IN THE SUPREME COURT
OF THE STATE OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Petitioner,

vs.

CASE NO.: 74,373

ROBERT H. BONNANO, AS
CIRCUIT COURT JUDGE OF
THE THIRTEEN JUDICIAL
CIRCUIT,

Respondent.

AMICUS BRIEF OF

GARY M. MAHON and CHRYSTAL D. MAHON, d/b/a POKEY'S CITRUS NURSERY; DOUGLAS A. HOLMBERG, d/b/a HILLSBOROUGH WHOLESALE NURSERY; FRED J. SNELL; CHARLES W. DEWITT; ENVIRONMENTAL CITRUS NURSERY, INC.; FORREST NURSERY, INC.; FLOYD PHILMON; DAVID S. PROSSER, JR.; SOUTHERN CITRUS NURSERY, INC.; W. A. WILLIAMS NURSERY SERVICE, INC.; BRUCE WILSON, d/b/a BRUCE WILSON NURSERY; and PETER F. A. HUTCHINSON, d/b/a HUTCHINSON CITRUS NURSERY,

SUPPORTING POSITION OF RESPONDENT

Original Proceeding for Writ of Prohibition
in the Supreme Court of the State of Florida

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STATEMENT OF THE CASE

In 1989, the litigation resulting from Florida's Citrus Canker Eradication Program (the "Eradication Program"), came to a crossroads. In January, Doyle Conner, Commissioner of the Florida Department of Agriculture and Consumer Services (the "Department"), failed to comply with a writ of mandamus issued in an ancillary proceeding to enforce a final judgment entered in Mid-Florida Growers, Inc. v. State of Florida, Department of Agriculture and Consumer Services. The Commissioner's failure prompted the trial court to issue an order to show cause why the Commissioner should not be held in contempt. In response, on January 20, 1989, the President of the Florida Senate and the Speaker for the House of Representatives filed a suggestion in this Court requesting a stay of the lower court proceedings for 120 days so that the Florida Legislature could "do its work" and "avoid an unnecessary constitutional clash."

This Court responded favorably to that suggestion and issued its stay. In its regular session, the Florida Legislature explored the potential liability of the State of Florida resulting from the Eradication Program and passed Chapter 89-91, Laws of Florida (the "Act"), which was signed into law and became effective on June 20, 1989.

The Act arguably divests the courts of all jurisdiction to hear cases involving claims for compensation against the Department as a result of the Eradication Program. Accordingly,

the day after the Act became law, attorneys for the Department made an ore tenus motion to dismiss the case at bar for lack of subject matter jurisdiction. The Circuit Court Judge denied that motion and the Department now seeks a writ of prohibition from this Court prohibiting the Circuit Court from exercising any further jurisdiction over this case.

The amici appearing in this proceeding, plaintiffs in various trial courts below, have proceeded against the Department pursuant to Article X, § 6 of the Florida Constitution. Their constitutional claims for inverse condemnation have been premised on the fact that the Department destroyed millions of healthy citrus trees during the Eradication Program and that the disease which triggered the program, an innocuous leaf spotting disease which appeared only on immature citrus nursery trees, posed no threat to their healthy trees or the citrus industry in general.

STATEMENT OF FACTS

The Act provides a comprehensive scheme and should be examined in its entirety. In its preamble, the Legislature complains that this Court's decision in Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988), "may chill the legitimate exercise of the police power by making the use of the police power cost prohibitive." Citing Kluger v. White, 281 So.2d 1 (Fla. 1973), the Legislature finds it is empowered to create a "reasonable alternative remedy" and that Article V, Section 1 of the Florida Constitution

authorizes the Legislature to assign "quasi-judicial powers to administrative officers." The Act purports to establish such a "reasonable alternative remedy", in that it allows a claimant to recover a presumed value for his destroyed citrus plants, which have been established by the Legislature, or have recourse to a hearing before an officer of the Division of Administrative Hearings in order to establish another compensation value, with appeal to the First District Court of Appeal. Finally, the Legislature gratuitously finds that the applications for financial assistance signed by the various claimants constitute "releases" and that the Legislature continues to recognize these "releases" as "valid waivers of liability."[1]

In Section 1, the Legislature defines "citrus canker" to mean a "bacterial disease of citrus incited by the organism Xanthomonas campestris pathovar citri, and includes what is commonly know as the nursery strain of citrus canker or citrus bacterial spot."[2] The Act then defines "claimant" to mean any person who owns citrus nursery plants which were destroyed by the Department pursuant to an immediate final order from the Department or the United States Department of Agriculture.

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[1]Although the Act states that the "releases" executed by a variety of claimants are valid and enforceable, the Legislature has in fact recognized the invalidity of such documents as releases and they are given no legal effect in the Act.

[2]The Legislature, positioning itself for further litigation, has still refused to officially recognize the scientific fact that the bacterial organism which causes citrus bacterial spot, the disease which prompted the Eradication Program, is a separate species entirely from the bacteria that causes citrus canker.

The Legislature makes various factual findings **directly relevant to pending canker litigation.** It concludes that the destruction of citrus nursery plants by the Department was a "valid exercise of the State's police power" and that the Department "acted properly in dealing with the **1984** outbreak of citrus canker disease." It finds that government scientists diagnosed the disease as citrus canker but "stated that it was different from known strains of citrus canker." The Legislature finds that the disease which was discovered in **1984** was a "previously unknown strain of citrus canker." Continuing, the Legislature finds that the Department used the "best scientific knowledge available at the time"[3] to deal with the disease outbreak, and that this Court's previous decision regarding citrus canker "places the State in a difficult financial and regulatory position with respect to future disease and pest eradication programs." See Mid-Florida Growers, Inc., supra. The Legislature proclaims that it is vested with the "sole constitutional authority" to appropriate monies from the State Treasury and that the "potential exists for disruption of the legislatively prescribed plan for the expenditure of public

[3]All of the Legislative findings regarding the propriety of the Department's actions are challenged in the pending cases involving amici. Amici would show at trial that the Department did not utilize the "best available knowledge" in that a number of scientists involved in the Eradication Program knew that the disease was harmless and that destruction of the nurseries was unnecessary. It is now undisputed that the disease at issue was not a "strain" of citrus canker in any common or scientific sense of the term, but rather a distinct disease which causes different symptoms, effects only immature nursery plants, and poses no threat to the Florida citrus industry.

funds which would adversely affect the important functions of government." The Legislature concludes by stating that its intent is to apply the Act to all claimants, even those with pending law suits filed prior to the effective date of the Act, and that the compensation procedure provided by the Act "shall be the sole and exclusive remedy and procedure" by which those claimants would receive compensation.

In Section 3, the Legislature establishes values for a variety of nursery products designed purportedly to provide "presumptive full and fair compensation'' for plants destroyed by the Eradication Program. Although the record in this case does not allow amici to challenge these values, a review of the Act's explanation of how these values were established reveals that the values set forth in the Act are grossly artificial, have little or no relation to the market value for plants in 1985 and 1986, and make no distinction between the various markets existing in different parts of the State.

Section 4 establishes a trust fund from which compensation and the cost of administering the Act shall be paid, and Section 5 establishes the Office of Citrus Canker Claims (the "Office") within the Department of Banking and Finance. Section 6 of the Act sets forth in detail the procedures for applying for compensation from the Office. If a claimant decides not to accept the presumptive values set forth in the Act from the Office, he is given the right to apply for a hearing before an officer appointed by the Director of the Division of

Administrative Hearings. In such hearing, the claimant can challenge the presumed values, but the Act provides that such values "shall be presumed to provide full and fair compensation." Such values must be rebutted by the claimant.[4] Orders entered by the hearing officer may be appealed pursuant to Section 120.68, Florida Statutes, and the Act provides that "the First District Court of Appeals shall have sole and exclusive jurisdiction over all interlocutory and final orders and proceedings under this Act."

Section 7 provides that the hearing officers may award attorneys' fees and costs, Section 8 establishes the venue for the administrative hearings, and Section 9 provides certain filing deadlines.

Sections 10 through 14 levy certain excise taxes on citrus nurseries and commercial citrus tree producers to fund claimant compensation and the costs of administering the Act. Finally, Section 15 provides that the office of Citrus Canker Claims shall cease payment of any claim if "there is a ruling from any Court that any provision of this act is unconstitutional and the ruling substantially affects this act."

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[4] In a similar case, Justice Grimes has suggested that the shift in the burden of proof at an evidentiary hearing does not comport with due process. Laborers' International Union of North America, Local 478, v. Burroughs, 541 So. 2d 1160, 1164 (Fla. 1989).

SUMMARY OF *ARGUMENT*

The Legislature intended the Act to depress the amount of compensation to be received by claimants on their constitutional claims. This improper objective is effected by provisions purporting to divest the courts of jurisdiction to decide the issue of full compensation and by attempting to exclusively delegate this fundamental judicial function to a non-judicial hearing officer. If so construed, the Act would contravene the separation of powers doctrine contained in Article 11, § 3 and Article V, § 1 of the Florida Constitution in that it would limit powers granted to the courts by the Constitution, improperly grant judicial powers to non-judicial officers and impermissibly interfere with pending cases over which the courts have already exercised jurisdiction. These constitutional flaws are not remedied by the provision for judicial review in the First District Court of Appeals or any argument that the Act more effectively and economically settles litigation resulting from the Eradication Program.

Amici request this Court to construe the Act to provide an alternative, but not exclusive, remedy to claimants and to affirm jurisdiction of the trial courts over claimants' claims for inverse condemnation.[5]

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[5]The Act variously provides that the claims procedure is a "reasonable alternative remedy" and "shall be the sole and exclusive remedy and procedure." The Act also provides that all claimants "be required to proceed pursuant to this Act as an exclusive alternative means of resolving these dispute." Amici

ARGUMENT

I. THE ACT WAS DESIGNED TO DENY CLAIMANTS THE PROTECTION OF *AN* INDEPENDENT JUDICIARY AND TO REDUCE THE FULL COMPENSATION TO WHICH THEY ARE ENTITLED BY THE FLORIDA CONSTITUTION.

Although Petitioners will argue that the Act modifies only the procedure by which claimants will recover compensation, that position ignores practical realities and the effect of the Act. Although the Act concedes the liability of the Department, it attempts to divest the judicial branch of State government from any jurisdiction to decide the most controversial aspect of these cases--the fair market value of the products destroyed by the Department. The Act, as construed by Petitioner, prohibits the claimants and the Department from proceeding before an independent circuit court judge or jury, and instead requires that claimants prove their damages before a hearing officer appointed by the Director of the Division of Administrative Hearings. The only possible judicial involvement is a limited appeal to the First District in accordance with the Adminstrative Procedures Act (Chapter 120, Florida Statutes). Additionally, the Act establishes an artificial schedule of values for destroyed citrus trees and mandates that such values are presumed to be correct for each claimant and requires that each claimant

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suggest that the Court, in order to render the Act constitutional, construe this language as permissive and not mandatory so that claimants who wish to forego the claims procedure may pursue their claims in the circuit courts. See Rich v. Ryals, 212 So.2d 641, 643 (Fla. 1968); Ayala v. Department of Professional Regulation, 478 So.2d 1116, 1118 (Fla. 1st DCA 1985).

has the burden of rebutting those values. Finally, Petitioner argues that these provisions are to be applied to all victims of the Eradication Program, even those who have already filed suit in the circuit courts and those who have already obtained judgments.

It is apparent, therefore, that the Legislature has been unhappy with the outcome of previous canker litigation conducted before independent judges and juries, and has acted to limit the "full compensation" required by the Florida Constitution by taking the current cases away from the courts and placing them in a more favorable forum. For what other purpose was the Act created? The Act suggests that the Florida Legislature is vested with the sole constitutional authority "to appropriate money for specific purposes" and that a "potential exists for disruption of the legislatively prescribed plan for public funds which would adversely effect the important functions of goverment." Petitioners will also suggest that the Act allows the various litigations to be settled in a more expeditious and orderly fashion.

Such rationales, however, are invalid and irrational. First, the Florida Legislature cannot be the sole constitutional authority to decide the validity of claims against the State treasury. If that be the case, and judgments pursuant to Article X, § 6 cannot be enforced without the Legislature's approval, then Article X, § 6 can have no real meaning when a taking is effected by State government. Secondly, it is untenable that the

State, a party to the various lawsuits and unsatisfied with its potential liability, can unilaterally and retroactively adjust the amount of its liability. Such a position is fundamentally unfair and antithetical to the right of Florida citizens to be protected from the whims of the majority. Finally, it is dangerously unacceptable for the Legislature to suggest that a relatively minor budget demand[6] or its desire to comply with some vague legislative budgetary plan should allow the Legislature to ignore the plain directives of the Florida Constitution.

These policy failings of the Act directly relate to the constitutional argument which follows involving the constitutional paradigm of the separation of powers. The rights of Florida citizens to the protection of an independent judiciary are at stake in this proceeding.

II. THE ACT IS AN UNCONSTITUTIONAL LEGISLATIVE INTRUSION UPON THE JUDICIARY

A. The Separation of Powers Mandated by the Florida Constitution is the Preeminent Constitutional Principle of Government

[6]Although Legislative leaders have bandied about a figure of $200,000,000 as representing the State's liability, only approximately 67 lawsuits have been filed against the Department to date, and the four-year statute of limitations for inverse condemnation has already run (and continues to run each day) against the majority of potential claimants. Interestingly, the State in the Act has appropriated only $28,000,000 to pay all claimants, including those which have not even filed suit. Even in the highly unlikely event that the higher number represents the actual liability of the State, this number cannot conceivably create a budgetary crisis of any significant proportion in a state whose budget for 1989-1990 exceeds $28,000,000,000.

Article II, 53 and Article V, §1 of the Florida Constitution places an impenetrable limitation on the delegation of judicial power to legislative or executive agencies. This provision of the Constitution embodies the principle of separation of powers universally recognized in American constitutions. Sylvester v. Tindall, **18** So.2d 892, 899 (Fla. 1944); see also, **16** Am. Jur. 2d, Constitutional Law, 5293 (1979).

In interpreting and enforcing Article 11, § 3, this Court has consistently shown a tenacious commitment to the governmental framework it mandates, and a wary reluctance to allow legislative experiments in the reallocation of governmental power. The Court has explained this commitment as follows:

> The fundamental principle of every free and good government is that these several coordinate departments forever remain separate and distinct. No maxim in political science is more fully recognized than this. Its necessity was recognized by the framers of our government, as one too invaluable to be surrendered, **and too sacred to be tampered with. Every other political principle is subordinate to it - for it is this which gives our system energy, vitality and stability.** Montesquieu says there can be no liberty, where the judicial are not separated from the legislative powers. 1 Spirit of Laws, pg. 181. Mr. Madison says these departments should remain forever separate and distinct, and that there is no political truth of greater intrinsic value, which is stamped with the authority of more enlightened patrons of liberty. Federalist, 270. It is only by keeping these departments in their appropriate spheres, that the harmony of the whole can be preserved - blend them, and the constitution no longer exists. **The purity of our government, and a wise administration of its laws, depend upon a rigid adherence to this principle. It is one of fearful import and a relaxation is but another step to its abandonment - for what authority can check the innovation, when the barriers so clearly defined by every constitutional writer, are once thrown down....** Under all circumstances, it is the imperative duty of

> the courts to stand by the Constitution. [emphasis added]

Otto v. Harllee, 161 So. **402, 403-404** (Fla. **1935).**

> This separation of powers, coupled with the fundamental individual rights which are guaranteed by our Bill of Rights, prevents the exercise of autocratic power and **is essential to the perpetuity of *our* form of government.** [emphasis added]

Sylvester v. Tindall, supra, 18 So.2d at **899.**

> The courts have been diligent in striking down acts of the legislature which encroached upon the judicial or the executive departments of the government. **. .** The separation of governmental power was considered essential in the very beginning of our government, and the importance of the preservation of the three departments, each separate from and independent of the other **becomes more important and more manifest with the passing years.** Experience has shown the wisdom of this separation **. . .** recorded history shows that such encroachments ultimately result in **tyranny, despotism, and in the destruction of constitutional processes.** [emphasis added]

Pepper v. Pepper, **66** So.2d 280, **284** (Fla. 1953).

These ringing admonitions establish the strictest level of scrutiny for legislative actions which would arrogate judicial power for legislative commissions or agencies. As will be discussed below, Petitioner would ask this Court to discard the principles enunciated above, and allow a dramatic encroachment on the constitutional sphere of the judiciary.

B. The Act Offends the Separation of Powers Doctrine in a Three-Fold Manner

As construed by Petitioner, the Act would offend the separation of powers doctrine in three different ways, any one of which would render the Act unconstitutional.

1. The Act Impermissibly Limits the Jurisdiction of the Courts

Article V, §1 of the Florida Constitution provides, in pertinent part:

> The judicial powers shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality.

Obviously, no judicial power is vested by this provision in the legislature, or any creature of the legislature. As this Court has had occasion to state more than once, those powers conferred upon the courts by the Constitution cannot be enlarged or abridged by the legislature. State ex rel Buckwalter v. City of Lakeland, 150 So. 508, 512 (Fla. 1933); Spafford v. Brevard County, 110 So. 451, 455 (Fla. 1926). Yet clearly, as agreed in its Petition, this is precisely what the Legislature is seeking to do in the Act. As construed by Petitioner, the Act divests the courts from subject matter jurisdiction of all cases related to the Eradication Program, even those cases already filed and now pending. How can it be doubted that the courts have proper and legitimate jurisdiction over the actions which are currently in process in the various circuit courts of this state for compensation for inverse condemnation?[7] A more frontal attack on the jurisdiction of the courts is hard to imagine.

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[7]The determination of damages in inverse condemnation falls squarely within the "judicial power" described in Article V, §1. Jacksonville Express-way Authority v. Henry G. Dupree & Co., 108 So.2d 289 (Fla. 1956), and other cases cited below.

Petitioner offers authority which suggests that the Legislature has the power to limit and define the jurisdiction of the courts, and to reallocate their jurisdiction to administrative bodies. However, what petitioner conceals in its discussion of Caudell v. Leventis, 43 So.2d 853 (Fla. 1950) and State, ex rel. York v. Beckham, 36 So.2d 769 (Fla. 1948), is that these cases were decided under the now-defunct Florida Constitution of 1885, as amended in 1914, which contained materially different provisions regarding the power of the legislature over the jurisdiction of the courts. Article V, $1 of that Constitution provided, in pertinent part:

> The judicial power of the state shall be vested in a Supreme Court, Circuit Courts, Court of Record of Escambia County, Criminal Courts, County Courts, County Judges and Justices of the Peace **and such other Courts or Commissions as the Legislature may from time to time ordain and establish.** [emphasis added]

Pursuant to this constitutional provision, the Florida Legislature did, for a time, have the constitutional power to create, limit and define the jurisdiction of the courts and vest judicial power in legislative commissions. State v. Sullivan, 116 So. 255, 258-260 (Fla. 1928). As noted above, however, the current constitution materially changes this provision and eliminates both the legislative power to create courts or limit their jurisdiction and the legislative power to vest judicial power in

commissions. Thus, both Caudell and Beckham are completely inapposite.[8]

Likewise, Petitioner's argument that Smith v. State Plant Board, 110 So.2d 401 (Fla. 1959) allows the curtailment of judicial power to make the original determination of compensation in inverse condemnation proceedings fails to recognize that Smith was decided under the same defunct constitutional provision which renders Caudell and Beckham inapplicable. Although the Constitution of 1885 was modified again by general election in 1956, at the time of the decision in Smith, in 1959, it still provided, in pertinent part:

> The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, **and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish.** [emphasis added]

Thus, the Court in Smith, while reserving the ultimate determination of full compensation for the judiciary, could have

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[8]The current Article V, Section 1 (adopted by special election in 1972) goes on to provide that "Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the function of their offices." As discussed below, the power to determine damages in an inverse condemnation suit is purely a judicial function and by no stretch of the imagination can constitute "quasi-judicial" powers. As this Court has recently explained, "an administrative agency conducts a quasi-judicial proceeding in order to investigate and ascertain the existence of facts, hold hearings, and draw conclusions from those hearings as a basis for their official actions." Broward County v. LaRosa, 505 So.2d 422, 423 (Fla. 1987). In these "canker" cases, the hearing officer would not be acting to gather facts for an agency, but would be acting simply and solely as a judge.

constitutionally allowed the original determination of compensation to be made by the State Plant Board. Id., 110 So.2d at 407. However, the same decision under the present Florida Constitution would be clearly erroneous, since there is no provision for limiting judicial power or for vesting it in an administrative agency.

2. The Act Attempts to Remove From the Courts a Fundamental and Exclusive Judicial Function

Another standard that has evolved in the case law of this Court to define separation of powers is that administrative agencies cannot "exercise powers that are **fundamentally judicial** in nature". Canney v. Board of Public Instruction, 278 So.2d 260, 262 (Fla. 1973) (disciplinary proceeding of student before School Board quasi-judicial only, therefore no violation of separation of powers); Biltmore Construction Co. v. Florida Department of General Services, 363 So.2d 851, 854 (Fla. 1st DCA, 1978) (power to grant equitable remedy of specific performance is fundamentally judicial in nature and cannot be delegated to Department of General Services).

The most notable recent case on this subject is Broward County v. LaRosa, 505 So.2d 422 (Fla. 1987). In LaRosa, this Court disallowed the delegation to a county human rights board of the power to assess damages for humiliation and embarrassment in housing discrimination cases. The LaRosa court observed a significant distinction between an administrative agency assessing objectively quantifiable damages (such as back rent or back wages) versus such a non-judicial body awarding

"nonquantifiable damages" (such as pain and suffering or humiliation and embarrassment). Id., 505 So.2d at 423, n.5. The essence of the LaRosa decision is stated as follows:

> . . . we cannot imagine a more purely judicial function than a **contested adjudicatory proceeding** involving **disputed facts** that results in an award of **unliquidated** common law damages for personal injuries in the form of humiliation and embarrassment. [emphasis added]

505 So.2d at 423-424.

The first step in any effort to apply LaRosa to the case at bar is to recognize that "it is well settled that the determination of full compensation is a judicial function" which cannot be performed "directly or indirectly" by the Legislature. Behm v. Division of Administration, 383 So.2d 216, 218 (Fla. 1980); e.g., Daniels v. State Road Dept., 170 So.2d 846, 851 (Fla. 1964); Spafford v. Brevard County, supra.; see also, Bowen v. D.E.R., 448 So.2d 566, 568 (Fla. 2d DCA 1984). The proposition seems thus beyond argument that the determination of damages in an eminent domain or inverse condemnation case is exclusively the province of the judicial branch, and cannot be delegated by the legislature to some other entity.

This same conclusion can be reached by applying the analysis used by the LaRosa court, as it has been re-emphasized in Metropolitan Dade County Fair Housing Employment Appeals Board v. Sunrise Village, 511 So.2d 962 (Fla. 1987), and recently interpreted in Laborer's Intern., L. 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989). Following footnote 5 of the LaRosa opinion

(505 So.2d at 424, n.5), the Laborers Intern. case held that LaRosa does not prohibit the delegation of the power to determine liquidated and objectively quantifiable awards for past wage loss to administrative agencies. 541 So.2d at 1163.

The market value of growing crops, on the other hand, which is the damages question involved in the present case, is far from being either "liquidated" or "objectively quantifiable". Rather, the damage suffered by claimants is susceptible of measurement only by a number of purely subjective tests approved by the law of this state. So, for example, a judge or jury must consider the fair market value of the trees on the date of taking, which is defined as the amount a hypothetical willing buyer and willing seller would assign to the trees. Department of Transportation of the State of Florida v. Nalven, 455 So.2d 301, 307 (Fla. 1984). The subjective question of fair market value might, in turn, be answered with reference to a comparable sales or market approach. Stubbs v. Dept. of Transportation, 332 So.2d 155 (Fla. 1st DCA 1976); Culbertson v. State Road Dept., 165 So.2d 257 (Fla. 1st DCA 1964). Or, the same issue might be addressed by either of the income or cost approaches to fair market value, both of which have been approved in Florida law. Meyers v. City of Daytona Beach, 30 So.2d 354 (Fla. 1947); Dept. of Transportation v. Byrd, 273 So.2d 400 (Fla. 1st DCA 1973). Finally, if fair market value fails to provide an adequate basis for valuation of the growing crops, other methods of valuation such as net probable yield at maturity may be considered by the

fact-finder. Lee County v. T & H Assoc., Ltd., 395 So.2d 557 (Fla. 2nd DCA 1981). In sum, unlike back rent, back wages or other forms of liquidated damages that can be easily calculated to a certainty by simple mathematics, claimants' damages are subject to subtle methods of valuation based upon evidence which is subject to more than one interpretation. This type of evidentiary balancing and deliberation is committed by the LaRosa holding to a judicial finder of fact, whether a judge or a jury, and **not** to an administrative agency.

Therefore, based either upon the general principle that fundamentally judicial powers cannot be delegated to legislative agencies, or the more specific approach adopted in LaRosa and its progeny, the Act as construed by Petitioner would violate the Constitution.

3. The Act Interferes with Pending Judicial Controversies

Although the issue has not arisen in Florida law, it is generally accepted, pursuant to the constitutions of the several states, and the federal Constitution, that, since the legislature does not possess and may not assume the exercise of judicial powers, it cannot interfere in any way with pending judicial controversies. 16 *Am.* Jur. 2d Constitutional Law, §329 (1979). Pursuant to this principle, it is violative of separation of powers for the Legislature to attempt to take any class of particular cases out of a settled course of judicial proceedings or adjudicate the legal rights of the parties thereto. Roles Shingle Co. v. Bergerson, 19 P.2d 94 (OR. 1933); Miller v.

McKenna, 23 Cal.2d 774 (Cal. 1937); 6 Ruling Case Law, Constitutional Law, §163. Yet the Act seeks to accomplish precisely this, in that it purports to remove an entire class of pending actions from the ambit of the judiciary, and to terminate judicial scrutiny of the claims made. This also argues strongly for the unconstitutionality of the Act as interpreted by Petitioner.

III. THE PROVISION IN TEE ACT FOR APPELLATE REVIEW DOES NOT CURE ITS CONSTITUTIONAL INFIRMITY

The Act provides that a determination of a claimant's compensation may be appealed pursuant to Section 120.68, Florida Statutes, to the First District Court of Appeals. Pursuant to that statute, the hearing officer's order would be examined to determine if it was supported by "substantial competent evidence." Section 120.68(10), Florida Statutes. The appellate court would be prohibited from "substitut[ing] its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." Id.

Petitioner argued below that this appellate review saved the Act from violating the separation of powers doctrine. That argument ignores the holding of two recent cases in which this Court applied LaRosa. In Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc., 511 So.2d 962 (Fla. 1987), the Court examined and struck down a portion of a county ordinance which allowed the housing

board to award damages for humiliation and embarrassment resulting from age discrimination. It is important to note that this delegation of a judicial function to the housing board was found to violate the separation of powers doctrine despite the fact that the county ordinance provided for an appeal of the board's damage award to the Circuit Court. Id., 511 So.2d at 964.

Similarly, in Laborers' International Union of North America, Local 478, v. Burroughs, 541 So.2d 1160 (Fla. 1989), this Court indicated that the right to appeal an order for future lost wages entered by a local employment discrimination board would not cure a separation of powers problem. Although this Court did not directly reach the question (because it found that subject ordinance did not expressly authorize an award of future pay), the opinion does not indicate that the right to appeal would enter into the separation of powers analysis. Id.

The constitutional prohibition against intrusion upon the judiciary's functions is absolute. The Legislature cannot simply remove the judiciary from performing the important initial function of examining the facts and weighing the evidence and insist instead that some judicial supervision of that process is sufficient. If the Petitioner's argument in this case is adopted, a case premised on a purely constitutional cause of action, then no case would be safe from removal from the courts to some forum which the Legislature determines to be more favorable. Carried to its logical end, Petitioner's argument

would mean that the Legislature could, in effect, do away with the circuit courts, and the original trial jurisdiction of the courts in general, and require that all cases be tried in front of hearing officers employed by the State, as long as the State allows some kind of judicial supervision by way of an appeal. That road has never been taken by this Court and should be strictly avoided in this case.

IV. NO ASSERTION OF IMPROVED EFFICIENCY OR PUBLIC NECESSITY *CAN* JUSTIFY THE VIOLATION OF THE SEPARATION OF POWERS DOCTRINE

The preamble to the Act seems to indicate that it is the position of the Legislature that the vitiation of separation of powers doctrine contained in the Act is justified by the improved efficiency which will result in the resolution of "canker" claims, and the fear that the liability resulting from the Eradication Program may disrupt some "legislatively prescribed plan for the expenditure of public funds." However, this rationale flies in the face of the purpose of the separation of powers doctrine, as it was described by this Court in Petition of Florida Bar, 61 So.2d 646, 647 (Fla. 1952):

> The distribution of powers into three departments **was not designed to promote haste or efficiency** but to head off autocratic power and insure more careful deliberation in the promulgation of government policy. Reason and forethought are its great components. [emphasis added]

Even if, arguendo, the claims procedure established in the Act is more efficient, that is no answer to its constitutional infirmity.

Nor is the argument compelling that the violation of separation of powers contained in the Act is justified by emergency or necessity. As the United States Supreme Court has recently noted:

> . . . the fact that a given law or procedure is efficient, convenient and useful in facilitating functions in government, standing alone, will not save it if contrary to the constitution.

I.N.S. v. Chadha, 462 U.S. 919, 944, (1983). The United States Supreme Court has also firmly rejected the same type of emergency or public necessity rationale for the abrogation of separation of powers. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 581-584 (1952).

The underlying logic of these holdings is simple and persuasive. If the legislative or executive branches are allowed to make inroads into the judicial power every time it is deemed expedient or in the public interest, there will soon be no judicial power remaining. It is the very foundation of the separation of powers doctrine that the coordinate branches of government should remain equal and independent. The purpose of this guarantee is to insure governmental integrity, not governmental efficiency. It can be no answer to the constitutional defects of the Act that the system designed by the legislature would "work better". The argument tempts constitutional disaster, and should be firmly rejected by this Court.

CONCLUSION

Amici request this Court to hold that the Act does not divest the courts of subject matter jurisdiction over cases resulting from the Eradication Program and instead provides an alternative remedy for those claimants who wish to accept the presumed values offered by the Act or consent to a determination of their case by a hearing officer. The Writ of Prohibition requested by Petitioner should be denied, and amici request that this Court indicate to the lower courts that motions to dismiss and motions for continuance based on the Act should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. mail this 20th day of July, 1989, to **David G. Guest, Esq., Assistant Attorney General, Special Projects Section, Department of Legal Affairs, 111-36 S. Magnolia Drive, Tallahassee, FL 32301; Johnnie B. Byrd, Esq., Trinkle, Redman, P. O. Box TT, Plant City, FL 34289-9040; Ronald G. Stowers, Esq., 111-36 S. Magnolia Drive, Tallahassee, FL 32301; and David K. Miller, Esq., Broad and Cassel, P. O. Box 11300, Tallahassee, FL 32302.**

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