IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC03-446 AND SC03-552 (CONSOLIDATED)

JOHN M. and PATRICIA A. HAIRE, et al.,

Petitioners,

v.

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
and STATE OF FLORIDA,

Respondents.

ANSWER BRIEF ON THE MERITS OF RESPONDENT FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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INTRODUCTION

Citrus canker is a disease that attacks citrus trees and presents a devastating threat to Florida's citrus industry. The threat is heightened because the disease is spread by wind driven rain conditions commonly occurring in Florida and because citrus trees exposed to the infection, but not yet visibly symptomatic, may nonetheless harbor and spread the disease to other citrus trees. As a result, effective eradication can be achieved only by enabling the Florida Department of Agriculture and Consumer Services ("the Department") to remove exposed trees before they exhibit disease symptoms.

The Department first detected citrus canker in South Florida in 1995, and instituted a conservative policy of pruning visibly infected citrus plants. When that approach failed, the Department progressed into the removal of both infected and exposed trees within a 125-foot removal radius. By 1998, it became apparent that this effort also failed to stop the spread of disease; the area in which citrus canker was discovered in 1995 had grown from a mere 14 square miles to *500* square miles. Accordingly, in 1999, the Department, based upon its practical experience with canker and its analysis of a peer-reviewed report by a renowned plant pathologist and epidemiologist, adopted a 1900-foot removal radius, which the Department determined was required to effectively eradicate the disease.

In October 2000, Broward County, several municipalities and individual residents thereof, all petitioners here, initiated declaratory, injunctive and inverse condemnation proceedings in the Broward County Circuit Court, embarking on an effort, now exceeding two and a half years, to derail the Department's citrus canker

eradication program ("the Program"). The litigation has resulted in two injunctions, both of which the Fourth District Court of Appeal has reversed, the latter of which, *Florida Department of Agric. & Consumer Servs. v Haire,* 836 So. 2d 1040 (Fla. 4th DCA 2003), is now before this Court for discretionary review. A copy of that decision is appended hereto.

STATEMENT OF THE CASE AND FACTS

I. The Department's practical experience with citrus canker.

The discovery of citrus canker in Florida and the nature of the disease are set out in *Florida Dep't of Agric. & Consumer Servs. v. City of Pompano Beach,* 792 So. 2d 539 (Fla. 4th DCA 2001), as follows:

> Citrus canker was discovered in Florida in 1914 and eradication programs continued through the mid 1930s. In the mid 1980s, an Asian strain of citrus canker, xanthomonas axonopodis pv.citri., the strain of citrus canker at issue in this case, was discovered in Manatee County. It was considered eradicated in 1992 and the eradication program halted in 1994. However, in 1995 an outbreak was discovered around the Miami International Airport.
>
> Citrus canker is a disease that is caused by a bacterial organism that attacks the fruits, leaves and stems of a citrus plant. It causes defoliation, fruit drop and loss of yield. It also causes blemishes on the fruit and a loss of quality. In severe cases, it can cause girdling of the stems and death of the tree.
>
> Stem lesions can survive for many years and are capable of producing bacterial inoculum eight to ten years later. Although symptoms of citrus canker may be seen seven to fourteen days after infection, the maximum visualization does not occur until approximately 107 to 108 days after infection. This makes it difficult to control a disease which easily spreads through wind-driven rain or contamination of equipment or plant material.

Id. at 541-42.

The United States Department of Agriculture declared an emergency in Florida following the mid-1980s canker outbreak, and the Department, fearing that canker would devastate the citrus industry and cause "a ripple effect" throughout the state, embarked upon an eradication effort, under which it removed diseased and exposed plants. (A:27:474).[1] *And see Department of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 26 (Fla. 1990). The Governor convened a special session of the 1984 Legislature, which enacted section 581.184, Florida Statutes (1984).

II. The Florida Legislature's findings.

The 2000 Florida Legislature amended the citrus canker laws in response to the increasingly acute nature of the emergency presented by the spread of the disease, and in its preamble set out the following findings:

- "an emergency exists in the South Florida area regarding the spread of citrus canker, a bacterial disease that damages fruit, weakens and eventually kills trees, is highly contagious, and the presence of which causes quarantines to be imposed on the shipment of fresh fruit";

- "joint state and federal attempts to eradicate citrus canker have so far been unsuccessful";

- "despite destruction of citrus trees infected with citrus canker and of citrus trees within 125 feet of canker-infected trees, citrus canker has spread at an alarming rate and is now present throughout Miami-Dade County and Broward County";

[1] The Department filed its brief in the Fourth District with an appendix in lieu of a record, pursuant to an expedited schedule. Record references here are therefore to that appendix in the Fourth District, and are designated as "A:".

- "if not eradicated quickly, citrus canker will spread to other parts of the state and may destroy the citrus industry and dooryard citrus throughout Florida"; and

- "recent scientific studies have shown that citrus trees as far as 1,900 feet from infected citrus trees will develop the disease from wind-blown rain or by other means";

Ch. 2000-308, Laws of Fla., prmbl.

III. The Program.

The Program commences with the surveying of property for citrus canker by teams of 2-3 trained surveyors acting under a team leader who communicates directly with property owners. (A:27:48, 1094-95, 1417). The survey is intended simply to identify citrus trees that appear to be infected and typically takes 10-15 minutes to complete. *Id.* at 49, 51, 1417, 1422. Upon finding an infected tree, a plant pathologist is dispatched to make the actual diagnosis. *Id.* at 440-41, 529-31, 1367-73, 1417. If the diagnosis is positive, the Department issues an Immediate Final Order ("IFO") of removal. *Id.* at 442. The surveyors then map a 1900-foot radius around each infected tree, deliver IFOs to property owners with citrus trees in the removal zone, and, assuming the absence of an appellate stay, remove those citrus trees. *Id.* at 442-44, 527-28, 1417. Periodic surveying for resprouting or replanting, and for new infections in outlying areas, is crucial to the Program's success in achieving effective eradication. *Id.* at 422-24, 649, 1107-09, 1411-12.

IV. Commencement of the citrus canker litigation.

In October 2000, Broward County, joined by several municipalities and named residents thereof, filed a Verified Complaint for Declaratory and Injunctive Relief and Claim for Inverse Condemnation against the Department. (A:1; A:2). The complaint challenged the Department's extant 1900-foot removal policy and rule establishing expedited IFO procedures, and sought to enjoin the Department from going forward under the Program. (A:1:8-18). The trial court entered a temporary injunction, pending a full evidentiary hearing. (A:6).

A 3-day evidentiary hearing ensued (A:7), following which the court conceded that the 1900-foot removal radius was based on "substantial, competent evidence" (*id.* at 12-13), but nonetheless permanently enjoined the Department from going forward with the Program in Broward County. *Id.* at 13-20.

The Fourth District vacated the judgment on appeal, finding that section 120.68, Florida Statutes (2002) provides meaningful review of IFOs, and directed the trial court on remand to dismiss the injunctive relief requests, for failure to exhaust administrative remedies. *Pompano Beach*, 792 So. 2d at 548.[2]

[2] The trial court subsequently certified an inverse condemnation class action on behalf of all non-commercial citrus tree owners in Miami-Dade and Broward Counties whose trees had been removed under the Program, but the Fourth District reversed that portion of the class certification order allowing non-Broward County residents to participate. *Florida Dep't of Agric. & Consumer Servs. v. City of Pompano Beach*, 829 So. 2d 928, 931 (Fla. 4th DCA 2002), *review denied*, SC02-2634 (Fla. Apr. 11, 2003).

V. The legislature's response.

The 2002 Florida Legislature, responding to the litigation[3], amended the citrus canker law to codify the Department's eradication efforts, in part, as follows: (i) section 581.184 was amended to direct the Department to remove citrus trees visibly infected with canker and all citrus trees located within 1900 feet of a visibly infected tree, and to provide property owners with more specific information concerning the diagnoses and the review procedures[4]; (ii) section 933.02 was amended to include the possession of property which may be subject to inspection and removal under section 581.184 as an additional ground for obtaining a search warrant; and (iii) section 933.07 was amended to authorize the Department to request an area-wide search warrant up to and including the size of the relevant county, but only after the issuing judge conducts a court proceeding upon reasonable notice, and to authorize Department employees and approved contractors to serve such warrants. *See* Ch. 2002-11, Laws of Fla.

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[3] Many of the Petitioners here also challenged the Program in the Division of Administrative Hearings (DOAH), which resulted in an order finding that the 1900-foot removal policy should have been adopted as a rule (A:12), which was upheld on appeal. *Florida Dep't of Agric. & Consumer Servs. v. Broward County*, 816 So. 2d 609 (Fla. 1st DCA 2002).

[4] The tree owner receives: (i) the physical location of the infected tree; (ii) the diagnostic report; and (iii) the distance between the infected and exposed tree. § 581.184(4), Fla. Stat. (2002).

VI. Events leading to the *Haire* decision.

A. The amended complaint.

In March 2002, Broward County, joined again by several municipal plaintiffs and individual residents thereof, all Petitioners here, filed an Amended Complaint for Declaratory and Injunctive Relief, together with a Motion for Temporary Injunction, in which proceeding Brooks Tropicals, Inc. intervened. (A:14; A:15; A:30). The amended complaint challenged the constitutionality of the 2002 citrus canker law on grounds that it violates due process and authorizes the unlawful search and seizure of private property. (A:14:18-19). This action also sought to enjoin the Department from (i) delivering IFOs, (ii) removing any citrus tree not visibly infected, and (iii) entering onto any person's property, even to search for canker, without a warrant or consent. (A:14:26-28; A:15:4-8).

B. The evidentiary hearing.

A 10-day evidentiary hearing ensued, during which both sides put forth expert testimony on the 1900-foot removal radius. (A:27:1-1763). The trial court also considered evidence presented during the 3-day hearing in November 2000, evidence obtained by the plaintiffs in discovery in the DOAH proceedings, and documents provided by the Department in response to numerous public records and document requests by Petitioners. *Id*. at 155-56, 1342.

(1) The science.

Soon after the 1995 outbreak in Miami-Dade County, the Program called for the removal of infected trees and citrus trees located within 125 feet of an infected tree. *Pompano Beach,* 792 So. 2d at 542. That removal radius did not abate citrus canker spread, however, and the Department determined to initiate a study to measure the distance that citrus canker spreads. (A:27:247-49, 361, 928-29). Dr. Tim R. Gottwald, a Fellow of the American Phytopathological Society (*id.* at 779-80), was tapped for the research because of his expertise in plant pathology and epidemiology, and he commenced his study in March 1998. *Id.* at 620-21, 928-29, 1144. The purpose of his research was to measure disease spread in a contiguous area. *Id.* at 928-29, 1035, 1144. Dr. Gottwald published the results of his study and his analysis thereon in a draft report initially, in which he advised that data was still being collected and analyzed. (A:27:224-33). The data that existed at the time of the initial draft, however, was "so weighty" that it was greater than the amount of data that most scientists would put into such a report; it was "very conclusive information and could be utilized for decision making." *Id.* at 233, 251-52.

In November 1999, Dr. Gottwald advised the Department at a meeting of the Florida Citrus Canker Technical Advisory Task Force, that his study confirmed that the prior 125-foot removal radius would be inadequate to accomplish effective eradication and that a removal radius of at least 1900 feet would be necessary to remove a sufficient proportion of diseased trees to accomplish effective eradication of citrus canker. (A:27:250-51; A:41:7-8; A:47). Importantly, exposed trees, and not just visibly infected trees, must be removed because apparently healthy trees can harbor and spread the disease before exhibiting signs of infection. (A:27:268, 700-01, 792-94).

Dr. Gottwald's study measured the spread of citrus canker, applying the "nearest neighbor" methodology, in 5 test sites within Miami-Dade and Broward Counties, which sites he personally selected. (A:27:260-61). He selected the sites because they showed a minimal (less then 1%) incidence of the citrus canker bacteria, thus making it easier to detect and measure the spread distance from a focal tree to a secondary source. *Id.* at 255-60, 639. The "nearest neighbor" methodology, commonly employed in plant pathology (*id.* at 785-86), measures "the shortest possible distance" of disease spread between the focal tree and a secondary tree (*id.* at 330-31) during identified 30, 60, 90 and 120-day temporal periods.[5] Dr. Gottwald

[5] These temporal windows are identified through an *ex post* analysis of the data based on the age of the lesion and the actual resulting infection period (they are *not* observational dates), and therefore the identified time periods themselves and the distance measurements during those periods were both constantly adjusted and changed as more data regarding infected trees was (continued...)

acknowledged that this model can result in an under-prediction of spread, particularly when a study site becomes saturated with infected trees. *Id.* at 787, 898. For those time periods at each site during which disease incidence was less than 5% (the epidemiological standard for preventing the "saturation effect" from obscuring the accuracy of spread distance measurements (*id.* at 787-88)), the use of the "nearest neighbor methodology" yielded data that demonstrated the need for a 1900-foot removal radius to effectively eradicate citrus canker. *Id.* at 868.[6]

Dr. Gottwald trained surveyors and pathologists involved in the study to give them a better understanding of the dynamics of the bacteria. *Id.* at 550-55. The study involved a two-tiered process: inspectors located citrus trees suspected of being infected with canker and pathologists then confirmed and dated the infections. *Id.* at 557-59, 621-22. Dr. Gottwald confirmed through field visits that the participants adhered to the protocol. *Id.* at 563-65. Dr. Xiaoan Sun, Chief Pathologist for the Program, was principally responsible for the diagnostic work, initially doing the identification and lesion dating himself and later assigning the task to diagnosticians whom he hand picked and directly trained in order to maintain consistency in the process. *Id.* at 240, 629-30, 634. Dr. Gottwald confirmed that although Dr. Sun would have personally performed the lesion dating for the temporal windows with less than 5% disease incidence, the diagnosticians he had trained were perfectly capable of accurately performing that responsibility. *Id.* at 809-15. The lesion dating methodology used in the study is a standard epidemiological principle which takes into account both dormancy and the multiple cycles of disease on the tree. *Id.* at 704-13, 799-802.

Dr. Gottwald's study was designed to measure the actual spatio-temporal dynamics of citrus canker spread in a real-world setting, a model commonly used in epidemiological studies. *Id.* at 940-41 1038-39. Dr. Gottwald did not use a control group because his study was not intended to serve as a clinical study that would measure the efficacy of alternative treatments. *Id.* at 940-41, 956-58. He noted the dissimilarities of the sites, particularly in terms of meteorological conditions, and commented that, from an epidemiological perspective, these dissimilarities served as a positive to the extent that the study produced a range of measurements, which could be applied to the larger, state-wide population. *Id.* at 348-49. Dr. Gottwald

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(...continued)

compiled and analyzed. *Id.* at 243-45, 788-92, 825-33, 835-41.

[6] Dr. Gottwald explained that the removal or failure to remove infected trees in the study sites during the study would have no effect on the spread distance measurements from each focal tree to its secondarily infected tree, but instead would only affect the amount of inoculum in the area and rate of spread, *not* distance. *Id.* at 864-67, 946-47, 1042-43.

then interpreted the data to determine from the ranges of spread measurements what degree of removal was necessary to depress reproduction rates to a level sufficient to stay ahead of the epidemic. *Id.* at 349-50, 723-24, 792-94, 863-68, 1509, 1548. He opined that a 1900-foot removal radius is reasonably necessary to effectively eradicate citrus canker in Florida. *Id.* at 867-68.

Dr. Gottwald's conclusion with respect to the 1900-foot removal radius is based on a compromise between the measurements ranges, which he confirmed is a standard practice in plant epidemiology. *Id.* at 658-59, 924. Its purpose is not to overshoot, and thereby remove more trees than would be reasonably necessary to eradicate the disease, but rather to capture 95-99% of the disease and then, through continued surveying, to catch whatever escapes and to eventually get ahead of the epidemic. *Id.* at 661-64, 723-24, 795-98, 860-64, 900-02, 1548-49. Dr. Gottwald rejected contentions that disease dormancy could create "false negatives," explaining that he disagreed that any dormancy period would exceed the 18-month time period of his study, emphasizing that if any sign of infection were missed it would be detected in the next flush. (*Id.* at 274-77, 801-15, 821-25).[7]

Dr. Gottwald's study was subjected to peer review, as the trial court recognized (A:28:27), which was anonymous: Dr. Gottwald did not select the peer-reviewers, nor did he know who they were. (A:27:668).[8] His report was published in the Phytopathology journal, after having been used by the Department in draft form and after the study and its results had been described in a letter to the editor published in Phytopathology. (A:27:710; A:43; A:45; A:46).

In the published article Dr. Gottwald explained the spatiotemporal study results, emphasizing that as a result of the saturation effect "the most important estimates of spread resulted from consideration of the first few temporal periods, during which longer distance estimates were less obscured" (A:46:369), and identifying those temporal periods in the published data tables relied upon in

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[7] Broward's assertion that Dr. Robert Stall, a retired plant pathologist who worked part-time for the Department, criticized Dr. Gottwald's distance measurements based on potential dormancy periods of the disease and concluded that the study was unreliable is not supported by the record citation provided. *Compare* Broward's Brief at 5, *with* A:27:206-07, 213-14, 216-17.

[8] Dr. Gottwald may have provided *Phytopathology* editors with the names of persons especially qualified to review the manuscript, but he did not select the peer-reviewers and did not even know their identity. (A:27:667-68). Moreover, *Phytopathology*'s policies are such that an author does not learn the peer-reviewers' identities. *Id.* at 1574-75.

determining a recommended removal radius. (A:46:373). The published article then expressly concluded:

> [I]t would appear from examination of results of the calculations presented that radii of ≥ 579 m [1900 feet] would be necessary to define exposed trees for removal to contain spread in many cases.

(A:46:373). Dr. Gottwald reaffirmed that opinion at trial. (A:27:895). Dr. Gottwald also testified that no treatment or control methodology other than the removal of exposed trees can achieve effective eradication (A:27:262). He further confirmed that he believed effective eradication of canker remained feasible, (*id.* at 869), and that even if the disease were re-introduced after eradication (which is commonly expected for eradicated plant diseases) it could be stomped out through the Department's sentinel tree program which is designed to locate and eliminate any such new infection outbreaks. *Id.* at 647-49, 887-93, 1052-53.

(2) The battle of the experts.

Dr. James Graham, a plant pathologist and citrus canker expert affiliated with the University of Florida (*id.* at 683-84), participated in Dr. Gottwald's study at all phases, including planning, implementation and data analysis. *Id.* at 716-18. He unequivocally endorsed Dr. Gottwald's study and noted that the Phytopathology journal in which it was published is the most "prestigious" journal published by the American Phytopathological Society. *Id.* at 710. Dr. Graham also opined that a 1900-foot removal radius is necessary to achieve sufficient disease capture to accomplish effective eradication of citrus canker. *Id.* at 723-24.

Dr. Lawrence V. Madden, a professor of plant pathology at Ohio State University also reviewed Dr. Gottwald's study in December 1999 and in November 2000, and he attended Dr. Gottwald's lectures. (A:27A:170, 173, 179). Dr. Madden, who dedicated his entire career to the study of plant diseases and the modeling analysis of plant epidemiology, and who also is the senior editor at a leading journal in that area, *Feitz Plant Pathology* (*id.* at 173), characterized his review of Dr. Gottwald's study as a "peer review." *Id.* at 180. He described the study as a measurement of what is actually happening in the real world, under real world conditions (*id.* at 189), and unequivocally concurred with Dr. Gottwald's study as "absolutely" supportable as a measure of the extent of citrus canker spread. *Id.* at

183, 185, 190. Dr. Madden ultimately recommended that the Department adopt the 1900-foot removal radius as appropriate for achieving effective eradication, based on Dr. Gottwald's study. *Id.* at 173, 185, 190.

John Scoggins, an applied econometrician, reviewed Dr. Gottwald's report and criticized it for assuming that all infected trees in the test sites had been identified. He suggested that it is possible that the measurement from the focal tree linked the wrong secondary tree. (A:27:91-98). Dr. Scoggins stated unequivocally, however, that his speculations were not intended to suggest that Dr. Gottwald's report should not have been published. *Id.* at 114. Moreover, he conceded that an epidemiologist, not an applied econometrician, is better equipped to research plant disease spread (*id.* at 116), and that his lack of epidemiological training limited his ability to authoritatively opine on whether the "nearest neighbor" methodology is appropriate for an epidemiological study. *Id.* at 127-28.

Bruce Davis, a geostatistician and an engineering consultant, also criticized Dr. Gottwald's study, characterizing it as "adequate for an observational study" but inapplicable to a larger population because of its failure to employ a control group and because it was not based on a random sampling of areas affected by citrus canker. *Id.* at 1232-43, 1281. Dr. Davis faulted the study for its failure to consider variables that potentially impact spread, and which are apparent in the varying rates of spread among the test sites. *Id.* at 1243-44, 1253-72. He, too, conceded his lack of experience in plant pathology, epidemiology and citrus canker; moreover, he admitted that he reviewed only 3 of 32 authorities cited by Dr. Gottwald (and none pertaining to citrus canker), all of which limited his ability to opine authoritatively. *Id.* at 1283-84. He conceded also that he could not conclusively confirm whether there is a specific model appropriate for a plant pathology or epidemiology study. *Id.* at 1291, 1307.

Dr. Gottwald disputed his critics' commentary regarding the lack of a control group, and defended his chosen methodology as appropriate for measuring the spread of citrus canker in a contiguous area, *i.e.,* he essentially studied the entire population of a universe that met the criteria for the disease spread study. *Id.* at 1490-94. He similarly rejected the suggestion that there should have been a cohort study to compare the efficacy of different treatments, because that is a model appropriate only in a clinical study. *Id.* at 1047-48. Dr. Gottwald further disputed that the "nearest neighbor" source of spread could have originated from outside the study sites because repeated surveys outside each site had shown there were no potential sources of infection closer than the nearest neighbor identified in the study. *Id.* at 288-89, 323-26.

Dr. Harald Scherm, a plant epidemiologist with the University of Georgia and an associate editor of *Phytopathology*, reviewed Dr. Gottwald's letter to the editor and his full paper published in April 2002. *Id.* at 1525-27. *And see*, (A:43; A:46).

He concurred with Dr. Gottwald's conclusions and endorsed Dr. Gottwald's use of the "nearest neighbor" methodology, noting its wide use in plant epidemiology. (A:27:1528-31, 1549-1551). He further approved Dr. Gottwald's method for selecting the test sites, confirming that the selection methodology was in accordance with generally accepted epidemiological principles, explaining that the subpopulation selected must be at risk of getting the disease. Therefore, Dr. Scherm explained, the selected subpopulation must be in areas to which the disease has already spread, but within which the saturation level is not so high that spread distance cannot reliably be measured. *Id.* at 1529-34. He furthermore concurred with the decision not to use a control group, explaining that, while such a methodology may be appropriate for a suppression study that relies on infection rate data, it has no application in an eradication study that relies on spread distance data. *Id.* at 1541-44, 1639-40. Acknowledging that, for practical reasons, infected trees were allowed to remain standing during the study, Dr. Scherm observed that such circumstances were irrelevant to Dr. Gottwald's study because while they may have related to disease incidence and the speed at which the disease spreads, they would have no effect on spread distance, the factor upon which a removal radius is based. *Id.* at 1541-45, 1557-59, 1609. Dr. Scherm also emphasized that variability in rates of spread among the study sites was to be expected due to varying weather events at the local level. *Id.* at 1543-44.

C. The 2002 injunction.

Three weeks after concluding the 10-day evidentiary hearing, the trial court announced its ruling in open court (*id.* at 1764-1819) and entered the injunction. (A:28). The trial court, without making any finding regarding credibility of any of the witnesses, charged that the Florida Legislature enacted the 2002 citrus canker law because it was "impatient with the judicial process" and condemned the Legislature for its "failure – or refusal" to "conduct a full adversary hearing" on the validity of the Program's scientific underpinnings. *Id.* at 1-2. Ultimately, the court declared the 2002 citrus canker law unconstitutional on due process and Fourth Amendment grounds and ruled, in pertinent part, as follows:

> (i) the 2002 amendments violate federal and state constitutional protections against unreasonable search and seizure;

> (ii) the science on which the Legislature acted is significantly unsound;
>
> (iii) trees that are not patently infected have a determinable value and cannot be destroyed without first allowing for a determination of fair compensation by appropriate condemnation proceedings;
>
> (iv) a warrant or consent is necessary before the Department can enter property even for purposes of inspection;
>
> (v) area-wide search warrants are prohibited; and
>
> (vi) search warrants must be executed by duly authorized law enforcement officers.

Id. at 30-31.

Following a series of post-order hearings, the trial court entered purported clarification orders, in which the court: (i) decreed that its injunction had statewide application (A:30); (ii) declared that the Department must obtain search warrants as a prerequisite to even inspecting for citrus canker, but precluded the Department from even seeking a warrant without first giving notice to counsel for the county in which the warrant is to be requested, and further prohibited the Department from relying on a property's proximity to a patently infected tree to establish probable cause (A:32; A:33); (iii) prohibited the Department from obtaining individual warrants based on a single application addressed to specifically identified properties; and (iv) prohibited the Department from obtaining warrants issued by a judge through an electronic signature under Chapter 668, Florida Statutes (A:35).

VII. The Fourth District's decision in *Haire.*

The Department appealed (A:38), and the Fourth District reviewed the order as "final," insofar as it made constitutional determinations and in light of the trial court's ruling "that after appellate review, all of the questions of law resolved in the order would become law of the case." *Haire,* 836 So. 2d at 1047 & n.2.

The Fourth District vacated the trial court's order in a comprehensive opinion, holding the trial court had erred with respect to both due process and also its construction of the search warrant statute. *Id.* at 1060.

A. Due Process.

The Fourth District recognized that the citrus industry has such significance on Florida's economic welfare and, directly or indirectly, on the welfare of the state's population, that it is within the state's police power to protect the industry. *Id.* at 1047 (*citing Johnson v. State,* 128 So. 853, 857 (Fla. 1930); *L. Maxcy, Inc. v Mayo,* 139 So. 121, 128 (Fla. 1931); *Coca-Cola Co., Food Div., Polk County v. State,* 406 So. 2d 1079, 1085-86 (Fla. 1981)). The court furthermore recognized that Florida appellate courts have routinely upheld the use of the police power to authorize the destruction of "apparently healthy citrus trees" under the Program and pursuant to prior Department rules. 836 So. 2d at 1047-48 (*citing Nordmann v. Florida Dep't of Agric. & Consumer Servs.,* 473 So. 2d 278, 280 (Fla. 5th DCA 1985); *Denney v. Conner,* 462 So. 2d 534, 537 (Fla. 1st DCA 1985)).

The court then considered this Court's decisions in *Corneal v. State Plant Board,* 95 So. 2d 1 (Fla. 1958), and *State Plant Board v. Smith,* 110 So. 2d 401 (Fla. 1959), upon which decisions *Nordmann* and *Denney* relied. 836 So. 2d 1048. The court gleaned from *Corneal* and *Smith,* that exigency sufficient to dispense with a

pre-deprivation hearing does not exist where the disease being eradicated is slow-moving and there is no provision for compensation. 836 So. 2d at 1048. Consistent with *Nordmann* and *Denney*, however, the Fourth District found that citrus canker poses a sufficiently imminent danger to dispense with a pre-deprivation hearing if there is a provision for compensation. 836 So. 2d at 1053.

The court then reviewed *Department of Agric. & Consumer Servs v. Mid-Florida Growers, Inc.,* 521 So. 2d 101 (Fla. 1988), and noted that this Court therein held that compensation is constitutionally required for the summary destruction of healthy trees for a public benefit. 836 So. 2d at 1049. The court upheld the summary destruction of infected and exposed trees under the 2002 canker law against the procedural due process challenge, because the statute does provide for compensation. *Id.* at 1050. As noted, the legislature adopted a per-tree minimum compensation allotment, but more importantly, unlike in forfeiture statutes, expressly provided in section 581.1845(4) that this allotment does not bar tree owners from bringing inverse condemnation actions for additional compensation. *Id.* at 1053-54 & n.5. The court held that the citrus tree owners' right to procedural due process here is protected by the combination of the floor compensation provision and the availability of inverse condemnation claims. *Id.* at 1054.

The court next addressed the substantive due process challenge, acknowledging the parties' disagreement as to the applicable test: The Department argued in favor of the rational basis test, whereas Petitioners argued that the statute must be narrowly tailored to adopt the least restrictive way of achieving the permissible end. *Id.* at 1050. The court noted that, under *Corneal,* where the

legislature authorized property destruction without compensation, the constitutionality inquiry was governed by "the narrowest limits of actual necessity" test. 836 So. 2d at 1051. Here, in contrast to the total lack of compensation under the statute in *Corneal*, the court noted that compensation is authorized in section 581.1845(4), rendering the rational basis standard applicable. 836 So. 2d at 1051.

The court also found support in *Miller v. Schoene,* 276 U.S. 272 (1928), in which the United States Supreme Court upheld under the rational basis test a Virginia statute that made it illegal to own, plant or keep alive any cedar tree which was either infected or may be the source or host of a communicable disease within two miles of an apple orchard. 836 So. 2d at 1050-51.

The court then considered the competing scientific evidence presented at the injunction hearing and noted that the legislature, though not limited to acting only under scientific certainty, had the benefit of Dr. Gottwald's peer-reviewed, published report, the advice of the Technical Advisory Board which reviewed the Gottwald report, and the Department's nearly 20 years of practical experience in fighting citrus canker. 836 So. 2d at 1052. The court concluded that any "debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment." *Id.* (*citing Sproles v. Binford,* 286 U.S. 374, 388-89 (1932)). The Fourth District therefore held:

> The Legislature's action was amply supported by the scientific studies and Florida's practical experience with citrus canker. The Legislature followed the recommendations of the scientific community to eradicate the disease. Destruction of exposed trees and those within the area where the disease is likely to spread is neither arbitrary nor capricious and bears a reasonable relationship to the goal of canker eradication.

836 So. 2d at 1052-53 (citation omitted).

The Fourth District alternatively considered the "narrowly tailored" test urged by Petitioners, and concluded that the 2002 canker law also passed constitutional muster under that heightened test, because there was no study or other record evidence to show that any other means were available to eradicate citrus canker. 836 So. 2d at 1053.

B. Search and seizure.

The Fourth District held that a warrant is required to search for citrus canker within the curtilage of a home, which can include the backyard of a residence, and that the exigent circumstances exception is inapplicable because "there is no danger the trees will be moved during the period of time necessary to get a warrant." *Id.* at 1057-58. Respecting area-wide warrants, authorized by section 933.02, the court held that "[a] search warrant merely describing the property to be searched as the entire county" is not sufficiently particular and therefore unconstitutional. *Id.* at 1058.

The court reversed the remaining restrictions imposed on the Department, holding that: (i) the trial court erred in imposing a single parcel requirement on the Department's search warrant applications, because all constitutional and statutory requirements are satisfied if an affidavit specifically describes each property to be searched (*id.* at 1058-59); (ii) the trial court erred in prohibiting the Department from relying on a property's proximity to an infected tree as probable cause for a warrant, since that is a "reasonable legislative . . . standard[]" (*id.* at 1059), and (iii) the trial court erred in prohibiting judges from electronically affixing their signatures to

warrants (like permissible ink-stamped signatures), there being no constitutional or statutory proscription. *Id.* at 1059-60.

SUMMARY OF THE ARGUMENT

The constitutionality of the 2002 citrus canker law is purely a question of law, reviewable by the Court *de novo*. While the form of the order reviewed is a preliminary injunction, which would ordinarily be reviewed for an abuse of discretion, the injunction is based exclusively on the trial court's determination that the 2002 statute is unconstitutional.

The Fourth District's procedural due process ruling is grounded on the availability of judicial review in Florida's appellate courts. The IFO procedure provides a 10-day window for an aggrieved property owner to seek a stay pending judicial review, and the 2002 law *does* provide both floor compensation and the opportunity to seek additional compensation through inverse condemnation claims.

The Fourth District properly analyzed the 2002 law under a rational basis inquiry, reviewing the evidence *de novo* and concluding that the trial court erroneously predicated the constitutionality ruling on its independent review of the science underlying the statute. It is, of course, not within the court's judicial authority to review the science and to choose between the competing experts. The judiciary must defer to the legislature's determination if there is any reasonable relation between the legislature's goal of eradication and its codification of the 1900-foot removal radius. Presented with a peer-reviewed published study by a leading expert in the relevant field, the trial court's inquiry should have ended. Petitioners'

attempt to circumvent the rational basis standard by contending that the statute deprives citizens of property without just compensation ignores that the Legislature has provided for a minimum compensation to tree owners whose trees are removed, and expressly mandated that claims for additional compensation can be adjudicated by the courts through inverse condemnation claims.

The Court should not reach the Fourth District's ruling on the search and seizure issues on this discretionary review which is predicated on the declaration of the constitutionality of section 581.184, which has no applicability to the statutory construction issues raised by Broward here regarding search warrants. Petitioners' search and seizure arguments are without merit in any event. Strict construction of Chapter 933 is perfectly consistent with allowing a single application for multiple warrants where the application and each warrant specifically identify the property to be searched under that warrant. Similarly, the use of an electronic signature by the issuing judge is entirely consistent with established legislative and judicial authority.

ARGUMENT

The finality of the issues adjudicated and the standard of review.

Broward argues that the trial court's order reviewed by the Fourth District granted only a "temporary injunction," that the order was reviewable for abuse of discretion, and that the statute's constitutionality was not ripe for plenary review. Not so. Broward misapprehends both the trial court's order and the applicable standard of review, and the case law upon which it relies is not supportive.

A. The order.

The trial court acknowledged the finality of its ruling, which adjudicated "the fundamental constitutionality of a statute." (A:28:6-7). The court stated in its conclusion that: (i) the 2002 canker law violates federal and state constitutional protections against unreasonable searches and seizures; and (ii) the science on which the legislature relied "is not constitutionally acceptable as a basis for" the legislation. *Id.* at 30. Most tellingly, the order expressly reflects the trial court's recognition that there remained pending only "a trial upon damages under prevailing inverse condemnation law," and that "[a]fter appellate review . . . all questions of law here resolved will become law of the case." *Id.* at 6. *And see Haire,* 836 So. 2d at 1047, n.2.[9]

Broward argues that a temporary injunction cannot decide the merits of a case, that a party is not required to prove its case in full in a temporary injunction, and that findings at a temporary injunction are moreover not binding at trial. Broward's Brief at 17. These general principles are not applicable here, however, and a review of the two cases upon which Broward relies is instructive. The Fourth District's decision in *Cox v. Florida Mobile Leasing Co.,* 478 So. 2d 1200 (Fla. 4th DCA 1985), does not provide any factual context within which the general rule was applied, and the United States Supreme Court's decision in *University of Tex. v. Camerisch,* 451 U.S. 390 (1981), upon which *Cox* relies, expressly states that the "general" rule limiting

[9] This Court's order denying bypass certification, *Florida Dep't of Agric. & Consumer Servs. v. Haire,* 824 So. 2d 167 (Fla. 2002), is not to the contrary and, in fact, did not pass on the finality of the trial court's order.

the finality of temporary injunction proceedings rest on the assumption that decisions made in that context are usually made in haste, do not purport to determine the actual merits of the controversy, and are based upon abbreviated proceedings that merely forecast the full evidentiary presentation that would follow in a full-blown trial. *Id.* at 397.

This assumption certainly presents circumstances radically different from those presented in this case. Here, the injunction was entered following a 10-day evidentiary hearing spanning three weeks which incorporated the additional evidence and testimony taken in a prior three-day evidentiary hearing, and which commenced 17 months into the citrus canker litigation. Moreover, prior to the hearing, Petitioners received voluminous discovery responses, including responses to public records requests and document requests, and answers to interrogatories, and they deposed numerous Department personnel and officials, including the Deputy Commissioner charged by the Commissioner with the primary responsibility for implementing the Program. The parties also had the benefit of prior administrative and judicial proceedings in which the Program was examined, including appeals therefrom.

Moreover, the trial court's order expressly declared the 2002 citrus canker law unconstitutional as the sole predicate for enjoining the Department from going forward with the Program as to any citrus tree located anywhere in Florida, not just those owned by Petitioners and not just those in Broward County. The constitutionality issue, not just a temporary injunction for those Petitioners in

Broward County,[10] was fully litigated. If additional proceedings were conducted, and Petitioners afforded the opportunity to present additional evidence in support of their arguments, Petitioners could do no more than inflame the "battle of the experts" and invite the trial court to once again impermissibly subject the legislature's choice to courtroom factfinding. Such circumstances are wholly unlike those considered in *Camerisch* and *Cox.*

Broward furthermore misplaces its reliance on *Identifax Investigative Serv. v. Viera,* 620 So. 2d 1147 (Fla. 4th DCA 1993), when it suggests that, to the extent the trial court's order does constitute a final ruling on the constitutionality of the 2002 canker law, the trial court erred and the Fourth District should have reversed and remanded for another trial. In *Identifax,* the Fourth District disapproved on procedural grounds the trial court's ruling on the merits in the context of an order *denying* a temporary injunctive relief request, and thereby effectively foreclosed the parties from proceeding to litigate the merits at a final injunction hearing. Here, in contrast, the trial court *granted* the injunctive relief requested, predicated on the underlying ruling that the 2002 canker law is unconstitutional and based on evidence determined by the court to be sufficient for the purpose it was submitted. Unlike *Identifax,* here there was nothing further to be presented to the court other than additional debate among the experts, which the Fourth District correctly held cannot

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[10] Of course, the geographic scope of an injunction is limited to the circuit in which it is entered. *Health Care Servs., Fla. Inc. v. Shevin,* 311 So. 2d 760, 760-61 (Fla. 3d DCA 1975), *appeal dismissed,* 334 So. 2d 608 (Fla. 1976); *Miami Health Studios, Inc. v. State ex rel. Gerstein,* 294 So. 2d 365, 367 (Fla. 3d DCA 1974); *accord, e.g., Lakeland Ideal Farm & Drainage Dist. v. Mitchell,* 122 So. 516, 518 (Fla. 1929).

affect the merits of the due process claim. In other words, the trial court's ruling on this point in favor of the plaintiffs-petitioners effectively obviated the need for the court to hear further argument on the constitutionality of the canker law, and Petitioners, having prevailed in the trial court, should not be heard to complain that the trial court cut their presentation short.

B. Standard of review.

While an order granting injunctive relief is reviewed for abuse of discretion, *Infinity Radio, Inc. v. Whitby,* 780 So. 2d 248, 250 (Fla. 4th DCA), *review denied*, 796 So. 2d 539 (Fla. 2001), when the injunction order rests on purely a legal matter (*e.g.*, the constitutionality), that underlying ruling is reviewed *de novo*. *Lowe v. Broward County,* 766 So. 2d 1199, 1203 (Fla. 4th DCA 2000), *review denied*, 789 So. 2d 346 (Fla. 2001); *State, Dep't of Ins. v. Keys Title & Abstract Co. Inc.,* 741 So. 2d 599 (Fla. 1st DCA 1999), *review denied,* 770 So. 2d 158 (Fla. 2000). The Fourth District in this case properly reviewed the trial court's order *de novo* insofar as it declared the 2002 citrus canker law unconstitutional, a decision that involved purely a question of law, and ultimately declared the statute valid. This Court also reviews the constitutionality of the 2002 canker law *de novo*, and begins with the presumption that the statute is constitutional. *Keys Title,* 741 So. 2d at 601.

II. The 2002 citrus canker law provides all the process that is due.

A. Procedural due process.

(1) The standard.

In *Denney v. Conner,* 462 So. 2d 534 (Fla. 1st DCA 1985), the court held that the Department "is allowed to act before according basic due process rights" where, as here, a valid emergency has been found to exist. *Id.* at 535 (citation omitted). In *Nordmann v. Florida Dep't of Agric. & Consumer Servs.,* 473 So. 2d 278 (Fla. 5th DCA 1985), the court approved the *Denney* rationale to allow the destruction of trees purchased from a nursery in which citrus canker had been detected, rejecting the property owner's contention that the Department "failed to show imminent danger justifying use of the state police power to destroy the trees." *Id.* at 279.

While the general rule is, of course, that due process is violated when a deprivation of a right has occurred without notice and an opportunity to be heard, *Joshua v. City of Gainesville,* 768 So. 2d 432, 438 (Fla. 2000), the United States Supreme Court has recognized the legitimacy of an immediate seizure of property where: (i) the seizure is "directly necessary to secure an important governmental or general public interest"; (ii) there is "a special need for very prompt action"; and (iii) the person initiating the seizure is a "government official responsible for determining, under the standards of a narrowly drawn statute, that it [is] necessary and justified in the particular instance." *Fuentes v. Shevin,* 407 U.S. 67, 91 (1972); *accord Boddie v. Connecticut,* 401 U.S. 371, 378-79 (1971). Particularly in cases involving property, the Supreme Court has stated:

> [I]t is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 303 (1981); *accord Catanzaro v. Weiden,* 188 F.3d 56, 63 (2d Cir. 1999).

(2) The 2002 law satisfies procedural due process.

Broward argues that the 2002 citrus canker law unconstitutionally deprives citrus tree owners of the opportunity for a meaningful pre-deprivation hearing (Broward's Brief at 33), but misstates the record when it repeatedly suggests that "canker... presented no imminent threat at all" and there is "limited spread potential." *Id.* at 34 & n.21. The Department's use of IFOs to eradicate citrus canker in the midst of an undisputed agricultural emergency, in a state where the citrus industry is a major component of the economy, fits squarely within the governing standard.

The nature of citrus canker and the present threat it presents to Florida's citrus industry is well-established, having been recognized by the United States Department of Agriculture and every branch of the state's government. *Haire*; *Pompano Beach*; *accord Bonanno*, 568 So. 2d at 26. There are, moreover, legislative findings establishing the imminent threat of citrus canker to Florida's citrus industry. *See* Ch. 2000-308, Laws of Fla., prmbl.

Broward's unfounded contention that the Fourth District found no imminent threat transposes the imminence of the threat in the context of "period of time necessary to get a warrant" because it is unlikely rooted trees will be moved during the limited time (measured in hours or days) before a warrant application is ruled

upon (*Haire,* 836 So. 2d at 1057-58), with the many months required for an eminent domain proceeding. A threat which may not be sufficiently "imminent" to dispense with a warrant requirement can certainly be sufficiently "imminent" to obviate a pre-deprivation eminent domain jury trial. Perhaps most compelling on this point is the undisputed fact that citrus canker is easily spread by wind driven rain. (A:28:2). *And see Haire,* 836 So. 2d at 1043 (*quoting, Pompano Beach*, 792 So. 2d at 542). The Fourth District was eminently correct in drawing that distinction here.

In *State Plant Board v. Smith,* 110 So. 2d 401 (Fla. 1959), this Court anticipated such imminent circumstances when it recognized that citrus diseases, which, like canker, are "carried by the wind or insects," pose the requisite imminent danger under which a post-deprivation compensation hearing is all the process that is due. *Id.* at 408. Because canker spreads by wind-driven rain, once it spreads to the groves it will be too late. Accordingly, *Denney* and *Nordmann* simply do not draw the artificial distinction that Broward proffers between trees located inside groves and those that threaten to infect those same groves. *See* Broward's Brief at 34. That is because canker's spread potential is not "limited," as argued by Broward; the inoculum progresses towards the groves by leaps and bounds with each rain storm, defeating any status quo preservation that might ordinarily result from a temporary injunction. Requiring the state to delay its eradication efforts until after eminent domain jury trials have been completed for each exposed tree would inevitably result in the failure of the Program and the state's eradication effort.

Broward suggests that a distinction lies between an imminent threat to human health and the economic threat that citrus canker presents, and contends that under

the latter a pre-deprivation hearing is required. This contention is at odds with the Florida Citrus Code, in which the legislature recognized the citrus industry's importance to the "health and welfare" of Florida's citizens. §§ 601.02(1) & (2), Fla. Stat. (2002). *And see* § 601.154(1)(g), Fla. Stat. (2002).

Broward also misstates both the record and the governing law, when it contends that the availability of a judicial review of an IFO and a stay "does not provide a meaningful pre-deprivation hearing." Broward's Brief at 35-36.

Principally, the only "irreparable injury" alleged is the removal of trees without an opportunity to be heard.[11] The issue then is whether the remedy of judicial review provided under section 120.68, Florida Statutes (2002), is adequate to permit an IFO recipient to timely seek and obtain a stay from an appellate court within 10 days after the delivery of the IFO, because, obviously, if the trees are not removed then there cannot be irreparable injury.[12] The Fourth District directly adjudicated this issue in *Pompano Beach,* when it held in a prior appeal in this case that the availability of review of IFOs in the district courts of appeal provides an adequate judicial remedy. 792 So. 2d at 542-44, 546. That "law of the case"

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[11] The removal of fungible trees is, of course, *not* the type of irreparable injury that would warrant an injunction. Indeed, even in quarantine areas citrus trees can be replaced with non-citrus trees and, ultimately, trees are replaceable and their removal is compensable. The pending inverse condemnation class action asserting that position in this very case precludes Petitioners from contending otherwise here.

[12] The United States Supreme Court has recognized that 10 days is sufficient notice to satisfy due process. *Atkins v. Parker*, 472 U.S. 115, 119 & 131 (1985); *accord Schraner v. Schraner (Emerson)*, 110 So. 2d 33, 36 (Fla. 1st DCA 1959).

determination is not now open for discussion. *Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105-06 (Fla. 2001).

The 2002 Florida Legislature, moreover, specifically altered critical aspects of the IFO process to assure greater procedural due process then had existed under the 2000 version of the law, which the Fourth District upheld in *Pompano Beach*. Under the 2002 enactment: (i) the IFO recipient has 10 days (increased from the 5 days previously allowed) to seek and obtain a stay from an appellate court; (ii) the IFO provides in writing the location of the infected tree, the distance from the infected tree, and the underlying diagnostic report; and (iii) the IFO includes forms for filing an appeal and requesting a stay. (A:51). Any IFO-recipient who wishes to seek a stay to enable them to obtain expert testimony, photographs, videotape or other evidence to substantiate their damage claim has an adequate remedy for doing so under sections 120.68(3) & (7), Florida Statutes (2002). *Pompano Beach,* 792 So. 2d at 545-46.[13]

The record is clear here that individual citrus tree owners in Broward County, including several of the Petitioners here, have perfected appeals and have obtained stays pending such review. *See, e.g.,* A:27:1179, 1208, 1216, 1217-20. Moreover, there is no evidence in the record that any tree has been removed before an appellate court has considered and ruled on a motion for stay filed within the statutory period. The denial of a stay or its vacation after review demonstrates precisely that a litigant *has* received due process through judicial review, and disproves a futility of process.

[13] There is no suggestion here that it would be appropriate under Rule 1.520, Florida Rules of Civil Procedure, or required by due process, for the jury in an inverse condemnation proceeding to view the tree itself.

B. Substantive due process.

(1) Overview.

Broward contends that the Fourth District committed three reversible errors in upholding the 2002 citrus canker law under the substantive due process analysis: (i) the court "erroneously ruled that *Corneal*'s exacting judicial scrutiny was inapplicable"; (ii) the court "erroneously determined that state destruction of property should only be subjected to rational basis scrutiny"; and (iii) the "court substituted its own factual findings for those of the trial court." Broward's Brief at 19. Brooks devotes almost the entirety of its brief to a trumpeting of their assault on the factual foundation for a 1900-foot removal radius.

It matters not who had the better of the debate among experts below regarding the science underlying the 1900-foot removal radius, although the record fully supports the Department's contention that it did so by a wide margin. The only thing germane to the constitutionality of the 2002 statute is that there *was* a debate, which the trial court characterized as "a battle of the scientists." (A:27:1395). The Legislature was not a defendant in a trial court proceeding where the winner is declared on the basis of which side put forward the greater weight of factual evidence. That a peer-reviewed publication may be subject to criticism by certain segments of the scientific community, does not allow the judiciary to second guess the legislature's decision to rely upon one side of the scientific debate supported by the peer-reviewed publication.[14]

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[14] Brooks ironically relies upon peer-reviewed, published articles to argue that the peer review process provides no credibility. Brooks' Brief at 32, 36, 40.

(2) The standard.

The bedrock principle, entrenched both in federal and Florida constitutional law, is that due process requires that the law shall not be unreasonable, arbitrary, or capricious, and that the courts must therefore determine only whether the means selected by the legislature bear a reasonable and substantial relation to the intended purpose. *Ilkanic v. City of Ft. Lauderdale*, 705 So. 2d 1371, 1372 (Fla. 1998); *Lane v. Chiles,* 698 So. 2d 260, 263 (Fla. 1997); *accord Lite v. State,* 617 So. 2d 1058, 1060 n.2 (Fla. 1993) (applying rational basis review while noting only that heightened scrutiny may apply under an equal protection analysis to actions that abridge a fundamental right or adversely affect a suspect class); *In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d 233, 235-36 (Fla. 1992) (only purporting to add a "less restrictive alternative" component to the rational basis review of a penal forfeiture statute); *c.f., Palm Harbor Special Fire Control Dist. v. Kelly,* 516 So. 2d 249, 251 (Fla. 1987) (applying heightened scrutiny only under equal protection analysis of suspect class); *State v. Leone,* 118 So. 2d 781 (Fla. 1960) (only purporting to add a "less restrictive alternative" component to *regulation* of pharmacies).

This Court has explained that, when the legislature exercises its police power:

> The fact that the legislature may not have chosen the best possible means to eradicate the evils perceived is of no consequence to the courts provided that the means selected are not wholly unrelated to achievement of the legislative purpose. A more rigorous inquiry would amount to a determination of the wisdom of the legislation, and would usurp the legislative prerogative to establish policy.

Fraternal Order of Police Metro. Dade County, Lodge No. 6 v. Department of State, 392 So. 2d 1296, 1302 (Fla. 1981) (citation omitted). Accordingly, "[t]he absence of record justification for the legislation is not dispositive," and it is "entirely irrelevant whether the conceived reasons actually motivated the legislature." *Agency for Health Care Admin. v. Hameroff,* 816 So. 2d 1145, 1149 (Fla. 1st DCA), *review*

denied, 835 So. 2d 266 (Fla. 2002) (*citing Federal Communications Comm'n v. Beach Communications, Inc.,* 508 U.S. 307 (1994), *petition for certiorari filed,* 71 U.S.L.W. 3667 (U.S. Mar. 31, 2003). As the First District recently explained:

> This presumption of constitutionality is a paradigm of judicial restraint and an acknowledgement of separation of powers principles. As the Court explained, "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation'. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."

816 So. 2d at 1149 (*quoting Ferguson v. Skrupa,* 372 U.S. 726 (1963)). And of course, the burden is upon the party challenging legislation to "negat[e] *every conceivable rational basis which might support it.*" 816 So. 2d at 1149 (*citing Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955)). Ultimately,

> it is not within the province of the judiciary to decide on the wisdom and utility of the legislature's action, but rather to determine whether any conceivable set of facts arguably supports it. Even if the assumptions underlying the rationale are erroneous, the very fact that they are arguable is sufficient, on rational-basis review, to immunize the congressional choice from constitutional challenge.

816 So. 2d at 1149-50 (internal quotations and citations omitted). *Accord Vance v. Bradley*, 440 U.S. 93, 111 (1979); *Danbridge v. Williams,* 397 U.S. 471, 485 (1970); *McGowan v. State of Md.,* 366 U.S. 420, 426 (1961).

In *L. Maxcy, Inc. v. Mayo,* 139 So. 121 (Fla. 1931), this Court emphasized that "the burden [is] always on the attacking party to establish the invalidating facts claimed to exist." *Id.* at 129 (citations omitted). The Court then squarely *rejected* the tree owners' argument that the existence of a less restrictive alternative to the statute's complete ban against any use of arsenic – regulating arsenic levels in sprays – rendered the statute unconstitutional under the due process clause:

> [F]or the Legislature by statute to attempt a mere regulation of the use of arsenical sprays on thousands of citrus trees scattered about the state as they are, and subject to being sprayed by the growers at varying times throughout the year, would require the state to provide an army of enforcement officers to execute such a law. That would result in such grave difficulties in the way of results from attempted enforcement, as to suggest the likelihood that the legislative measure would prove wholly ineffective for the particular purpose designed to be accomplished.

Id. at 130.

Both this Court and the United States Supreme Court have emphasized that the mere existence of a debate among experts ends the due process challenge conclusively.

> [I]f any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the courts, and the deference due to the legislative judgment in the matter will be observed in all cases where the court cannot say on its judicial knowledge that the Legislature could not have had any reasonable ground for believing there were public considerations justifying the particular classification and distinction made.

Yoo Kun Wha v. Kelly, 154 So. 2d 161, 166 (Fla. 1963) (citation omitted). *Accord*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981).

In *Sproles v. Binford*, 286 U.S. 374 (1932), the Supreme Court upheld a statutory amendment that limited the net weight and size of trucks operating over the state's highways, and rejected a due process challenge that the amendment was "opposed to sound engineering opinion." The Court held that, "[w]hen the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own

judgment." *Id.* at 388-89. *And see, Meehan v. Kansas Dep't of Revenue,* 959 P.2d 940, 944-45 (Kan. Ct. App. 1998) (upholding breathalyzer testing statute against due process challenge because, "where scientific opinions conflict on a particular point, the Legislature is free to adopt the opinion it chooses, and the court will not substitute its judgment for that of the Legislature") (*citing, People v. Ireland,* 39 Cal. Rptr. 2d 870, 877 (Cal. Ct. App. 1995)).

(3) There is no basis for imposing a more onerous standard.

(a) *Corneal*'s "actual necessity" test does not apply.

Broward contends that the Fourth District misapplied the Supreme Court's holdings in *Corneal v. State Plant Bd.,* 95 So. 2d 1 (Fla. 1947), and in *Smith v. Plant Bd.,* 110 So. 2d 401 (Fla. 1959), and misapprehended the 2002 citrus canker law when it used a rational basis test instead of *Corneal*'s "narrowest limits of actual necessity" standard, which test Broward contends is applicable unless the Legislature provides for full compensation. Broward's Brief at 19-23.[15]

In *Corneal,* the Court addressed a statutory scheme akin to a forfeiture statute, insofar as the legislature had declined to provide for statutory compensation or any right to judicial compensation. Under those circumstances, this Court found that the state must show there is an actual necessity for the taking of property in order to attain the legislative goal, and thus that there is no less restrictive means by which that legislative goal can otherwise be achieved.

[15] Brooks' reliance on *Keshbro, Inc. v. City of Miami,* 801 So. 2d 864 (Fla. 2001), is misplaced because that decision expressly did *not* considered any due process challenge. *Id.* at 876 & n.20.

The fundamental flaw in Petitioners' position is that section 581.1845 *does* expressly provide for compensation for the destruction of trees, and *does* expressly allow for additional compensation through the courts. Indeed, payment of compensation to homeowners whose citrus trees are removed under the Program is mandated under section 581.1845(1), and the legislature set a minimum compensation structure under sections 581.1845(3) and (6). The statute plainly sets a floor below which a damage award cannot fall, and, equally important, *expressly* provides that the floor "does not limit the amount of any other compensation" which may be ordered by a court to effectuate the required compensation. § 581.1845(4), Fla. Stat. (2002). The availability of inverse condemnation proceedings (currently pending in the trial court) provides a vehicle through which such "other compensation" may be awarded. Nothing further is necessary to satisfy the constitutional requirements for compensation.

The statute certainly does not need to include any greater precision regarding the *amount* of compensation than here exists. Indeed, greater precision would be improper because the amount of compensation is not fixed by the legislature, but rather it is appropriately left for the judiciary to determine what, if any, "other" amounts may be compensated. *Bonanno,* 568 So. 2d 24, 30-31; *Smith,* 110 So. 2d at 406-07. Accordingly, by mandating that the Department "shall provide compensation," and leaving to the courts the issue of whether amounts above the statutory floor are required, the 2002 Legislature – like the 1957 Legislature referenced in *Smith* – could not "have done more." *Smith,* 110 So. 2d at 406.

Broward posits that if the least restrictive alternative test does not apply where the legislature expressly provides a minimum floor of compensation and for the right to seek additional compensation from the courts, then the test would be "toothless" because "an inverse claim can be raised every time" the state takes property. Broward's Brief at 21 Of course, inverse condemnation is *not* always available. There certainly is no compensation in the context of a criminal forfeiture, which supports the "least restrictive alternative" test in that context. *E.g., In re Forfeiture of 1969 Piper Navajo,* 592 So. 2d at 235; *Department of Law Enforcement v. Real Property,* 588 So. 2d 957, 964 (Fla. 1991). The Fourth District correctly distinguished section 581.1845 from forfeiture statutes in which the legislature has not provided for recourse to the courts for compensation.[16]

Broward also contends that the Fourth District's *Haire* decision represents "the first appellate court to subject state destruction of private property to mere rational basis scrutiny" and "ignored the fundamental difference between regulation

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[16] The amount of the compensation properly awarded to tree owners is currently before the Court in *Patchen v. State Dep't of Agric. & Consumer Servs.,* 817 So. 2d 854 (Fla. 3d DCA), *review granted,* 829 So. 2d 919 (Fla. 2002), in which case the Court will determine the actual value of trees infected with and exposed to citrus canker. That the Department has argued in *Patchen* that the courts should award zero dollars of additional compensation does not transform section 581.1845 into a forfeiture statute, under which property owners have no recourse to the courts for any compensation. The threat of court-ordered compensation here for the many hundreds of thousands of trees removed under the Program alone provides "strong incentive to destroy only what is necessary," which even Broward concedes is sufficient to trigger rational basis review. *See* Broward's Brief at 21.

and destruction of private property." Broward's Brief at 19. Broward has it precisely reversed: If Broward were to prevail on its argument then this would be the first time that a court applied strict scrutiny to a property destruction case, in which there is a statutory provision for compensation and an available inverse condemnation right.[17]

Broward's argument ultimately reveals its illogic when it suggests that legislation to destroy every backyard citrus tree in the state would also be rationally related to the eradication goal. Broward's Brief at 25. It is untrue, however, that every citrus tree in the state presents a reasonable threat of harboring the disease regardless of its proximity to a known infected tree. Both the testimony below (A:27:1386-88) and the published peer-reviewed article supporting the legislation are to the contrary (A:46): Only those citrus trees exposed to infection (whichever

[17] Broward's suggestion that there is a greater need for meaningful judicial scrutiny here because the state will benefit financially from the legislative finding that the infected and exposed citrus trees present an imminent danger (Broward's Brief at 26, *citing Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 626 (Fla. 1990)), is completely misguided. In that case the trial court struck as unconstitutional a statute which imposed a development moratorium on property in transportation corridors, based on the legislature's "candidly" conceded intent "to reduce the cost of acquisition should the state later decide to condemn the property." *Id.* at 626. It was that undisputed improper legislative purpose which violated due process. *Tampa-Hillsborough Expressway v. A.G.W.S.*, 640 So. 2d 54, 57-58 (Fla. 1994). The circumstances in *Joint Venture* are inapposite. Certainly, *Joint Ventures* does *not* suggest that inverse condemnation is not an adequate remedy for a taking of trees or that tree owners are entitled to prove the value of their trees in eminent domain proceedings before the trees are removed.

the legislature could reasonably determine them to be) reasonable threaten to harbor the disease; and the legislative power is limited to that extent and no more.

(b) *Miller v. Schoene* does apply.

Broward also argues that the Fourth District misapprehended *Miller v. Schoene,* 276 U.S. 272 (1928), and that the *Miller* decision does not support application of the rational basis standard in this case because the Supreme Court in that case "addressed the destruction of infected cedar trees in close proximity to apple orchards." Broward's Brief at 23. That is not so.

In *Miller v. Schoene,* 276 U.S. 272, 277 (1928), the Supreme Court upheld as constitutional a statute which authorized the destruction of ornamental red cedar trees – without compensation to the owner – to prevent the communication of a plant disease. The Court held that "the preferment" of the public interest in preventing the spread of plant disease over the property interest of the individual, even where property is destroyed, "is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.* at 279-80. More importantly, the Court there considered infected *and exposed* cedar trees. The statute there contemplated the removal of trees that were infected *and* trees that were a source for infection – in other words, trees that "may be" infected based upon their proximity to known infected trees. *Miller v. Plant Entomologist,* 135 S.E. 813, 817-18 (Va. 1926), *aff'd sub nom. Miller v. Schoene,* 276 U.S. at 277.

Moreover, the 1-2 mile "buffer" limitation in *Miller* cited by Broward constitutes a distinction without a difference. Buffer zones were examined here by

the legislature and the Department with respect to canker, and rejected because the build-up of inoculum outside any buffer area could always be carried into the groves by a hurricane or other extreme weather event, or manually. (A:27:498-501, 1386). There is no evidence that legislative determination was not reasonably related to a valid legislative goal of protecting Florida's citrus industry. The threat to Florida's citrus industry in this case is precisely on point with the threat contemplated by the Supreme Court in *Miller,* and the legislative remedy of eradication through removal of all exposed trees should be similarly approved.

(c) The least restrictive alternative test has been satisfied in any event.

Broward's contention that the least restrictive alternative test could not have been satisfied because the record in this case does not establish that "Florida's citrus industry could not co-exist with citrus canker," or that there is "certainly no evidence that 'exposed' trees far away from groves could not possibly co-exist with the groves" (Broward's Brief at 24), plainly misstates the record (A:27:500-01, 1386), and ignores the uniform testimony of the plant pathologists and plant epidemiologists that a 1900-foot removal radius is "reasonably necessary" to eradicate canker. (A:27:867-68, 723-24, 1550). *And see* 607-08, 1487-90. It also ignores that any such potential co-existence of canker and citrus groves would not satisfy the statutory objective of effectively eradicating canker (*See* 2000-308, Laws of Fla., prmbl.), and is therefore not a less restrictive means of achieving that legislative goal. Moreover, the Fourth District correctly pointed out that Petitioners failed to produce evidence of less restrictive alternatives to the 1900 foot removal radius which would satisfy the legislative goal of canker eradication (*Haire,* 836 So. 2d at 1043-44), and no evidence that the legislative goal of eradication is somehow improper.

(d) The compelling governmental interest test certainly does not apply.

Broward argues for the first time that the "strict scrutiny" test applicable to First Amendment challenges to content-based speech restrictions should be applied to this due process claim, and that, even if the Fourth District were correct in concluding that this record showed the lack of less restrictive alternatives, there still was no evidence that eradication of canker constituted a "compelling government interest." Broward's Brief at 27. Broward does not cite to any precedent applying such "strict scrutiny" to the taking of property. Moreover, the very property seizure cases to which it does cite only apply the "least restrictive alternative," or "actual necessity," test to property seizures without compensation. *E.g., Corneal*, 95 So. 2d at 4. Under that standard, regardless of whether there is a "compelling government interest" in eradicating canker, the record demonstrates that the Legislature's eradication goal was reasonable, in light of evidence that control measures, windbreaks and buffer zones would not protect Florida's citrus industry (and thus the state's economy) from the threat posed by canker so long as the disease remained at detectable levels in this state. (A:27:262, 498-501, 607-08, 713-15, 742-43, 1386, 1487-88) *And see* 2000-308, Laws of Fla., prmbl.

(4) The rational basis.

The Legislature enacted the 2002 citrus canker law to protect the state's citrus from disease and quarantine through effective eradication. Because the enactment constitutes an amendment of Chapter 581 "soon after controversies as to the interpretation of the original act" arose, courts are to consider it "a legislative interpretation of the original law and not as a substantive change thereof." *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999) (citations omitted); *accord Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 217 (Fla. 1st DCA 1983), *approved*, 452 So. 2d 932 (Fla. 1984). Thus, the legislative purpose expressed in the factual findings set forth in Chapter 2000-308, Laws of Florida, is equally applicable to the 2002 citrus canker law. Both legislative enactments seek to protect Florida's citrus industry by attempting to eradicate citrus canker, as a valid exercise of the police power. *See Mayo v. Polk County,* 169 So. 41, 44 (Fla. 1936); *Johnson v. State*, 128 So. 853, 857 (Fla. 1930).

The record *amply* supports the 1900-foot removal zone under the foregoing rational relationship analysis. Dr. Gottwald, seconded by a plant pathologist and two plant epidemiologists, testified that his study both supports and provides a proper basis for the 1900-foot removal zone codified in the 2002 citrus canker law, and that its implementation is necessary to effectively eradicate citrus canker to non-detectable levels. Dr. Gottwald's study has been closely examined by regulators, university scientists, federal scientists and leaders of the citrus industry. His report was published in the leading plant pathology journal, Phytopathology, after blind

peer review. The existence of contrary expert opinions cannot create a due process violation. There simply is no precedent for striking a statute on due process grounds where the underlying scientific evidence is predicated upon a peer-reviewed published article.

The weight of expert opinion in any event tilted unequivocally in favor of Dr. Gottwald's peer-reviewed study. Both experts presenting views contrary to Dr. Gottwald (an econometrician (A:27:91-92), and a geostatistician (*id.* at 1232)) conceded that an epidemiologist would be better equipped to research plant disease spread and to opine conclusively on the efficacy of Dr. Gottwald's study. *Id.* at 116, 127-28, 1291, 1307.

The proponents of Dr. Gottwald's study are distinguished in the relevant scientific fields. Dr. Graham is a plant pathologist and citrus canker expert affiliated with the University of Florida. *Id.* at 683-84. Dr. Scherm is a plant epidemiologist with the University of Georgia, and an associate editor of the Phytopathology journal. *Id.* at 1525-26. Dr. Madden is a professor of plant pathology at Ohio State University, has dedicated his career to the study of plant diseases and the modeling analysis of plant epidemiology, and is the senior editor at the leading journal in that area, Feitz Plant Pathology. (A:27A:170, 173).[18]

[18] Contrary to Broward's assertion, Dr. Gottwald did not block his peer-reviewers from having access to the data underlying his published report, and the transcript pages to which Broward cites say nothing of the sort. Broward's Brief at 28. Moreover, the published article itself belies Broward's contention that "only a small portion" of Dr. Gottwald's report related to the 1900-foot removal radius and that it was "the other issues" that supported publication. Broward's Brief at 29. There is no indication that the peer-reviewers approved the report based on anything less then its entire

(continued...)

Faced with such expert testimony in support of the scientific basis behind an act of the legislature, the judiciary cannot strike down that legislation on due process grounds because a judge finds the opinions of opposing experts more persuasive.

(...continued)

content including its extended discussion of the 579-meter (1900-foot) removal radius. (A:46:373).

III. Search and seizure.

A. The Court should limit its discretionary review to the constitutionality of section 581.184, Florida Statutes (2002).

Petitioners invoked the Court's jurisdiction and the Court granted review here on the sole ground that the Fourth District upheld the constitutionality of section 581.184 Fla. Stat. (2002). The search and seizure issues raised only by Broward, however, are bereft of any constitutional challenge to the Fourth District's decision, and are admittedly grounded exclusively on principles of statutory construction. *See* Broward's Brief at 37-38 & n.27. Accordingly, this case accordingly falls squarely within the guidelines established by the Court for confining its review to the issue that has provided the jurisdictional basis for review[19], and declining to consider non-jurisdictional issues that are not dispositive of the issues upon which jurisdiction is grounded.[20] This Court should accordingly and consistently limit its review here to the constitutionality issue, and not concern itself with the sundry statutory construction issues that Broward has raised in its brief, none of which are dispositive of the constitutional issue.

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[19] *E.g., Chester v. Doig,* 842 So. 2d 106 (Fla. 2003) (limiting discretionary review to certified question).

[20] *E.g., Murray v. Regier,* 2002 WL 31728885, n.5 (Fla., Dec. 5, 2002). *Savona v. Prudential Ins. Co. of Am.,* 648 So. 2d 705, 707 (Fla. 1995).

B. Warrant procedures.

Broward urges that the Court strictly construe section 933.01, Florida Statutes (2002), which sets forth the requirements for each "warrant," and thereon contends that such reference reflects the legislature's intent to proceed only on individual applications for each warrant. Broward's Brief at 39. While the statute contemplates a warrant directed at a single property, it is completely silent on the use of a single application seeking multiple individualized warrants. Broward's argument plainly is the antithesis of strict construction.

Broward additionally argues that because an application for an inspection warrant under sections 933.20-30 requires consent (§ 933.26, Fla. Stat. (2002)), the same requirement should be implied into the provisions of section 933.01-19 governing warrants to search for and destroy infected trees and trees exposed to infection under section 581.184 (*see* § 933.02(4)(e), Fla. Stat. (2002)) – even though the legislature saw fit to include that requirement only for inspection warrants, and not the warrants at issue here. Broward's effort to engraft a consent requirement into a statute in which the legislature has excluded that requirement is, again, the antithesis of strict construction.

Broward cites to no other statutory language that purports to require a separate application and affidavit for each warrant, and thus there is no statutory language to "strictly construe." Ultimately, instead of strict construction, the issue here is whether strict compliance with the literal language of Chapter 933 is required under the Fourth District's decision. It is. A showing of probable cause to search multiple

properties through a single application and supporting affidavit strictly complies with the literal statutory language of Chapter 933. Indeed, *State v. Tolmie,* 421 So. 2d 1087 (Fla. 4th DCA 1982), upon which Broward relies, makes this point. The court there was only concerned with whether an unsigned affidavit strictly complied with the statute's express requirement that the affidavit be subscribed. In sum, Chapter 933 sets out the limitations and requirements that govern search warrant applications, and the procedures approved by the Fourth District strictly comply with those limitations and requirements.

Broward next contends that the Fourth District again violated the rules of strict construction when it determined, based on the absence of any requirement to the contrary, that the judge issuing a search warrant may do so by an electronic signature. Broward's Brief at 41. The fundamental flaw in this argument is self-evident: The statute does not prohibit the use of an electronic signature and so there is no statutory language on point to strictly construe.

The requirement that a search warrant contain the signature of the issuing judge is statutory, not constitutional. *E.g.* § 933.07, Fla. Stat. (2002); § 668.004, Fla. Stat. (2002); §§ 116.34(2) & (3), Fla. Stat. (2002). *And see State v. Hickman,* 189 So. 2d 254, 258 (Fla. 2d DCA), *cert. denied*, 194 So. 2d 618 (Fla. 1966) (approving facsimile signature on warrant because, in the absence of contrary statutory proscription, "it is immaterial with what kind of an instrument a signature is made" on the warrant); *People v. Stephens,* 297 N.E.2d 224, 226 (Ill. App. Ct. 1973) (upholding warrant bearing ink-stamped stamp signature because "[i]t is the intent of

the person executing his signature, not the manner by which it is executed, which determines the signature's validity").

CONCLUSION

The court should deny the petition for review, affirm the Fourth District's *Haire* decision in all regards, and grant such other and further relief as the Court shall deem appropriate.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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