



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2024**

ON THE FOLLOWING MEASURE:

H.B. NO. 2773, RELATING TO AGRICULTURAL PRODUCT LABELING.

BEFORE THE:

HOUSE COMMITTEE ON AGRICULTURE AND FOOD SYSTEMS

DATE: Monday, February 12, 2024 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 312 and Videoconference

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Travis T. Moon or Bryan C. Yee, Deputy Attorneys General

Chair Gates and Members of the Committee:

The Department of the Attorney General respectfully submits comments regarding this bill.

This bill proposes to amend chapter 486, Hawaii Revised Statutes, by requiring country or region of origin labeling requirements for all honey, macadamia nuts, coffee, tea, chocolate, vanilla, sea salt, and any other plant or animal product grown, packaged or sold in Hawaii that contains any information or name indicating "Hawaii," "Hawaiian," or any region of Hawaii, and where the product is less than one hundred percent grown in Hawaii.

A portion of the country-of-origin labeling requirement on page 1, lines 5-16, would be preempted by federal law. Under the United States Constitution's Supremacy Clause, the laws of the United States are declared to be supreme to those of the individual states.

The Federal Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1638, *et seq.*) (federal act), and its corresponding regulation, title 7 Code of Federal Regulations part 65 (federal regulation), require retailers to inform consumers of the country of origin of raw unprocessed macadamia nuts and muscle cuts of lamb, chicken, goat, and venison, ground lamb, chicken, goat, and venison, and meat produced from goats, chicken, wild fish and farm-raised fish.

The United States Department of Agriculture, Agricultural Marketing Service (USDA) states in the Federal Register (promulgating 7 C.F.R. part 65), that the language of the federal act “is clear” that Congress intended to preempt State law. See Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2658 at 2679, 2701 (January 15, 2009). A state’s country of origin labeling requirement that encompasses commodities governed by this federal regulation are preempted. See id. at 2701. As stated above, the federal act and the corresponding federal regulation specifically regulates country of origin labeling for the commodities stated above. Labeling requirements for processed macadamia nuts and other types of animal meats not referenced, however, are allowed. See 7 C.F.R. §§ 65.220 and 65.300(c).

We recommend including a new subsection (f) on page 6, line 4, to include a new definition as follows: “Animal Product’ means animal products, not including muscle cuts of lamb, chicken, goat, and venison, ground lamb, chicken, goat, and venison, and meat produced from goats, chicken, wild fish and farm-raised fish”. We also recommend replacing the term “macadamia nuts” with “processed macadamia nuts” on page 1, line 5.

The bill could be subject to a constitutional challenge under the U.S. Constitution’s dormant Commerce Clause, which authorizes the federal government to regulate commerce and exclude undue state interference, thereby precluding state laws that impermissibly burden interstate commerce. The Supreme Court has held that a state law violates the dormant Commerce Clause if it mandates “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” See Granholm vs. Heald, 544 U.S. 460, 472 (2005) (citing Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of Ore., 511 U.S. 93, 99 (1994)). A “discriminatory [state] law is virtually per se invalid, and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives[.]” Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 338–39 (2008) (internal quotation marks and citations omitted).

It is not clear what legitimate state purpose is served by requiring country of origin labeling on all honey, macadamia nuts, coffee, tea, chocolate, vanilla, sea salt, and any other plant or animal product grown, packaged or sold in Hawaii that contains any information or name indicating "Hawaii," "Hawaiian," or any region of Hawaii, and contains less than one hundred percent grown in Hawaii. We recommend providing an explanation on how the bill advances a legitimate state purpose (i.e. health, safety, and general welfare), that cannot be adequately served by a reasonable nondiscriminatory alternative, and to narrow the burden on interstate commerce, by, for example, limiting the requirement to such commodities whose labels indicate the commodity was grown, harvested, or raised in Hawaii.

Thank you for the opportunity to provide this testimony.

JOSH GREEN, M.D.
Governor

SYLVIA LUKE
Lt. Governor



SHARON HURD
Chairperson, Board of Agriculture

DEXTER KISHIDA
Deputy to the Chairperson

State of Hawai'i
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TESTIMONY OF SHARON HURD
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE HOUSE COMMITTEE ON AGRICULTURE & FOOD SYSTEMS

FEBRUARY 12, 2024
2:00 PM
CONFERENCE ROOM 312

HOUSE BILL NO. 2773
RELATING TO AGRICULTURAL PRODUCT LABELING

Chair Gates, Vice Chair Kahaloa and Members of the Committee:

Thank you for the opportunity to testify on House Bill No.2773. This bill establishes certain standards for agricultural products labeled as being Hawaiian or from Hawaii. The Department of Agriculture offers comments.

The intent of the bill is to set minimum standards for labeling of agricultural products grown and produced in Hawaii. Of the varied products mentioned in the bill some have individual statutes with labeling rules and requirements that may supersede this bill. Coffee and Macadamia nuts for instance are governed by HRS 486-120.6 and HRS 120.5 respectively. The bill may be too broad in its scope of trying to incorporate all agricultural products not including spices. For products like chocolate bars that use Hawaiian grown Cacao will be under 75% by weight and will have other ingredients such as milk and sugar that exceeds the 25% allowed for production since these are imported.

A minimum font size of 1/16 inch is the quantity statement size so the font size should be the same as the minimum size for the front font. We support the statement



that nothing on the side or back labels of any product subject to this section shall be inconsistent with statements appearing on the front label.

Thank you for the opportunity to testify on this measure.

Testimony of Jeffrey Clark

Edmund C Olson Trust No 2/Hamakua Macadamia Nut Company/Ka'u Coffee Mill

February 12, 2024

RE: 2773 HB RELATING TO AGRICULTURAL PRODUCT LABELING.

Aloha Chair Gates, Chair Kahaloa, Members of the Committee on Agriculture and Food Systems, and Members of the Committee on Consumer Protection and Commerce,

My name is Jeffrey Clark and I am the Chief Operating Officer and President of Hamakua Macadamia Nut Company, a processor and farmer of Hawai'i -grown macadamia nuts on the Big Island. I am writing to you in support of House Bill 2773 HB RELATING TO AGRICULTURAL PRODUCT LABELING..

Hawai'i's macadamia nut farmers have faced some of the most difficult times our industry has seen in the past few years. USDA NASS reported utilized production of Hawai'i macadamia nuts fell by 29 percent from 52.9 million pounds in 2021 to 37.7 million pounds in 2022. Farmgate prices also fell to the lowest price since 2015 to an average of \$0.88/lb. The total take-home value for macadamia nut farmers fell by 49%, wiping out nearly half of Hawai'i's macadamia nut market value. A major driver of this problem is that cheap foreign grown nuts are being used in consumer products and deceptively marketed as being Hawai'i-grown. This drives the price and quality down for 100% Hawai'i-grown products which mainly affects farmers.

My organization also owns Ka'u Coffee Mill which grows and processes 100% Hawai'i grown coffee. The coffee industry faces the same issue that the macadamia nut industry is facing regarding country of origin labeling. Cheap Foreign grown coffee is brought in and marketed as being Hawai'i-grown, which damages the coffee industry. I support this bill because I see the damage caused by foreign grown crops that are brought into Hawaii and deceptively marketing as having been grown in Hawai'i. All Hawai'i-grown crops should have the same protections from mislabeled products.

One of the greatest threats to the viability of farming in Hawai'i is the misleading labeling of products. HB2773 requires country of origin to be included on the label of a consumer package of products marketed as Hawai'i grown. This legislation ensures the authenticity of Hawai'i's products and gives consumers and retailers important information on the origin of those products.

Thank you for taking the time to consider this bill and my testimony.

Mahalo,



Jeffrey Clark

Chief Operating Officer

Hamakua Macadamia Nut Company

Ka'u Coffee Mill

HB-2773

Submitted on: 2/12/2024 10:54:39 AM

Testimony for AGR on 2/12/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
bruce corker	Rancho Aloha Coffee Farm	Support	Written Testimony Only

Comments:

Dear Chair Gates, Chair Nakashima, and Members of the AGR and CPC Committees:

I am a coffee and avocado farmer in the Kona region of Hawaii Island and strongly support the enactment of HB2773--and I thank Rep. Kahaloa for its introduction.

As shown by the more than \$41 million in settlement payments made by defendants in the recent class action lawsuit brought by Kona farmers alleging fraudulent labeling of coffee, the mislabeling of Hawaii's specialty agricultural products is all too common. See also, for example, the 2022 SF Chronicle article entitled "How US Businesses Are Cashing In On The Made in Hawaii Label". <https://www.sfgate.com/hawaii/article/hawaii-products-not-from-islands-17312415.php>

Hawaii needs to actively provide the protection for its farmers that other states provide to theirs-- for example, **Idaho** for its potato farmers; **Vermont** for its maple syrup producers; **Georgia** for its Vidalia Onion farmers; **California** for its wine grape growers.

Please support Hawaii farmers by passing this bill.

Thank you,

Bruce Corker, Rancho Aloha, Holualoa



Hawaii Cattlemen's Council, Inc.

COMMITTEE ON AGRICULTURE & FOOD SYSTEMS
Rep. Cedric Asuega Gates, Chair
Rep. Kirstin Kahaloa, Vice Chair

LATE

RECEIVED
Date & Time

Feb 12, 2024, 6:57 pm

HB2773

RELATING TO AGRICULTURAL PRODUCT LABELING

Monday, February 12, 2023, 2:00 PM
Conference Room 312 & Videoconference

Chair Gates, Vice Chair Kahaloa, and Members of the Committee,

The Hawaii Cattlemen's Council **supports HB2773** which establishes certain standards for agricultural products labeled as being Hawaiian or from Hawai'i.

The Hawaii Cattlemen's Council supports the purchasing of locally sourced food, and Hawaii's ranchers are ready to contribute to that by providing local beef, a nutritious protein. However, when products are labeled with misleading information about the origin of its contents, our local producers suffer because they still face the higher costs to produce and market in Hawaii. We are fortunate that the consumer is conscious about where their food is coming from, but labels should be clear so that local producers can capture the premium that the consumer is willing to pay to support local.

Thank you for the opportunity to testify on this matter. The Hawaii Cattlemen's Council (HCC) is the Statewide umbrella organization comprised of the four county-level Cattlemen's Associations. Our member ranchers represent over 60,000 head of beef cows; more than 75% of all the beef cows in the State. Ranchers are the stewards of over 750 thousand acres of land in Hawaii, or 20% of the State's total land mass. We represent the interests of Hawaii's cattle producers.

Nicole Galase
Hawaii Cattlemen's Council
Managing Director



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TO: Representative Cedric Asuega Gates, Chair
Representative Kirstin Kahaloa, Vice Chair
Committee on Agriculture & Food Systems

FROM: Gerard Bastiaanse
President- Hawaii Coffee Company

RE: **HB 2773 Relating to Agricultural Product Labeling – Opposition**
Monday, February 12, 2024; 2:00 P.M.; Conference Room 312

Aloha Chair Gates, Vice Chair Kahaloa and members of the committee:

Hawaii Coffee Company has concerns with HB 2773 as written, which amends HRS Chapter 486 by adding a new section to include guidelines for agricultural product branding labeled as being Hawaiian or from Hawaii.

Our company complies with the FDA’s strict food labeling laws, as well as Hawai‘i state labeling regulations. False labeling of Hawai‘i coffee products and other made in Hawai‘i products is a serious matter that harms both consumers, businesses, and industries in Hawai‘i. While Hawaii Coffee Company supports what appears to be the *intent* of HB 2773, it *must oppose* HB 2773 as currently written due to numerous legal and policy concerns, including that the bill in its current form:

1. Is likely to be found void, at least in part, for vagueness.
2. Arbitrarily requires 75% of a named region’s agricultural product in order to include the named region in a product’s front label.
3. May violate the dormant Commerce Clause.
4. Conflicts with the rights of federally registered trademarks under the Lanham Act.
5. Is unduly burdensome and not commercially reasonable.
6. Conflicts with HRS § 486-119 governing the labeling and advertising of Hawai‘i-made products.

First, in part, HB 2773 proposes to add labeling requirements for agricultural products containing some but less than 100% Hawai‘i grown product, including “all honey, macadamia nuts, coffee, tea, chocolate, vanilla, sea salt, *and any other plant or animal product* grown, packaged, or sold in Hawaii for which *any information or name indicating* ‘Hawai‘i, Hawaiian, or any region of Hawaii, and where the product is less than one hundred per cent grown in

Hawaii[.]” The phrases “any other plant or animal product”, “any information”, and “indicating” are vague and ambiguous, and not defined in the statute. For example, it is unclear whether a photograph depicting a place in Hawai‘i, such as a photograph of Diamond Head, could be construed as “any information” “indicating” “Hawai‘i”.

Under the circumstances, HB 2773 as written is likely to be found void for vagueness because it fails to give notice that will allow people a reasonable opportunity to understand what it prohibits so they may act accordingly; and fails to provide clear standards for enforcement of the law. As a result, the bill as written can enable and even encourage arbitrary and discriminatory enforcement.

Second, in part, HB 2773 requires blended Hawai‘i products labeled with the words “Hawai‘i” “Hawaiian” or the name of any Hawaiian region, shall include a minimum of 75% of that named region’s agricultural or animal product in order to feature the regional name on the product’s front label. This is an arbitrary and overbroad requirement that is likely to have unintended consequences. For example, a product named “Kaua‘i saltines” consisting of crackers made of flour from out of state seasoned with salt grown in Kaua‘i, which salt comprises less than 5% of the total product ingredients but is the ingredient that gives the product its defining taste and is the dominant feature of the product, would be prohibited from using the Kaua‘i regional name on the product front label. This would produce an absurd result.

Third, as written, HB 2773 may violate the dormant commerce clause to the extent it discriminates against interstate commerce in favor of in-state commerce; and imposes a burden on interstate commerce that is excessive relative to the putative benefits as there has been no demonstration that the intent of HB 2773 cannot be served by reasonable nondiscriminatory alternatives, especially where a number of false labeling/counterfeiting laws already exist, such as HRS § 486-120.6 (coffee), HRS § 486.120.5 (macadamia nuts), and HRS § 486-119 (Hawai‘i made products).

Fourth, as written, HB 2773 would prohibit the use of federally registered trademarks that incorporate geographic designations of origin (such as Hawai‘i, Kona, or Ka‘u) in conjunction with coffee products that contain less than 75% coffee from the designated regions may be preempted and rendered unenforceable to the extent it conflicts with the Lanham Act, and potentially lead to lawsuits challenging the validity of HB 2773.¹

Fifth, as written, HB 2773 is unduly burdensome and not commercially reasonable because it does not have any phase-in over time provisions to allow vendors to come into compliance. HB 2773 would impact many companies and require significant economic investment to modify packaging (e.g., complete redesign or, at minimum, placement of label stickers over existing packaging). The expense of redesigning product packaging to comply with HB 2773 would apply broadly given the overbroad and vague nature of HB 2773 as written.

¹ A trademark can be any word, phrase, symbol, design, or a combination of these things that identifies the source of goods or services. Hawaii Coffee Company is the owner of a number of well-known and widely recognized federal and state trademarks (“HCC Marks”). Hawaii Coffee Company has spent significant time, energy, and expense promoting the HCC Marks and the HCC Marks have accrued considerable value and goodwill to Hawaii Coffee Company. Hawaii Coffee Company’s claims of ownership in the HCC Marks are based upon long existing and clearly delineated common law and statutory rights. These rights constitute legally protectable property.

It will be impossible to retrieve *all* products already being offered for sale or in the possession/control/ownership of third-parties and imposing the requirements of HB 2773, without any phase-in over time provisions, is not commercially reasonable. The concerns regarding having adequate time to come into compliance are magnified here where HB 2773 is vague as written and fails to provide ordinary people a reasonable opportunity to understand what it prohibits so they may act accordingly.

Sixth, HB 2773 conflicts with HRS § 486-119 governing the labeling and advertising of Hawai'i-made products and is unnecessary.

For these reasons, we respectfully ask you to hold this measure. Thank you for the opportunity to submit testimony.