

JOSH GREEN, M.D.
Governor

SYLVIA LUKE
Lt. Governor



SHARON HURD
Chairperson, Board of Agriculture

MORRIS M. ATTA
Deputy to the Chairperson

State of Hawai'i
DEPARTMENT OF AGRICULTURE
KA 'OIHANA MAHI'AI
1428 South King Street
Honolulu, Hawai'i 96814-2512
Phone: (808) 973-9600 FAX: (808) 973-9613

TESTIMONY OF SHARON HURD
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE SENATE COMMITTEE ON AGRICULTURE AND ENVIRONMENT

MARCH 29, 2023
1:01 PM
CONFERENCE ROOM 224

SENATE CONCURRENT RESOLUTION 24

URGING THE STATE TO PURSUE AN EXEMPTION TO THE COMMERCE CLAUSE
OF THE UNITED STATES CONSTITUTION FOR AGRICULTURAL PRODUCE
GROWN OR RAISED IN THE STATE OF HAWAII.

Chairperson Gabbard and Members of the Committee:

Thank you for the opportunity to testify on Senate Concurrent Resolution No. 24 and Senate Resolution No. 19. These resolutions urge the State to pursue an exemption to the commerce clause of the United States Constitution for agricultural produce grown or raised in the State of Hawaii. The Department of Agriculture strongly supports this measure.

This measure seeks to help to restore balance and fair markets to small agricultural producers in the State of Hawaii. The Department agrees with the intent of the measure to curb transportation costs for locally grown and raised agricultural production.

Thank you for the opportunity to testify on this measure.



Testimony of the Hawaii Harbor Users Group
Opposition to SCR24 and SR19
Before the Committee on Agriculture and Environment
March 29, 2023

Dear Chair Gabbard, Vice Chair Richards, and Members of the Committee:

The Hawaii Harbor Users Group (HHUG) is a non-profit maritime transportation industry group comprised of key commercial harbor users statewide. HHUG strongly opposes SCR24 and SR19.

Any legislation addressing shipping costs to export agricultural products is extremely premature. To date, the agricultural industry has never approached the maritime shipping industry regarding costs to export product. Respectfully, we submit that serious reconsideration should be given to going to the unnecessarily extensive lengths of urging Congress for an exemption to the U.S. Constitution when these two industries have never met with each other to discuss this perceived issue.

As an island state, Hawaii is very dependent upon our commercial harbors to ensure the continued and unimpeded flow of cargo in and out of our State. It is estimated that over 90 percent Hawaii's imported goods pass through our commercial harbors, including consumer goods, motor vehicles, construction materials, and fuel. Given the critical role of our commercial harbors, it is imperative that the State support dependable and efficient cargo transportation and handling to service our residents and businesses.

The Merchant Marine Act of 1920 is a vital lifeline for Hawaii and the United States. It ensures Hawaii receives reliable shipping service, provides family wage jobs for thousands of Hawaii workers, and provides an essential national security asset for our State. At least 91 nations have similar laws to protect the stability of its shipping industry and national security. The Merchant Marine Act of 1920 is not a factor in creating an almost insurmountable hurdle for agricultural producers and in fact ensures that local agricultural products can be transported within the State and to the continental United States reliably and timely.

Thank you for considering our testimony.

SCR-24

Submitted on: 3/22/2023 3:33:55 PM

Testimony for AEN on 3/29/2023 1:01:00 PM

Submitted By	Organization	Testifier Position	Testify
Barbara Barry	Individual	Support	Written Testimony Only

Comments:

Aloha,

It's ridiculous that Hawai'i cannot export produce to the continent. Especially avocados!
I strongly support this Bill,

Mahalo

SCR-24

Submitted on: 3/23/2023 7:59:28 AM

Testimony for AEN on 3/29/2023 1:01:00 PM

Submitted By	Organization	Testifier Position	Testify
Daniel Bishop	Individual	Support	Written Testimony Only

Comments:

I am a small farmer and in strong support of SCR24

Mahalo

Daniel Bishop

Aloha Chair Gabbard and AEN Committee members;

SCR24/SR19 calls on our congressional representatives to explore the options for Hawaii to receive an exemption from the federal Commerce Clause which has been used to prevent states from providing incentives to favor local farmers over mainland producers despite the deep disparities in costs of production.

In recent years there have been important conversations among a number of states and within the Supreme Court regarding the need to unburden farmers from laws that favor big agriculture in the fresh produce market at the expense of small farmers, and there is some indication that President Biden supports some change (eg. an executive order to lessen the burden for the meat industry).

The following excerpt of the legal basis of what is known as the “dormant” Commerce Clause provides insight:

<https://lawprofessors.typepad.com/agriculturallaw/2021/06/the-dormant-commerce-clause-and-agriculture.html>

Article I Section 8 of the U.S. Constitution provides in part, “the Congress shall have Power...To regulate Commerce with foreign Nations and among the several states, and with the Indian Tribes.”

The Dormant Commerce Clause of this statute cannot be found in the Constitution. It is a judicially-created doctrine that several U.S. Supreme Court Justices don't believe in and that special interests groups have utilized to achieve an outcome in the courts that they could not obtain in state legislatures. In essence, the doctrine has been used to create law where there is none with the result of a further expansion of the federal government into what should be purely a state matter. The outcome is that elected state legislators are stripped from establishing policy for their own citizens. For example, with respect to agriculture, this has been evident in the past couple of decades with respect to ... anti-corporate farming laws. *[this includes Hawaii's ability to support local growers with tax incentives or by creating state standards for produce or animals that favor local farmers]*

It is a constitutional law doctrine that says Congress's power to "regulate Commerce ... among the several States" implicitly restricts state power over the same area. In general, the Commerce Clause places two main restrictions on state power – (1) Congress can preempt state law merely by exercising its Commerce Clause power by means of the Supremacy Clause of Article VI, Clause 2 of the Constitution; and (2) the Commerce Clause itself--absent action by Congress--restricts state power. In other words, the grant of federal power implies a corresponding restriction of state power. This second limitation has come to be known as the "Dormant" Commerce Clause because it restricts state power even though Congress's commerce power lies dormant. [*Willson v. Black Bird Creek Marsh Co., 27 U.S. 245 \(1829\)*](#).

The rationale behind the Commerce Clause is to protect the national economic market from opportunistic behavior by the states - to identify protectionist actions by state

governments that are hostile to other states. Generally, the dormant Commerce Clause doctrine prohibits states from unduly interfering with interstate commerce.

The U.S. Supreme Court has developed two tests to determine when state regulation has gone too far. Under the first test, states are generally prohibited from enacting laws that discriminate against interstate commerce. [*City of Philadelphia v. New Jersey*, 437 U.S. 617 \(1978\)](#). Under the second test, the Court balances the burden on interstate commerce against the state's interest in its regulation. [*Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 \(1981\)](#).

The Court has never held that discrimination between in-state and out-of-state commerce, without more, violates the Dormant Commerce Clause. Instead, the Court has explained that the Dormant Commerce Clause is concerned with state laws that both discriminate between in-state and out-of-state actors that compete with one another, *and* harm the welfare of the national economy. Thus, a discriminatory state law that harms the national economy is permissible if in-state and out-of-state commerce do not compete. See, e.g., [*General Motors Corp. v. Tracy*, 117 S. Ct. 811, 824-26 \(1997\)](#).

Conversely, **a state law that discriminates between in-state and out-of-state competitors is permissible if it does not harm the national economy.** [*H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 \(1949\)](#).

The Mitchell Hamline Law Review provides a report on the Dormant Commerce Clause Challenge to Conflicting Standards in Agricultural in 2017 discussing several cases, including California's Proposition 2 regarding setting state poultry standards for any incoming poultry produce. <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1076&context=mhlr>

As stated in SCR24/SR19, this judicial law could not have foreseen the level of burden that would be placed on Hawaii producers nor the degree to which it has been manipulated by unfair competition. This resolution is not asking for an exemption to the US Constitution, as inferred by the title, but to the dormant Commerce Clause, which doesn't actually exist in the constitution but rather as a judiciary court decision. It does not serve Hawaii and it is our responsibility is to make a case for an exemption regarding inter-state competition. Favoring Hawaii producers does not endanger the national economy.

I support SCR24/SR19 for all farmers in Hawaii and encourage our legislators to do so, as well.
Penny Levin