addressed in a comprehensive State statutory scheme, the statutory scheme disclosed an intent to be exclusive and uniform throughout the State without further County involvement, and the terms of the ordinance are inconsistent with or would frustrate the purpose of the State law. These circumstances are not present in Bill 2491 in its present form. The County clearly has the authority to protect the public health, safety, and welfare of its residents.

With regards U.S. law, the Supreme Court has made clear, for example, that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which grants federal oversight over the registration and use of pesticides, "leaves ample room for States and localities to supplement federal efforts ..." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607, 613 (1991). Section 24 of FIFRA authorizes states and political subdivisions to regulate pesticides with regard to local use. Nor does Bill 2491 appear in any way to violate the commerce clause of the U.S. Constitution or involve a taking in violation of the due process guarantee of the 14<sup>th</sup> Amendment.

In addition to being prepared to defend Bill 2491, we are also prepared to recruit additional *pro bono* counsel to work in conjunction with the County, the Center, and/or intervening organizations defending the legality and constitutionality of Bill 2491 in the event it is enacted in substantially its present form and then subject to legal challenge. A legal challenge will have little chance of success and, as stated above, would largely be initiated in an effort to win preliminary relief delaying implementation of one or more parts of the law and to pressure the Council to repeal the Ordinance to avoid legal fees.

I would be happy to answer any questions that you may have regarding this correspondence.

Sincerely,



Peter A. Schey  
President  
Center for Human Rights and  
Constitutional Law