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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

SYNGENTA SEEDS, *et al.*,	)	Case No.: 14-cv-00014-BMK
	)	
Plaintiffs,	)	**MEMORANDUM OF FREE SPEECH FOR PEOPLE, EQUAL JUSTICE SOCIETY, NATIONAL CENTER FOR LESBIAN RIGHTS, AND EARTHRIGHTS INTERNATIONAL AS AMICI CURIAE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM FOUR [DKT #47]**
	)	
v.	)	
	)	
COUNTY OF KAUA'I,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
KA MAKANI HO'OPONO, CENTER FOR FOOD SAFETY, PESTICIDE ACTION NETWORK NORTH AMERICA, and SURFRIDER FOUNDATION,	)	
	)	
	)	
	)	
	)	
	)	
	)	HEARING:
	)	Date: July 23, 2014
	)	Time: 2:00 PM
	)	Judge: Hon. Barry M. Kurren
	)	
Intervenor-Defendants.	)	

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INTEREST OF AMICI CURIAE

Amici curiae have moved to file this brief in support of the defendant County of Kaua'i.[1]

Free Speech For People is a national non-partisan campaign committed to the propositions that the Constitution protects the rights of people rather than state-created corporate entities; that the people's oversight of corporations is an essential obligation of citizenship and self-government; and that the doctrine of "corporate constitutional rights" improperly moves legislative debates about economic policy from the democratic process to the judiciary, contrary to our Constitution. Free Speech For People monitors litigation around the country where corporations challenge local legislation or ballot initiatives under the federal Equal Protection Clause and misapply equal protection precedent designed to protect disfavored minorities.

[1] Amici have no parent corporations, and no publicly held corporation owns more than 10% of any of the amici organizations. No party's counsel authored this brief in whole or in part. No party or party's counsel, nor any person other than amici, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

The Equal Justice Society (EJS) is transforming the nation's consciousness on race through law, social science, and the arts. A national legal organization focused on restoring constitutional safeguards against discrimination, EJS's goal is to help achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, which guarantees all people receive equal treatment under the law. We use a three-pronged approach to accomplish these goals, combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies. As part of our mission of restoring the Equal Protection Clause, we are interested in safeguarding the clause and its jurisprudence from misuse and dilution in cases that do not involve equal protection.

Founded in 1977, the National Center for Lesbian Rights (NCLR) is one of the nation's leading legal advocacy groups for lesbian, gay, bisexual, and transgender people. NCLR has litigated many cases involving the federal constitutional rights of persons who are treated differently because of their sexual orientation or gender identity, including many cases involving the Fourteenth

Amendment's Equal Protection Clause. NCLR has a strong interest in ensuring that the heightened equal protection review applied in *Romer v. Evans*, 517 U.S. 620 (1996), and other similar cases is properly applied only to laws that target disfavored individuals and groups for discriminatory treatment, not to ordinary economic regulation.

EarthRights International (ERI) is a human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide, in particular, in which corporations are complicit. More generally, ERI works to ensure that courts do not create new, unwarranted constitutional rights for corporations.

SUMMARY OF ARGUMENT

Agricultural company plaintiffs claim that a law regarding use and disclosure of pesticides and genetically-modified crops violates their rights under the Equal Protection Clause of the Fourteenth Amendment.[2] But plaintiffs' argument relies on the wrong legal standard. There are two distinct lines of Equal Protection Clause

[2] "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

"rational basis review" cases: a standard of heightened rational basis review for regulations impacting disfavored minorities such as people with intellectual disabilities, gay and lesbian people, and undocumented immigrant children, and a much more deferential rational basis standard for regulations impacting businesses generally. This case falls squarely into the latter category.

Agribusinesses are not comparable for equal protection purposes to these politically vulnerable minorities, and should not be permitted to invoke the more exacting standard of rational basis review (sometimes referred to as "rational basis with bite") that was developed to protect such vulnerable groups. Plaintiffs' attempt to misdirect the Court to the wrong standard of scrutiny is part of a larger national trend that the Court should reject.

ARGUMENT

I. This equal protection challenge to business regulation is reviewed under the most deferential standard.

This is a challenge to mundane business regulation—a county ordinance regulating use and disclosure of certain agricultural products in a commercial setting—not a law burdening a disfavored group of individuals. "When economic legislation does not employ classifications subject to heightened scrutiny or impinge on

fundamental rights, courts generally view constitutional challenges with the skepticism due respect for legislative choices demands." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010) (rejecting natural gas marketing corporations' equal protection challenge to tax law). These business regulation cases are decided under the most deferential "rational basis review" standard. *See FCC v. Beach Comms., Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification*.") (emphasis added). Under this deferential standard, plaintiffs can prevail only by showing "that the legislative facts on which the classification is apparently based *could not reasonably be conceived to be true* by the governmental decision maker." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (emphasis added) (quotation marks and citation omitted). To succeed, plaintiffs must prove the legislation beyond reason.

The pre-New Deal era in which the Supreme Court regularly invoked the Equal Protection Clause to strike down state legislation

regulating business interests and activities has long since passed.[3] In *United States v. Carolene Products Co.*, 304 U.S. 144, 153 & n.4 (1938), the Court famously distinguished "regulatory legislation affecting ordinary commercial transactions," which enjoys a strong presumption of validity, from legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, . . . [is] directed at particular religious, or national, or racial minorities . . . [or results from] prejudice against discrete and insular minorities." And since the 1940s, the Supreme

[3] That era began in 1886, when the Supreme Court decreed, without argument, that corporations are "persons" under the Equal Protection Clause. *See Santa Clara County v. S. Pac. R. Co.*, 118 U.S. 394, 396 (1886). This *ipse dixit* contradicted the Court's earlier (contemporaneous) understanding of the Equal Protection Clause, *see Slaughter-House Cases*, 83 U.S. 36, 81 (1872) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."), and the historical evidence does not suggest that the Fourteenth Amendment's author intended the Equal Protection Clause to extend to corporations, *see* Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale L.J. 371 (1938). By 1938, Justice Black observed that the Fourteenth Amendment, which "sought to prevent discrimination by the states against classes or races," had become a tool for corporate challenges: "[O]f the cases in [the] Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent invoked it in protection of the negro race, and more than 50 per cent asked that its benefits be extended to corporations." *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

Court has retreated from *laissez faire*-inspired review of economic legislation under the Equal Protection Clause. *See, e.g., Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 365 (1973) (describing such an analysis as "only a relic of a bygone era"); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955) (rejecting equal protection challenge to state law limiting who was authorized to fit eyeglass lenses; noting that "[t]he problem of legislative classification is a perennial one," but that "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination").

In practice, the modern Court virtually never invalidates economic legislation on equal protection grounds. A review of every rational basis equal protection challenge decided by the Supreme Court from 1971 to 1996 found that only 10 out of 110 such challenges succeeded. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 Ind. L. Rev. 357, 358 (1999). Of those ten, only two were challenges by business interests to economic legislation, and both of those decisions have been eclipsed by more recent cases. *See id.* at 391-92, 402. Equal protection challenges to business legislation have fared no better in the Court in the years since then. *See, e.g., Levin*, 560

U.S. at 413; *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 106-08 (2003) (rejecting equal protection challenge to law favoring riverboat casinos over racetracks).

II. The Supreme Court's enhanced rational basis review applies to laws burdening unpopular minority groups, not business interests.

Plaintiffs do not cite this (to them unfavorable) precedent, but, instead, misdirect the court to other Supreme Court equal protection cases that seem to support their claim. *See* Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment of Claims One, Two, Three, Four, and Five, Dkt. #47.1, at 40.

But the cases cited by plaintiffs are not on point. All examined laws that burden vulnerable minority groups that do not fall in the traditional suspect classes. *See Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment prohibiting anti-discrimination measures for gay and lesbian people); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating zoning law excluding group homes for people with intellectual disabilities); *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating state law denying elementary public school education to undocumented immigrant children); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)

(invalidating provision denying welfare to households of unrelated individuals as based on malice toward hippie communes).

Although the Court has described its scrutiny in those cases as "rational-basis review," it in fact applied a more exacting standard. *See Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) ("[H]owever labeled, the rational basis test invoked today is most assuredly not the rational-basis test of *Williamson* . . . ."); Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 Wash. L. Rev. 281 (2011) ("Although it purports to be a single standard, equal protection's rational-basis review has two faces that use different methods and produce conflicting results. The United States Supreme Court employs both versions but does not acknowledge that a conflict exists between them.").[4] Such heightened review was appropriate because the laws at issue involved discrimination against disfavored minorities of natural persons, through laws described variously as "classification of persons undertaken for its own sake," *Romer*, 517

[4] In academic literature, the more exacting standard applied in *Romer*, *Cleburne*, *Plyler*, *Moreno*, and similar cases is often described as "rational basis with bite." *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 759 (2011).

U.S. at 635; "rest[ing] on an irrational prejudice," *Cleburne*, 473 U.S. at 450; and "creation and perpetuation of a subclass of illiterates within our boundaries," *Plyler*, 457 U.S. at 230.

The Supreme Court has not clarified just where this heightened review applies, and commentators have attempted to discern its precise bounds. *See, e.g*, Farrell, 32 Ind. L. Rev. at 411-15. But what is indisputably clear is that "the Court itself has never applied *Cleburne*-style rational-basis review to economic issues." *Powers v. Harris*, 379 F.3d 1208, 1224 (10th Cir. 2004). Neither the logic of cases such as *Romer*, *Cleburne*, and *Plyler*—a rejection of prejudice or animus against a politically unpopular group of natural persons—nor precedent suggest that their reach should be extended to ordinary business regulation.[5] For this reason, the Ninth Circuit has rejected the argument that courts should apply this heightened scrutiny to

[5] Nor is this a case where an administrative official has improperly adjudicated a plaintiff's request based on personal hostility or other capricious reasons. *See, e.g., Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 584 (9th Cir. 2008) (affirming denial of motion to dismiss where plaintiff alleged that state land manager rejected its winning bid because of discrimination based on perceived ties to conservationists and out-of-state headquarters*); Lockary v. Kayfetz*, 917 F.2d 1150, 1156 (9th Cir. 1990) (reversing grant of summary judgment, where plaintiffs' evidence suggested that water district's refusal to provide hookups to plaintiffs "may have been arbitrary or even malicious").

business regulation, and explained that "unlike the hippie communes in *Moreno*, privately-owned water utilities are neither members of a suspect class nor a politically unpopular group prompting 'heightened' scrutiny in equal protection analysis from this court." *Mountain Water Co. v. Mont. Dep't of Pub. Serv. Regulation*, 919 F.2d 593, 598-99 (9th Cir. 1990); *accord Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City*, 742 F.3d 807, 810 (8th Cir. 2013) (noting, in equal protection challenge to taxicab licensing scheme, that taxicab drivers' citation of *Romer* and *Cleburne* "is not persuasive" because those authorities "are non-economic in nature").

III. Other federal courts have rejected similar invitations to extend heightened review to ordinary business legislation.

In recent years, there has been an increasing trend of plaintiffs attempting to exploit the heightened "rational basis with bite" standard of *Romer*, *Plyler*, and *Cleburne* in business regulation cases. A few district courts have applied *Romer*, *Plyler*, and *Cleburne* to strike down laws in domains such as liquor licensing or nuclear power plant rate-setting—though the courts of appeals have typically reversed or otherwise distanced themselves from the analysis of such

cases.[6] And other courts have respected the Supreme Court's distinctions between mere business regulation and laws that affect disempowered groups of people, and rejected efforts to extend this heightened standard to laws on such topics as casket sales[7] or business tax rates.[8] But the fact that some trial courts have granted

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[6] *See Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 743-52 (W.D. Ky. 2012) (applying *Cleburne* and *Romer* to invalidate state law banning grocery and convenience stores from selling liquor and wine), *rev'd in relevant part, aff'd in part on other grounds*, 739 F.3d 936 (6th Cir. 2014); *Consol. Edison Co. of New York, Inc. v. Pataki*, 117 F. Supp. 2d 257, 264 (N.D.N.Y. 2000) (applying *Plyler*, *Cleburne*, *Moreno*, and *Romer* to invalidate state law limiting ratepayer recovery for costs from nuclear power plant's accidental radiation leak), *aff'd and remanded on other grounds*, 292 F.3d 338, 345 & n.2 (2d Cir. 2002) (noting that the court was "skeptical" that the law violated the Equal Protection Clause); *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 409-25 (N.D.N.Y. 1987) (applying *Plyler*, *Cleburne*, and *Moreno* to invalidate state law regarding calculation of nuclear power plant's rate base), *aff'd in part and vacated in part after settlement*, 888 F.2d 230 (2d Cir. 1989).

[7] *See Powers*, 379 F.3d at 1224 (rejecting equal protection challenge to state funeral practices law by casket sales corporation and its owners; noting that "the [Supreme] Court itself has never applied *Cleburne*-style rational-basis review to economic issues" and declining to do so itself).

[8] *See, e.g., Retail Indus. Leaders Ass'n v. Fielder*, 435 F. Supp. 2d 481, 501 (D. Md. 2006) (rejecting equal protection challenge to state law applying principally to Wal-Mart, and noting that enhanced standard only applies to "politically vulnerable groups" but "Wal-Mart does not contend that it is similarly situated to the plaintiffs in *Romer* and *Cleburne*"), *aff'd on other grounds*, 475 F.3d 180 (4th Cir. 2007).

business enterprises the same level of protection from economic regulation as the Supreme Court has provided to disfavored minorities does not control or advise this court, which must emphatically reject plaintiffs' attempt to blur the distinction. *See Mountain Water Co.*, 919 F.2d at 598-99 (rejecting argument that court should apply "heightened scrutiny" under *Moreno* to law distinguishing privately from publicly-owned water utilities).

This is a challenge to a run-of-the-mill agricultural regulation. Plaintiffs—multinational seed corporations, and subsidiaries and partnerships thereof—are not members of a disadvantaged minority that is unable to protect itself in the political process. As the Ninth Circuit has explained, "large businesses that occupy and profit from prime real estate can hardly be considered vulnerable." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1156 (9th Cir. 2004) (rejecting equal protection challenge); *cf. Carolene Prods.*, 304 U.S. at 153 n.4. And the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), did not purport to reverse decades of cases holding that government may, consistent with equal protection, distinguish among business entities. *See Levin*, 560 U.S. at 426 (reviewing, post-*Citizens United*, standard equal protection principles

as applied to business regulation); *Koyo Corp. v. United States*, 899 F. Supp. 2d 1367, 1372 (Ct. Int'l Trade 2013) (rejecting claim that *Citizens United* implicitly overturned equal protection precedent regarding differential regulation of businesses).

So long as the Supreme Court applies the single label of "rational basis review" to both the increased scrutiny that it applies to laws disfavoring unpopular minorities, and the far more deferential review that it applies to business regulations, challenges such as this case may continue. But "rational basis review with bite" does not apply here, and Ordinance 960 is subject to ordinary rational basis review. *See Beach Comm.*, 508 U.S. at 313; *Clover Leaf Creamery Co.*, 449 U.S. at 464.

Reasonable people can disagree about the best policy for managing pesticides and genetically-modified crops, and rational decisions by legislative bodies to regulate such products may differ. But one thing is clear: global agribusinesses do not need the courts to protect them from being disenfranchised in the democratic process.

CONCLUSION

The Court should reject plaintiffs' attempt to hitchhike aboard a more favorable line of cases, hold that ordinary (not "with bite")

rational basis review applies, and deny plaintiffs' motion for partial summary judgment on claim four.

Respectfully submitted,

/s/ Carl M. Varady

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