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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

HAWAI‘I FLORICULTURE AND NURSERY ASSOCIATION, *et al.*, *Plaintiffs*, v. COUNTY OF HAWAI‘I, *Defendant*, and CENTER FOR FOOD SAFETY, NANCY REDFEATHER, MARILYN HOWE, and RACHEL LADERMAN, *Proposed Intervenor-Defendants*.	Case No.: 1:14-cv-00267-BMK MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE BY CENTER FOR FOOD SAFETY, NANCY REDFEATHER, MARILYN HOWE, AND RACHEL LADERMAN

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I. INTRODUCTION

Ordinance 13-121 provides farmers and residents of Hawai‘i, their property, and the environment important protection from the impacts of genetically engineered crops, such as transgenic contamination and associated pesticide drift. It "preserves Hawai‘i Island's unique and vulnerable ecosystem while promoting the cultural heritage of indigenous agricultural practices." Ordinance 13-121, § 3.

Ordinance 13-121 is vital because Hawai‘i is the epicenter of genetically engineered (GE) organism experimentation, development, and production, and thus also the epicenter of their impacts. One major impact that Ordinance 13-121 addresses is GE, or transgenic, contamination: the unintended, undesired presence of transgenic material in organic or conventional (non-GE) crops, as well as wild plants. This happens through wind or insect pollen drift, seed mixing, faulty or negligent containment, weather events, and other means. *See, e.g.*, *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, 2007 WL 518624, at *4 (N.D. Cal. Feb. 13, 2007) ("Biological contamination can occur through pollination of non-genetically engineered plants by genetically engineered plants or by the mixing of genetically engineered seed with natural, or non-genetically engineered seed."). Harm from transgenic contamination manifests itself in several ways; the "injury has an environmental as well as an economic component." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010). The agronomic injury can

cause significant and widespread economic damage; past transgenic contamination episodes have cost U.S. farmers literally billions of dollars. In addition, the harm is irreparable, because once the contamination occurs, it becomes difficult, if not impossible, to contain it. Unlike standard chemical pollution, transgenic contamination is a living pollution that can propagate itself over space and time via gene flow. *Geertson Seed Farms*, 2007 WL 518624, at *5 ("Once the gene transmission occurs and a farmer's seed crop is contaminated with the Roundup Ready gene, there is no way for the farmer to remove the gene from the crop or control its further spread."). Just the risk of contamination itself creates costly burdens, such as the need for contamination testing or buffer zones, on organic and conventional farmers and businesses. *Monsanto*, 561 U.S. at 154-55.

In addition to economic harms, the escape of transgenes into wild or feral plant populations is in most cases irreparable.[1] The State of Oregon, for example, continues the Sisyphean task of trying to find and destroy feral populations of Monsanto's "Roundup Ready" genetically engineered bentgrass that escaped field trials in Oregon over a decade ago. *See Int'l Ctr. Tech. Assessment v. Johanns*, 473 F. Supp. 2d 9, 29-31 (D.D.C. 2007) (discussing contamination of a National

[1]*See, e.g.*, Doug Gurian-Sherman, Ph.D., Ctr. for Food Safety, *Contaminating the Wild* (2006), *available at* http://www.centerforfoodsafety.org/reports/1396/contaminating-the-wild.

Grassland, holding field trials' oversight violated the National Environmental Policy Act).[2]

Here in Hawai'i, the risks of contamination are perhaps even greater than elsewhere, for several reasons. In Hawai'i, different land uses often take place in close proximity, which means different forms of agricultural production and natural areas are found near one another. Thus, a larger GE producer may be located near small organic growers or natural areas, or both. As is well known, despite its relatively small area Hawai'i has more endangered species than any other state, with dozens of unique and rare plants and animals found throughout each island. *See, e.g.*, *Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1181 (D. Haw. 2006) (noting that Hawai'i has more protected species than any other state in the context of holding that GE organism field trials violated the Endangered Species Act). Transgenes that escape a field trial or commercial production site therefore can easily contaminate a nearby grower's fields or natural areas. Hawai'i's all-year growing season and lack of cold winter support the survival and dispersal of any GE plants that do escape. There has already been widespread contamination of feral papaya, along with non-GE cultivated papaya,

[2] Mitch Lies, *Feds Mum on GMO Spread*, Capital Press (Nov. 18, 2010), http://www.capitalpress.com/content/ml-bentgrass-111910#.U9lGp_ldVZo; Mitch Lies, *Bentgrass Eradication Plan Unveiled*, Capital Press (June 16, 2011) http://www.capitalpress.com/content/ml-scotts-061711#.U9lHsfldVZo.

so that any grower who wants to produce non-GE papaya must isolate himself from areas of GE production, test his crop regularly to ensure it has not been contaminated, and take measures to reduce the likelihood of contamination, such as bagging flowers to prevent cross-pollination, which increase his cost of production. GE growers face no such costs; purchasers of organic or conventional produce will reject GE produce, while a GE grower need have no similar concerns.

In addition to concerns of transgenic contamination, genetically engineered crops come with associated problems of pesticide drift. Chemical companies genetically engineer crops to withstand the direct application of their pesticide products, and the vast majority of all GE crops are engineered to be resistant to pesticides. The cultivation of these genetically engineered, pesticide-resistant crops marks a significant change from conventional or organic farming by massively increasing the amount, timing, and frequency of pesticide applications.[3]

The tremendous increase in pesticide use associated with the cultivation of genetically engineered crops in the past few decades has also altered agricultural production in Hawai‘i, where the year-round warm climate allows for continuous production of genetically engineered seeds, and experimental testing of new genetically engineered crops, both destined for commercial production on the

[3] Charles Benbrook, *Impacts of Genetically Engineered Crops on Pesticide Use in the U.S.–The First Sixteen Years*, 24:24 Envtl. Sci. Europe, 2012, *available at* http://www.enveurope.com/content/pdf/2190-4715-24-24.pdf.

mainland rather than local consumption.[4] The state has hosted more open-air, experimental field trials of genetically engineered crops than any other state in the nation.[5] The toxic pesticides routinely used on GE crops may drift easily on the wind, and the warm climate that makes the islands convenient for genetically engineered seed production and crop testing increases the chance of exposure to pesticides through vapor drift.

Proposed Intervenors possess significant interests in the implementation of Ordinance 13-121, the provisions of which ensuring the prevention of the transfer and uncontrolled spread of genetically engineered pollen and transgenic material to private property, public lands, and waterways are critical to protecting the health and property of Proposed Intervenors and their members, and go to the core of Proposed Intervenor Center for Food Safety's organizational interests.

Accordingly, the Court should grant Proposed Intervenors' timely Motion for Leave to Intervene under Rule 24 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 24.

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[4] Andrew Pollack, *Unease in Hawaii's Cornfields*, N.Y. Times (Oct. 7, 2013), http://www.nytimes.com/2013/10/08/business/fight-over-genetically-altered-crops-flares-in-hawaii.html?_r=0.

[5] Info. Sys. Biotechnology, http://www.isb.vt.edu/locations-by-years.aspx (last visited August 1, 2014) (select "1987" through "2014" and "Locations"; then follow "Retrieve Charts").

II. ARGUMENT

Proposed Intervenors are entitled to intervene in this case, since they meet the requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. They have significant protectable interests related to Ordinance 13-121 that may be impaired by the case's outcome, and their interests may not be adequately represented by the County. Alternatively, Proposed Intervenors also meet the requirements for permissive intervention under Rule 24(b). The Court should grant Proposed Intervenors' Motion for Leave to Intervene.

A. Proposed Intervenors Are Entitled to Intervene As of Right.

Rule 24(a) provides:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The Ninth Circuit "construe[s] the Rule broadly in favor of proposed intervenors" in an analysis that is guided by "practical and equitable considerations." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (*en banc*) (internal quotations omitted). According to the Ninth Circuit, its "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Id.; see also Syngenta Seeds, Inc. v. Cnty. of*

Kaua'i (*Syngenta*), Civ. No. 14-00014, 2014 WL 1631830, at *3 (D. Haw. Apr. 23, 2014).

The Ninth Circuit utilizes a four-part test to determine whether intervention as a matter of right is warranted:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y, 630 F.3d at 1177 (internal quotations omitted); *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (internal quotations omitted). "[T]he requirements are broadly interpreted in favor of intervention." *Prete*, 438 F.3d at 954. As the Ninth Circuit instructs, "allowing parties with a practical interest in the outcome of [the case] to intervene" reduces and eliminates "future litigation involving related issues," and enables "an additional interested party to express its views before the court." *United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002). Proposed Intervenors satisfy each of the four requirements for intervention as of right under Rule 24(a).

1. Proposed Intervenors' Motion Is Timely.

The Ninth Circuit evaluates the timeliness of a motion to intervene under three criteria: (1) the stage of the proceeding; (2) potential prejudice to other

parties; and (3) the reason for any delay in moving to intervene. *See, e.g., Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996). Proposed Intervenors' Motion satisfies all criteria for timely intervention. This case is still in its initial stage: Plaintiffs filed their Complaint less than two months ago, on June 9, 2014, *see* Compl., Dkt. No. 1; Defendant Hawai'i County answered on July 1, 2014. Dkt. No. 19. Plaintiffs then filed a motion for summary judgment, two weeks ago.[6] A Rule 16 scheduling conference is set for October 23, 2014.

Proposed Intervenors are submitting a Proposed Answer concurrently with their Motion, to further eliminate any potential delay or prejudice to existing parties. Proposed Intervenors also agree that, should the Court permit them to intervene, they will comply with the current summary judgment briefing schedule, if the Court concludes that the current schedule is appropriate. Thus, no prejudice, delay, or inefficiency will result from allowing Proposed Intervenors to intervene at this time. *See, e.g., Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (motion filed "less than three months after the complaint was filed and less than two weeks after the Forest Service filed its answer to the complaint" was timely); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (motion filed "four months after [plaintiff initiated] action" and "before any hearings or rulings on substantive matters" was

[6] Pls.' Mot. Summ. J., Dkt. No. 28 (filed July 16, 2014).

timely).

Finally, courts should consider the reason for any delay. *Nw. Forest Res. Council*, 82 F.3d at 836-37. Considering that Proposed Intervenors filed this Motion less than two months after this suit was commenced, there has been no meaningful delay. Moreover, as the Court is aware, up until a few days ago, the same nonprofit counsel for Proposed Intervenors (Center for Food Safety and Earthjustice) were preparing their summary judgment reply briefs, and then preparing for oral argument in *Syngenta*, and filed this Motion as quickly as possible.

2. Proposed Intervenors Have Significantly Protectable Interests.

According to the Ninth Circuit, the requirement that a party seeking intervention as of right have an "interest" in the subject of the lawsuit is "'primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process'" *Wilderness Soc'y,* 630 F.3d at 1179 (quoting *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)). A court's assessment of an applicant's interest in the case is a "'practical, threshold inquiry.'" *Nw. Forest Res. Council*, 82 F.3d at 837 (9th Cir. 1996) (quoting *Greene v. United States*, 996 F.2d 973, 976; *Citizens for Balanced Use*, 647 F.3d 897 (9th Cir. 2011) (same). A party has a sufficient interest for intervention as of right if "'it will suffer a practical impairment of its

interests as a result of the pending litigation.'" *Wilderness Soc'y*, 630 F.3d at 1180 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)). No specific legal or equitable interest is required; an interest is "significantly protectable" so long as it is "'protectable under some law'" and "'there is a relationship between the legally protected interest and the [plaintiffs'] claims.'" *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (quoting *Sierra Club v. U. S. Envtl. Prot. Agency*, 995 F.2d 1478, 1484 (9th Cir. 1993)).

Proposed Intervenors have significantly protectable interests in this matter. For nearly two decades, Proposed Intervenor Center for Food Safety (CFS), a sustainable agriculture nonprofit, has worked to improve the oversight of genetically engineered organisms at the federal, state, and local level. Kimbrell Decl. ¶¶ 3-9. CFS's fundamental mission is ameliorating the adverse impacts of industrial farming and food production systems—such as genetically engineered crop production and pesticide use—on health and the environment. CFS has a substantial program on genetically engineered organisms. *Id.* As part of this program, CFS has assisted numerous states and counties in drafting and passing legislation related to protecting the environment and farmers from the impacts of industrial agriculture, including assisting numerous counties in passing ordinances like Ordinance 13-121, which restrict the growing of genetically engineered crops

and create GE free-zones. *Id.* ¶¶ 9-12. Because none of these ordinances has ever been challenged by biotech and chemical interests, this case will be critical to CFS's ability to continue its programmatic mission.

CFS and its members were active supporters in Ordinance 13-121's passage, testifying in support and providing feedback and input to the County. Kimbrell Decl. ¶ 12; Sakala Decl. 10; Redfeather Decl. 14. *See Jackson v. Abercrombie*, 282 F.R.D. 507, 516-17 (D. Haw. 2012) (finding nonprofit organization that spent time and money providing information in a campaign to educate voters had a significantly protectable interest to meet that requirement for intervention as of right); *Tucson Women's Ctr. v. Ariz. Medical Bd.*, Civ. No. 09-1909, 2009 WL 4438933, at *4 (D. Ariz. Nov. 24, 2009) (holding public interest group that provided testimony in support of the challenged law had a demonstrated significant interest warranting intervention as of right); *Pickup v. Brown*, No. 2:12-CV-02497-KJM, 2012 WL 6024387, at *1 (E.D. Cal. Dec. 4, 2012) (finding public interest group that sponsored and lobbied for the challenged bill prior to its passage has a significantly protectable interest in the case).

The Ninth Circuit has held that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397-98 (upholding intervention as of right and finding that a conservation group that had participated

in the administrative process prior to the decision to list an endangered species had significant interest in suit seeking to remove the listing); *see also Nw. Forest Res. Council*, 82 F.3d at 837-38 (public interest groups permitted to intervene as of right when groups "were directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose"); *Sagebrush Rebellion v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (holding that national wildlife organization had a significant interest in suit challenging the Department of Interior's decision to develop a bird conservation area where the organization had participated in the administrative process prior to the development); *Jackson*, 282 F.R.D. at 514-15 (holding that nonprofit organization that actively supported the ratification of a constitutional amendment reserving the right of marriage to opposite-sex couples had demonstrated a significantly protectable interest warranting intervention as of right).

CFS also seeks to intervene on behalf of its many members that reside in Hawai‘i County who are personally and directly protected by the ordinance. Kimbrell Decl. ¶¶ 19-20; *see generally* Sakala Decl.; Redfeather Decl. They are farmers and businesspeople that practice organic agriculture and that care deeply about the purity of seed and protecting it from transgenic contamination and pesticide drift. They farm or otherwise work in the food industry, and their reputations with their customers and their economic well-being depends on their

ability to keep their products free of transgenic contamination. They also care about protecting the native ecosystems of Hawai‘i Island from transgenic contamination. *See* Sakala Decl.; Redfeather Decl.; *see also United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 552 (1996) (organization's interests in litigation shown by alleged harms to its members).

In *Syngenta*, this Court held that where "proposed intervenors assert an interest in environmental actions affecting their members, courts have generally found a significantly protectable interest to exist for purposes of intervention as of right." *Syngenta*, 2014 WL 1631830, at *4 (citing *Am. Farm Bureau Fed'n v. U.S. EPA*, 278 F.R.D. 98, 106 (M.D. Pa. 2011) (holding environmental group whose members used the Chesapeake Bay for aesthetic and recreational purposes had a significantly protectable interest in litigation challenging EPA Clean Water Act restrictions); *Cal. Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 306-07 (E.D. Ca. 2011) (holding that members of an environmental group who benefited from improved air quality under regulations restricting emissions had sufficient interest in litigation attacking those regulations for purposes of intervention). In *Syngenta*, this Court concluded that CFS—one of the Proposed Intervenors here—was entitled to intervene as of right. *Syngenta*, 2014 WL 1631830, at *1. Since intervenors' members in that case live and work in close proximity to the agricultural operations that grow genetically engineered crops and use associated

pesticides, this Court held that they had a "'significantly protectable interest' in limiting their exposure to allegedly toxic chemicals." *Id.* at *4. The facts in this case are essentially the same, and should result in the same conclusion that CFS is entitled to intervene to protect its interests and those of its members.

Proposed Intervenors also include farmers and farm businesspeople who grow organic or natural, non-genetically engineered crops in Hawai'i County. Howe Decl. ¶¶ 2-5; Redfeather Decl. ¶¶ 4-5; Laderman Decl. ¶¶ 2-5. For example, Proposed Intervenor Rachel Laderman grows nearly a dozen crops using organic methods and sells to several markets. Laderman Decl. ¶¶ 2-5. Proposed Intervenor Marilyn Howe similarly farms nearly a dozen crops using organic methods, has a local roadside stand, and sells her produce to a local store. Howe Decl. ¶¶ 2-5. Proposed Intervenors' farms and businesses are at risk from contamination. *See id*. ¶¶ 6-9, 12-16. Proposed Intervenors also have significant personal health and environmental interests in the enactment of Ordinance 13-121. Howe Decl.14; Redfeather Decl. ¶¶ 8, 13, 15, 19-23; Laderman Decl. ¶¶ 7, 11-12, 15.

3. The Outcome of this Case May Impair Proposed Intervenors' Interests.

Where the rights of an applicant for intervention may be substantially affected by the disposition of the matter, "he should, as a general rule, be entitled to intervene." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d at 822 (quoting

Fed. R. Civ. P. Rule 24 Advisory Committee Notes). Courts should focus on the "future effect pending litigation will have" on the intervenors' interests. *Syngenta*, 2014 WL 1631830, at *5 (quoting *Parker v. Nelson*, 160 F.R.D. 118, 122 (D. Neb. 1994)). The relevant question is whether the disposition of the matter "'may' impair rights 'as a practical matter' rather than whether the decree will 'necessarily' impair them." *City of L.A.*, 288 F.3d at 401.

The inquiry into whether an interest is impaired is necessarily tied to the existence of an interest. *See Syngenta*, 2014 WL 1631830, at *5. Indeed, "after determining that the applicant has a protectable interest, courts have 'little difficulty concluding' that the disposition of the case may affect such interest." *Jackson*, 282 F.R.D. at 517 (quoting *Lockyer*, 450 F.3d at 442); *Syngenta*, 2014 WL 1631830 at *5 (because this Court found that the intervenors have a significantly protectable interest in the protections afforded by the ordinance relating to pesticides and genetically modified organisms, "it naturally follows that the invalidation of [the ordinance] would impair those interests").

Plaintiffs seek declaratory relief that Ordinance 13-121 is illegal and invalid, and an injunction enjoining the County from enforcing it. The Court's resolution of this case will thus directly affect Proposed Intervenors' ability to protect themselves and their health and property, as well as their interests in protecting Hawai'i's public health and environment from the detrimental impacts of

genetically engineered crop cultivation. *See generally* Howe Decl., Laderman Decl., Redfeather Decl. As a precedent, the decision could impair Proposed Intervenor CFS's mission elsewhere to enact similar laws, on behalf of its members in those places, or for the first time threaten the viability of similar county ordinances that have already been enacted. Kimbrell Decl. ¶ 22. Accordingly, the Court should grant intervention as of right. *See Jackson*, 282 F.R.D. at 517 (finding that an adverse decision in the case would impair public interest group's interest in preserving the challenged constitutional amendment).

4. The Defendant County May Not Adequately Represent Proposed Intervenors' Interests.

The burden of showing inadequate representation is minimal, and the applicant need only show that representation of its interests by existing parties "'may be' inadequate." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *Sagebrush Rebellion*, 713 F.2d at 528 ("[T]he burden of making this showing is minimal.").

Although a general presumption exists that "a state adequately represents its citizens" when the applicant for intervention shares the same interest, the presumption is rebuttable. In the Ninth Circuit, for example, the presumption can be overcome where the applicant for intervention demonstrates "more narrow, parochial interests" than existing parties. *Syngenta*, 2014 WL 1631830, at *6 (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499

(9th Cir. 1995), *abrogated on other grounds*, *Wilderness Soc'y*, 630 F.3d at 1178)*; Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Dist.*, No. 1:07-cv-0820 LJO DLB, 2007 WL 2757995, at *4 (E.D. Cal. Sept. 21, 2007) (quoting *Lockyer*, 450 F.3d at 444-45; *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) ("[B]ecause the employment interests of [intervenor]'s members were potentially more narrow and parochial than the interests of the public at large, [intervenor] demonstrated that the representation of its interests by the [defendant state agencies] may have been inadequate."). The Ninth Circuit has held that "[i]nadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public." *Forest Conservation Council*, 66 F.3d at 1499.

Proposed Intervenors have a narrower, more parochial interest than that of the County. The County must represent the entire county and all its varied interests, including business and economic interests of Plaintiffs and their employees. In contrast, Proposed Intervenors are farmers, businesspeople, and a public interest organization—all of whom have a specific and personal interest in Ordinance 13-121's protections, and in improving the oversight of genetically engineered organisms. This is very different from the County's general duty to defend its laws.

Proposed Intervenors and their members are residents of Hawai‘i County

who live and farm on the island, and are personally subject to the risk of transgenic contamination; they have their own narrower personal property interests in ensuring that Ordinance 13-121 is upheld. Proposed Intervenors Laderman, Howe, and Redfeather are farmers who would lose their reputation and markets if their food were contaminated by genetically engineered crops. Laderman Decl. ¶¶ 5-7; Howe Decl. ¶¶ 5, 11-13, 16; Redfeather Decl. ¶¶ 15-18. They are uniquely injured even by the risk of contamination without Ordinance 13-121, because it forces them to take onerous and costly measures to try to avoid contamination, such as DNA testing or avoiding growing certain crops. *Id.* As local growers, the Ordinance offers them a protected, GE-free market and the economic opportunity to foster sustainable agricultural practices, local food security, and seed diversity, without transgenic contamination. *See* Ordinance 13-121, § 1(3). These personal interests of Proposed Intervenors are sufficiently distinct from the County's general interests. *Syngenta*, 2014 WL 1631830, at *6-7 (holding that "proposed Intervenors are, or represent, individuals directly affected by the activities of Plaintiffs and by the restrictions on those activities encompassed by [the ordinance]" and are the direct recipients of the benefits of the ordinance, and, as a result, "[t]heir interests in upholding the law are decidedly more palpable than the County's generalized interest").

In *National Association of Home Builders*, the court allowed national public

interest environmental groups to intervene on behalf of the defendant district agency in a suit challenging the district agency's promulgation of a regulation requiring construction companies to mitigate emissions of air pollution from residential construction projects. 2007 WL 2757995, at *4. In seeking intervention, the applicant public interest groups emphasized their individual members' health interests. *Id.* at *5. The court agreed, holding that "[w]hile [p]roposed [i]nterveners and the [d]istrict share a general interest in public health, the [d]istrict has a much broader interest in balancing the need for regulations with economic considerations . . . ." *Id.* The court found that the defendant district's interest in defending the rule was motivated by other factors such as "cost and political pressures." *Id.*

Other courts similarly have found the presumption of adequate representation rebutted where the proposed intervenors had narrower interests than those of the defendant government agency's general duty to uphold challenged laws. *See, e.g., Golden Gate Restaurant Ass'n v. City & Cnty. of S.F.*, No. C 06-06997 JSW, 2007 WL 1052820, at *4 (N.D. Cal. Apr. 5, 2007) (in suit challenging validity of city ordinance requiring businesses to contribute to employees' health care expenses, finding that "the [u]nions' members here have a personal interest in the enforcement of the [o]rdinance that is more narrow than the [c]ity's general interest because they would be among the employees directly affected by the

injunction of the [o]rdinance."); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that because the government must represent the broader public interest, the interest of the defendant agency and the proposed intervenor industry group "will not necessarily coincide" even if they may share some "common ground").

Not only are Proposed Intervenors and their members' interests narrower than that of the County Defendant, but in other ways they are also broader than the County's interests. Proposed Intervenor CFS has over half-million members across the country who are closely watching this case and have a significant stake in its outcome. For those CFS members, an adverse decision by this Court could affect their own ability to in the future enact ordinances creating GE-free zones like Ordinance 13-121. Kimbrell Decl. ¶¶ 10, 22. Other CFS members live in counties that have already passed ordinances that go further than Ordinance 13-121 and prohibit all GE crops, such as some counties in California, Oregon, and Washington. *Id*. Those members also have distinct interests, as an adverse decision in this case could erode their own hard-won protections. Defendant County does not represent these broader interests.

Finally, Proposed Intervenors will offer unique elements to the present litigation not shared with—and in fact neglected by—the existing parties. Defending Ordinance 13-121 as a valid exercise of the County's authority to

protect the health of its citizens and its natural resources requires knowledge of the public health and environmental harms associated with genetically engineered crop cultivation. Proposed Intervenors and their members have singular legal, scientific, and policy expertise regarding such genetically engineered crops, their impacts, and their oversight. Kimbrell Decl. ¶¶ 4-15. They can and will use this expertise to provide the Court with the most well-versed and complete briefing possible in defense of the Ordinance.

In sum, Proposed Intervenors have made a compelling showing that their interests at least "may" not be adequately represented. Accordingly, they meet all of the requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure.

B. At a Minimum, the Court Should Grant Permissive Intervention.

Proposed Intervenors also satisfy the requirements for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure. As with intervention of right, under Rule 24(b), "the Ninth Circuit upholds a liberal policy in favor of intervention." *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, No. 3:12-cv-01751-AC, 2014 WL 1094981, at *2 (D. Or. Mar. 19, 2014); *see, e.g.*, *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) ("In determining whether intervention is appropriate, courts are guided primarily by practical and equitable considerations, and the requirements for intervention are

broadly interpreted in favor of intervention."); *accord Wilderness Soc'y*, 630 F.3d at 1179; *City of L.A.*, 288 F.3d at 397. This liberal policy favoring intervention allows for "both efficient resolution of issues and broadened access to the courts." *Id.* at 397-98.

Permissive intervention is appropriate where there is "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013). Courts also consider whether intervention would cause undue delay or prejudice. *See* Fed. R. Civ. P. 24(b)(3). Importantly, under Rule 24(b), a proposed intervenor need not demonstrate inadequate representation, or a direct interest in the subject matter of the challenged action. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002), *abrogated on other grounds*, *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

Proposed Intervenors meet the criteria for permissive intervention. First, this Court has "an independent ground for jurisdiction" over Proposed Intervenors' arguments in defense of Ordinance 13-121. *See Blum*, 712 F.3d at 1353. In the Ninth Circuit, an independent jurisdictional ground for permissive intervention exists where an applicant "assert[s] an interest" in the challenged law by presenting defenses and arguments that "squarely respond to the challenges made by plaintiffs

in the main action." *Kootenai Tribe*, 313 F.3d at 1110-11.

As explained in detail, Proposed Intervenors have "asserted an interest in" the challenged legislation, *supra* pp. 9-16, interests that are sufficient to establish an independent basis for jurisdiction for the purpose of permissive intervention. Proposed Intervenors are local farmers, businesspeople, and citizens that will be individually harmed by transgenic contamination and other consequences of growing genetically engineered crops. They support the protections that Ordinance 13-121 provides in creating a GE-free environment and local farm economy. They were very active in the passage of Ordinance 13-121. Proposed Intervenor CFS has long been the national leader on the issue, working on it in many counties, including Hawai'i, and has an entire program dedicated to improving the oversight of GE crops and ameliorating their adverse impacts. Kimbrell Decl. ¶¶ 4-15. Proposed Intervenor CFS's programmatic mission and its members' personal economic, health, and environmental interests, and the interests of the other Proposed Intervenors, are at the heart of Ordinance 13-121 purpose. *See City of Los Angeles*, 288 F.3d at 404 ("[T]he idea of 'streamlining' the litigation . . . should not be accomplished at the risk of marginalizing those . . . who have some of the strongest interests in the outcome.").

Moreover, "[w]here the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away." *Freedom from*

Religion Found., Inc. v. Geithner, 644 F.3d 836, 844 (9th Cir. 2011); *accord* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1917 (3d ed. 2010) ("In federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant . . . ."). Here, Plaintiffs assert federal-question jurisdiction, Pls.' Compl. ¶ 16, Dkt. No. 1, and Proposed Intervenors do not seek to bring counterclaims or cross-claims. The first criterion for permissive intervention plainly is met.

Second, Proposed Intervenors' Motion for Leave to Intervene is "timely," *Blum*, 712 F.3d at 1353, because this case is still in its initial stage, given that Plaintiffs filed their complaint only last month, *see, e.g.*, *Ctr. for Biological Diversity v. Kelly*, No. 1:13-CV-00427-EJL-CWD, 2014 WL 3445733, at *7-8 (D. Idaho July 11, 2014) (intervention "timely" where applicants moved to intervene up to ninety days after commencement of action); *Schmidt v. Coldwell Banker Residential Brokerage*, No. 5:13-cv-00986 EJD, 2013 WL 2085161, at *2 (N.D. Cal. May 14, 2013) (intervention "timely" where applicants moved to intervene two months after commencement of action).

To further eliminate any possibility of delay, prejudice, or inefficiency, Proposed Intervenors have filed a Proposed Answer concurrently with this Motion. *See Utica Mutual Ins. Co. v. Hamilton Supply Co.*, No. C 06-07846 SI, 2007 WL 3256485, at *4 (N.D. Cal. Nov. 5, 2007) (finding "little to no prejudice" from

granting intervention "because plaintiff has done little up to this point other than file a motion for default judgment"). Proposed Intervenors further agree to abide by the current briefing schedule, if the Court concludes that this schedule is appropriate. Proposed Intervenors meet the second criterion for permissive intervention.

Finally, Proposed Intervenors undeniably share "a common question of law or fact [with] the main action," *Blum*, 712 F.3d at 1353, because they seek to address precisely the legal and factual issues raised in Plaintiffs' Complaint, and to assist the County in its defense of Ordinance 13-121 against Plaintiffs' attacks, *see* Fed. R. Civ. P. 24(b)(1)(B) (permissive intervention is appropriate where an applicant "has a claim or defense that shares with the main action a common question of law or fact").

In so doing, Proposed Intervenors will significantly contribute to the Court's ability to effectively and efficiently understand and resolve this case. As explained, Proposed Intervenor CFS is a recognized national expert on genetic engineering, transgenic contamination, pesticides, and other agricultural issues, and will thus provide this Court with a valuable and unique legal and practical perspective, as well as the expertise necessary for fully and correctly adjudicating sensitive and complex issues about local regulation of food production. Kimbrell Decl. ¶¶ 3-15; *see Ctr. for Biological Diversity v. Kelly*, 2014 WL 3445733, at *8

(finding permissive intervention "appropriate" where proposed intervenors "represent large and varied interests whose unique perspectives would aid the Court in reaching an equitable resolution in this proceeding") (internal quotations omitted); *accord Kootenai Tribe*, 313 F.3d at 1111. Similarly, Proposed Intervenors who are farmers and businesspeople have personal experience in the practical consequences of allowing cultivation of GE crops, and will be able to provide a perspective that otherwise is likely to be absent from the presentation of the issues to the Court. Laderman Decl. ¶¶ 5-10; Howe Decl. ¶¶ 5-9, 11-13; Redfeather Decl. ¶¶ 10-12, 15-18. Accordingly, Proposed Intervenors also meet the third criterion for permissive intervention.

In sum, Proposed Intervenors' substantial interests in Ordinance 13-121, and in genetically engineered organism regulation broadly, are directly threatened by an adverse ruling in this case. *See* Fed. R. Civ. P. 24, Advisory Committee Notes ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."). Therefore, if this Court denies Proposed Intervenors intervention as of right under Rule 24(a), it should nonetheless grant them permissive intervention under Rule 24(b).

III. CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully request that the

Court grant leave to intervene as of right pursuant to Rule 24(a). In the alternative, Proposed Intervenors, and each of them, request that the Court grant permissive intervention pursuant to Rule 24(b).

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Respectfully submitted,

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