IN THE SUPREME COURT OF FLORIDA

CASE NOs. SC03-446 and SC03-552 (consolidated)

Lower Court Case Nos. 4D02-2584 and 4D02-3315 (consolidated)

JOHN M. and PATRICIA A. HAIRE, CAROLYN SELIGMAN, LAZ and ELLEN SCHNEIDER, SUSAN B. PETERSON, STEPHEN M. WOLFMAN, ROBERT SCHERER, SUSAN and HIRAM FRANK, JUDITH and BERNARD MACNOW, BROWARD COUNTY, MIAMI-DADE COUNTY, CITY OF PLANTATION, CITY OF FT. LAUDERDALE, CITY OF POMPANO BEACH, CITY OF CORAL SPRINGS, TOWN OF DAVIE, CITY OF HOLLYWOOD, CITY OF BOCA RATON and VILLAGE OF PINECREST,

Petitioners,

vs.

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

Respondents.

PETITIONERS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The state contends that citrus canker ("canker"), a cosmetic plant disease, presents a substantial economic threat to the citrus industry in Florida. Canker blemishes do not affect the taste or internal quality of the fruit. Canker has no impact, whatsoever, on human health or safety. **(**T:472).[1] The state has been attempting to eradicate canker in Florida since the 1980s. (A:2:1; T:423).

The state's eradication program removes canker-infected trees and certain healthy trees in the vicinity of infected trees. The healthy trees are destroyed because the state claims they have been exposed to canker bacteria and some may, therefore, become infected. Petitioners have never challenged the removal of infected trees. Rather, Petitioners have been attempting to challenge the state's destruction of the surrounding healthy trees.

Prior to January 2000, the state's policy was to destroy only those healthy trees within 125 feet of an infected tree, (A:2:2), an area comprising about one (1) acre. In January 2000, the state changed its policy, increasing the destruction zone to 1,900 feet, containing over 260 acres (the "1,900-foot zone"). (A:2:13). The 1,900-foot zone was formally codified March 18, 2002, when the state enacted Chapter 2002-11, Laws of Florida (the "Canker Law"). The Canker Law does not provide for payment of full compensation, denies tree owners the opportunity for a meaningful predeprivation hearing, and allowed the state to search all backyards in an entire county with a single area-wide warrant. Petitioners filed suit to challenge the Canker

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[1] "R" refers to the record on appeal. The complete record covers the November 2000 injunction trial and the inverse condemnation class action. The relevant record for purposes of this proceeding begins at R:2463, with the filing of the amended complaint. "T:__" refers to specified pages in the transcript of the temporary injunction hearing, which is located at R:4362-6129. "A:_" refers to specific tabs in Petitioners' Appendix filed concurrently herewith, followed by page numbers where applicable.

Law and immediately sought a temporary injunction. (R:2522).

On May 24, 2002, the trial court, having preliminarily found that the Canker Law denies due process and authorizes unreasonable searches, temporarily enjoined the state from destroying healthy trees or searching private yards without consent or a property-specific search warrant. The temporary injunction was based on trial court findings that (1) the 1,900-foot zone is arbitrary because it is not based on reliable science and it will not achieve eradication of citrus canker; (2) the state failed to demonstrate that it could not achieve its goal through less destructive means; (3) because the targeted trees present no imminent threat to the citrus industry, tree owners are entitled to a meaningful predeprivation hearing; and (4) the state's warrantless searches and the area-wide warrant provision of the Canker Law were unconstitutional. (A:1).

The state appealed the temporary injunction. Instead of determining whether the trial court abused its discretion in preserving the status quo pending trial, the district court ruled on the ultimate constitutionality of the Canker Law. Petitioners respectfully request that this Court reverse the district court's ruling.

I. Prior Efforts To Challenge The 1,900-Foot Zone.

After first implementing the 1,900-foot zone in January 2000, the state quickly destroyed over 500,000 residential citrus trees. (A:2:1). In July 2001, after the district court ruled that Petitioners' original complaint for injunctive relief must be dismissed for failure to exhaust administrative remedies, Petitioners prevailed in a rule challenge, proving the 1,900-foot zone was an unadopted rule. The Administrative Law Judge found that the rule should have been adopted by December 1999, and that the state's failure to do so rendered the 1,900-foot zone "practically immune" from scrutiny. *Broward County v. Dept. of Agriculture*, DOAH Case No. 00-4520RX, *aff'd Dept. of Agriculture v. Broward County*, 816 So.2d 609 (Fla. 1st DCA 2002). (A:3:54, 63).

This ruling prevented the state from using the 1,900-foot zone prior to rule adoption. §120.56(4)(d), Fla. Stat. (2001).

Claiming the citrus industry faced imminent catastrophe, the state responded by adopting an emergency rule permitting immediate resumption of the 1,900-foot zone. Fla. Admin. Code R. 5BER01-1 (2001). The First District Court of Appeal stayed the emergency rule and authorized an immediate challenge to the 1,900-foot zone. (A:4). The state avoided challenge by withdrawing the emergency rule. (A:4).

In November 2001, nearly two years after it began using its 1,900-foot zone, the state finally published a proposed rule. Petitioners quickly filed a rule challenge. The state sought certiorari review of several orders resulting from discovery disputes, and filed a petition to disqualify the DOAH Judge. Discovery came to a complete halt until the First District Court of Appeal ruled on the petitions in March 2002. *Dept. of Agriculture v. Broward County*, 810 So.2d 1056 (Fla. 1st DCA 2002).

The Canker Law was enacted days thereafter, mooting the rule challenge through legislative codification of the 1,900-foot zone. Petitioners challenged the Canker Law and, without the benefit of any discovery,[2] obtained the instant temporary injunction on May 24, 2002. (A:1).

II. The Instant Temporary Injunction Hearing.

The 1,900-foot zone is based on a study performed by Dr. Timothy Gottwald ("Gottwald"). The trial court found Gottwald's study was so poorly designed and implemented, and so arbitrarily interpreted, it is not a reliable basis for the 1,900-foot zone. (A:1:27-31).

A. Development of the 1,900-Foot Zone.

By early 1998, the state determined that the 125-foot eradication zone it was then

[2] Petitioners relied principally on public records and the limited discovery obtained in the November 2001 rule challenge.

using was not working. The state asked Gottwald to study canker spread so a new eradication zone could be established.[3]

Gottwald selected study sites comprised of homes in Miami-Dade and Broward counties, collectively containing about 19,000 trees. Each tree would be periodically inspected to determine if it was infected. For each infected tree, a state employee would determine the location of the tree and estimate the date the tree became infected. The estimated infection date, and the location of each infected tree, were then entered into a computer data base. (T:903-04). A computer program measured the distance between each infected tree and the nearest known previously-infected tree, which was deemed the source tree for the new infection. (T:903-04). The spread distances for all infected trees identified during the study were compiled into the spread distance tables appended to Gottwald's report. Gottwald stated that these tables were the foundation for the 1,900-foot zone. (T:619-20, 624).

1. <u>The Data Collected Was Unreliable</u>.

Gottwald conceded that his spread distance tables, and the new eradication radius based thereon, would be reliable only if all infected trees on the study sites were found and only if the infection date for each tree was reliably estimated. (T:622-24). Neither condition was met.

a. <u>Infected Trees Were Not Detected</u>.

According to Dr. Stall, a preeminent canker scientist <u>employed by the state</u>, Gottwald's study design prevented all infected trees from being found. (T:203-16). The problem involved the concept of dormancy. Dr. Stall stated that infected trees can become symptomless (dormant) for up to three years, but could spread canker during that time. Additionally, dormant trees may re-develop symptoms at any time.

[3] The problem with the 125-foot radius was not its size but, instead, the state's failure to remove trees before further spread could occur. (T:362; A:2:3).

Gottwald measured spread from the nearest tree with symptoms, ignoring closer source trees which had dormant infections. Gottwald also mis-labeled dormant trees, which redeveloped symptoms during his study, as new infections, and measured spread from the nearest known infected tree even though no spread actually occurred. Both problems lead to an overestimate of spread distance. Gottwald could have used available techniques to "mark" bacteria to verify that canker was spreading only from known infected trees, but he claimed doing so was unworkable. (T:665). Dr. Stall's testimony eviscerated Gottwald's spread distance tables, rendering them useless.

The horribly unreliable nature of visual detection also prevented the state from identifying all infected trees, something necessary to reliably measure spread. (T:620-24, 639-40). Gottwald conceded the unreliability of visual detection, stating that "if the [state] was actually to look at the reliability of visual detection it would send chills up the agency's spine." (T:645). In a pre-publication draft of his report, Gottwald admitted that because of detection problems, the state's inspectors consistently failed to identify infected trees. This admission was, in Gottwald's words, "word-smith[ed]" out of the final draft. (T:637). Because all infected trees were not found, and could not be found given the defective design of Gottwald's study, the spread distance measurements were unreliable.

b. <u>Estimated Infection Dates Were Likewise Unreliable</u>.

Finding all infected trees was only the first crucial step. Gottwald testified that the reliability of his spread distance tables also depended on reliable infection dating, which was necessary to determine the source tree for each new infection. (T:622-24). Dr. Stall testified that, because of dormancy and other factors, Gottwald's study design prevented infection dates from being reliably estimated. (T:208-09, 1346-47).

Gottwald responded by misrepresenting facts and repeatedly changing his testimony. First, Gottwald claimed that, to maximize reliability and consistency, his

study design ensured that all infection dating was performed by a single qualified scientist, Dr. Sun. (T:240). Gottwald later claimed that experienced persons helped Dr. Sun estimate some infection dates. (T:622, 629). Later, upon learning that infection dating was done by inexperienced laypersons, Gottwald again changed his story, and claimed that most infection dating was unimportant. (T:810-815, A:5).

2. <u>The Data Collected Was Arbitrarily Manipulated</u>.

Gottwald testified repeatedly that the data contained in his spread distance tables would determine the new destruction zone. (T:247-49, 624, 660, 840, 1032-33). Dr. John Scoggins, an expert econometrician, reviewed the spread distance tables in the three primary drafts of Gottwald's report. (T:92). The first draft was relied on by the state to initially implement the 1,900-foot zone in January 2000. The second was Gottwald's initial publication of the data. The third was the current draft at the time the Canker Law was enacted. These drafts contain major inconsistencies. For example, the beginning number of infected trees inexplicably dropped from 64 to 50 to only 9 in the successive drafts. (T:100). The average purported spread distance dropped <u>77%</u> from 3,924 feet to only 915 feet. (T:104).

Rather than adjust the radius size based on the new data, Gottwald decided to ignore most of it. Despite collecting data covering 25 time periods, Gottwald ignored the spread distance measurements for all but the first 4. (T:104-12, 634). Ignoring 84% of data collected violates a fundamental scientific principle requiring that conclusions be dictated by the actual data, not by an arbitrary selection of data. (T:106-07). Because of these and other irregularities, Dr. Scoggins testified that the Gottwald study cannot credibly predict the spread of canker. (T:113-14).

In an attempt to explain these inconsistencies, Gottwald first claimed data were withheld from earlier drafts. (T:243, 826). Next he claimed the data stayed the same but the analysis changed. (T:253, 902-04). It is impossible to determine why

Gottwald's numbers shifted so radically without seeing the actual data.

3. <u>The "Capture Percentage" Was Arbitrarily Determined</u>.

After trying to document spread, Gottwald determined the percentage of spread that must be eliminated to achieve eradication. Gottwald testified that, to eradicate, a destruction zone must be sufficient to remove an amount of bacteria exceeding the reproduction rate. Gottwald also said an eradication zone would be "draconian" if it included all spread, since some of the spread could be caused by humans, which is completely random and uncontrollable.[4] (T:329, 350, 659-60, 741-42).

Gottwald guessed that <u>95%</u> of spread must be eliminated, which purportedly corresponded to a 1,900-foot zone. (T:793-95, 861; A:6). Gottwald admitted that such a high percentage is not always necessary, and admitted he never studied or even read that such rate is necessary for canker. (T:899-02). If Gottwald's guess was wrong, and, instead, merely by way of example, the necessary rate is only <u>90%</u>, even assuming Gottwald's spread distance observations were accurate, a 1,200-foot radius would be appropriate. (A:6). This smaller radius contains only 104 acres, which would result in <u>60% less destruction of healthy trees</u>.

B. <u>The 1,900-Foot Zone Will Not Achieve Eradication Short of Destroying Every Citrus Tree In The State</u>.

There was also evidence the 1,900-foot zone would not achieve eradication. The strongest evidence came from Gottwald. Gottwald admitted he does not expect the 1,900-foot destruction to achieve eradication, analogizing the likelihood of success to a roll of the dice.[5] (T:647-48; A:7:12). Even if temporarily eliminated, Gottwald

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[4] Despite recognizing that human spread events must be identified to ensure the eradication zone is not "draconian," Gottwald admitted he never tried to determine whether any of the longer spread events he observed resulted from random, uncontrollable human movement. (T:327-28, 920-21, 927-28).

[5] In yet another example of Gottwald misrepresenting facts in an attempt to extricate himself from pre-litigation public statements, Gottwald claimed his

conceded canker will return again and again and again. (T:649, 890-91).

Additionally, the trial court asked Gottwald how eradication can be achieved if the zone captures only 95% of spread. Gottwald stated the key is to immediately inspect the surrounding area to catch the remaining 5% of newly infected trees before new spread occurs. (T:274, 663-64). Gottwald admitted that this critical condition assumes an ability to quickly detect canker, (T:663-64, 874), an assumption at odds both with Gottwald's frequent statements regarding the unreliability of detection and with the testimony of the state's top eradication program managers.[6]

C. Gottwald's Study Did Not Address, And The State Did Not Demonstrate, That The Mandated Destruction Is Narrowly Tailored.

Aside from finding the 1,900-foot distance arbitrary, the trial court found that the very design of Gottwald's study was the antithesis of narrow tailoring. The trial court noted the complete lack of any effort by the state to determine whether and how far canker would spread if known infected trees were promptly discovered and removed or if any other efforts were made to limit spread. (A:1:28-9; T:247**)**. Gottwald's study did the opposite. Thousands of known infected trees were left standing on the study sites for up to two years. (A:2:3, 5-9, 12).

Even Dr. Scherm, a state epidemiological expert, admitted that Gottwald's study tried to measure spread under a regimen inconsistent with the crucial protocol of trying to prevent spread, and that, during Gottwald's study, canker was being permitted to

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uncertainty over whether eradication could be achieved was due to injunctions and other litigation barriers. The documents included in A:7, however, show his "roll of the dice" analogy was used more than a year before any litigation commenced.

[6] Like Gottwald, the state conceded that frequent, high quality inspections leading to early detection, and subsequent prompt removal, are essential to eradication success. The state's experts advised the state of the urgency of removing all infected trees within 14 days after prompt detection. (T:371-72). In southeast Florida, the state has historically taken several months, after detection, to remove infected trees. (T:414-18).

spread at will. (T:1595). Dr. Scherm also admitted the study shed no light on what the appropriate destruction zone would be if infected trees were promptly removed. (T:1608-09). Thus, even if Gottwald's study had been perfectly executed, its very design would still yield an arbitrarily large eradication zone.

The state's top eradication managers conceded the destruction radius was substantially increased because destroying "exposed" trees, which the state considers valueless, was cheaper and more convenient than more frequent inspections. (T:389-94, 412-13). According to these managers, by clear-cutting trees in 1,900-foot zones, the state can save substantial money on tree inspections, and the savings from this "tradeoff" can be used to pay for more tree destruction. (T:389-94). Because Brazil's eradication program focuses on timely inspections rather than destruction, Brazil destroys about 90% fewer healthy trees in the name of eradication than does Florida. **(**T:643, A:8:302-04).

Gottwald also candidly admitted that the 1,900-foot zone includes some unquantified "fudge factor," a phrase that cannot be reconciled with the concept of narrow tailoring. (T:640-42). If that "fudge factor" involves only a 5% additional capture (95% instead of 90%), the destruction zone is 150% too large (260 acres instead of 104). (A:6).

The state never explained why some of the world's leading citrus-producing nations are able to manage citrus canker yet canker would destroy Florida's juice-based industry. Gottwald admitted that, even where canker is endemic, the use of windbreaks can effectively control canker in groves. (T:607-08). Another state expert stated that high-quality fruit meeting fresh market standards can be produced even in canker endemic areas. (T:750-51). The trial court found the state made no effort to determine whether canker spread could be contained through common pest management techniques. (A:1:28-29).

D. The Targeted Healthy Citrus Trees Present No Threat, And No Imminent Threat, To The Citrus Industry.

1. "Exposed" Trees Are Unlikely To Become Infected.

Only infected trees can spread canker. Few trees "exposed to infection" will become infected. Gottwald testified that canker bacteria landing on a healthy citrus tree will not cause infection unless very specific conditions are present. (T:1484-85). Gottwald further testified that, if exposure is going to result in infection, symptoms will appear on a tree within 7-14 days. (T:274). Petitioners presented examples of "exposed" trees well within the 1,900-foot zone that remained healthy years after alleged exposure. (A:9; T:39-40, 159-64, 274, 1078-1086). These examples were consistent with Gottwald's findings. Of the 19,000 trees Gottwald studied over 2 years, only 18% purportedly became infected. (T:610-11; A:2:5-9).

2. Even Infected Trees Distant From The Citrus Growing Region Present No Imminent Threat To The Citrus Industry.

Two crucial facts were not disputed by the state. First, southeast Florida is sufficiently far removed from the commercial growing region that the state used southeast Florida as its living laboratory to conduct the Gottwald study, leaving thousands of known infected trees standing for up to two years. (A:2:3, 5-9, 12). Second, the state routinely allows known infected trees in southeast Florida to remain in place for several months after they are identified. (T:414-18).

E. Appealing An IFO Is Not A Meaningful Predeprivation Remedy.

The Canker Law permits the state to issue immediate final orders ("IFOs") notifying property owners that their healthy trees will be destroyed within ten days unless the property owner, within those ten days, files an appeal, pays the $250.00 filing fee and obtains a stay from a district court of appeal. Obtaining a stay within ten days, and maintaining the stay pending appeal, is virtually impossible. (T:1156-80, 1217-20). The trial court preliminarily concluded that the state's use of IFOs denies

access to courts and is "nothing more than a thinly veiled scheme designed to avoid the due process rights of citrus tree owners." (A:1:24).

F. Search and Seizure Issues.

The eradication program involves periodic state searches of private yards. Even after all citrus trees in a yard are destroyed, the state continues to search that yard for the foreseeable future to ensure there has not been replanting. (T:421-24). Prior to the temporary injunction, the state never sought a single warrant to search private yards. (T:436). Instead, nonconsensual, warrantless searches were effected by threatening to arrest any homeowner who insisted on a warrant. (T:30-31, 1077, 1217-22). The trial court ruled that the state was required to obtain consent or a property-specific warrant, and that the area-wide warrant provision of the Canker Law was unconstitutional. (A:1:30-31).

The state responded by seeking the bulk issuance of thousands of fill-in-the-address warrants from Judge Barkdull in Palm Beach and Judge Greene in Broward. In each county, the state filed a single application and appended, collectively, more than 10,000 residential addresses within defined geographical areas. (A:10; A:11). Thousands of the listed properties were, inexplicably, high-rise dwellings with no private yards. (A:10:25-62). It is unclear why the state sought so many warrants since it has developed a system of consensual searches which, if employed, would greatly reduce the need for warrants and intrusions into private yards. (T:891-92).

To accommodate the huge warrant requests, both judges authorized the state to prepare the warrants and to electronically affix the judges' signatures. Both judges also extended the statutory 10-day period for returning warrants. Judge Barkdull, upon learning that the state prepared and signed his name to many warrants containing terms he expressly disallowed, declared the warrants void. (A:12). Judge Green subsequently learned the warrant terms sought by the state expressly violated the

temporary injunction order. After admonishing the state for failing to disclose the terms of that order, Judge Green directed the parties to seek resolution from the trial court in which the challenge to the Canker Law was pending. (A:11:15-16). Soon thereafter, the trial court determined that the state's bulk warrant requests violated the terms of the temporary injunction, to wit:

> The [state] is prohibited from seeking area-wide warrants. The Court finds there is no substantive difference between a single area-wide warrant covering 7,402 individual residences, and 7,402 "individual" warrants issued based upon a single application.

(A:13). The trial court also prohibited the state from applying for warrants containing electronic judicial signatures. The state appealed these prohibitions.

Subsequently, the state filed an application for the issuance of 69 warrants in Broward County.[7] (A:14). The warrant judge found that the incomplete documents included within the application and the substantial delay in making the application raised questions "as to the reliability of some of the documentation." (A:15:11). The judge denied the application on that basis and because he was unwilling to authorize multiple warrants based on a single application. (A:16). The state sought certiorari review of that ruling, and its petition was consolidated with the main appeal.

The district court ruled that warrants were required to search private yards absent homeowner consent, and declared the area-wide warrants authorized by the Canker Law "patently unconstitutional." *Fla. Dept. of Agriculture v. Haire*, 836 So.2d 1040, 1058 (Fla. 4th DCA 2003). The district court affirmed the trial court's prohibition against the state affixing judicial signatures to search warrants, but reversed the trial court's prohibitions against electronic judicial signatures on warrants and the

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[7] The application was randomly assigned to Judge Fleet, before whom the Canker Law challenge was pending. On the same day, the state filed a single warrant application to search 87,000 residential yards in Palm Beach County. (A:15:31-33).

issuance of multiple warrants based on a single warrant application.

G. Irreparable Harm.

At the time the temporary injunction was granted, the state was within weeks of commencing, and months of completing, the destruction of 200,000 healthy residential citrus trees. (T:450). The destroyed trees could not be replaced in kind. There is no replacement market for mature, rooted citrus trees. These trees are not inventory, but rather integral parts of homes and yards. (T:490, A:1:30-31; A:9).

Even assuming replanting was permitted, it would take many years or decades to re-grow the trees destroyed. In any event, replanting will not be permitted until two years after canker is declared eradicated, (T:422), something Gottwald stated may never occur. Even if money was otherwise an adequate remedy, the trial court found that the state's summary destruction eliminates necessary evidence of value, making questionable whether full compensation would be obtainable. (A:1:29-30; A:9).

The trial court, after seeing a surveillance videotape and hearing unrefuted expert testimony, also found that the state was spreading canker, potentially great distances, through its reckless decontamination and use of wood chippers to dispose of plant materials. (A:1:29; T:53-58, 71-88, 437, 594, 600, 614, 731, 1055-60, 1147, A:18). Gottwald has even documented an example of a state inspector likely causing canker to spread from a backyard into a grove. (T:918-20).

III. Proceedings After Issuance Of The Temporary Injunction.

After the temporary injunction issued, Petitioners continued their efforts to obtain the data underlying Gottwald's conclusions. Obtaining that data is necessary to independently analyze the Gottwald study, and to, for the first time ever, depose Gottwald, the state's most essential witness. While the state emphasized that Gottwald's study had been published and peer-reviewed, Gottwald conceded that he never let the peer reviewers or anyone else review his underlying data. (T:603, 619).

On June 5, 2002, the trial court ordered the state to produce the data, or risk the exclusion, at trial, of all evidence related to Gottwald's study. (A:17).

On June 21, 2002, the state appealed the temporary injunction, and the trial court granted Petitioners' motion to vacate the Rule 9.310(b)(2) automatic stay. (R:6751, 6754). The district court, upon the state's motion, certified the case for immediate review by this Court. *Fla. Dept. of Agriculture v. Haire*, 832 So.2d 778 (Fla. 4th DCA 2002). This Court denied bypass jurisdiction since the case was only at the temporary injunction stage. *Fla. Dept. of Agriculture v. Haire*, 824 So.2d 167 (Fla. 2002).

On January 15, 2003, the district court, having conducted plenary review, reversed the temporary injunction and, apart from the area-wide warrant provision, declared the Canker Law constitutional. On February 10, 2003, the district court granted the state's motion to reimpose the automatic stay. (A:19). The district court denied Petitioners' motions for rehearing, rehearing en banc and certification on February 17, 2003. (A:20). Petitioners timely filed a notice to invoke this Court's discretionary jurisdiction, and jurisdiction was granted April 14, 2003.

SUMMARY OF THE ARGUMENT

The district court never determined that the trial court abused its discretion in granting the temporary injunction. Instead, the district court ruled on the ultimate constitutional merits. By requiring that Petitioners present a complete case at the temporary injunction stage, without the benefit of discovery, the district court denied due process and created an impossible standard for Floridians seeking to protect their property from imminent state destruction.

Corneal v. State Plant Board established the limited circumstances under which the state may destroy private property. Under *Corneal*, such destruction is permissible only when it is "within the narrowest limits of actual necessity, unless the

state chooses to pay compensation." The district court ruled that *Corneal*'s exacting judicial scrutiny does not apply since the Canker Law provides for the payment of some compensation, with any balance due resolved by an inverse condemnation claim. The district court misconstrued *Corneal* and became the first appellate court in the United States to hold that a state may destroy private property whenever such destruction is arguably rational.

The district court also ruled that the fundamental right to a meaningful, predeprivation hearing may be denied whenever the state claims that summary destruction of property is necessary to address an imminent danger. The district court afforded such substantial deference to the state's baseless claim of imminent danger that it upheld the denial of a predeprivation hearing despite expressly acknowledging that the need for summary destruction was belied by the state's own conduct. In *State Plant Board v. Smith*, this Court held that the evidence presented, and not the state's unsubstantiated claims, determines whether the right to a meaningful predeprivation hearing may be denied.

The district court also authorized the issuance of multiple search warrants, based on a single warrant application, to search the curtilage area of many thousands of homes. No appellate court in the United States had ever before authorized such bulk issuance of fill-in-the-address search warrants. These warrants will subject millions of Floridians to constant surprise intrusions in their own backyards, and have a demonstrated history of jeopardizing core Fourth Amendment protections. The district court's reasoning for authorizing such warrants and intrusions violates the uniform principle that search warrant statutes must be strictly construed.

In contrast to the tremendous deference afforded the Legislature, the district court freely invaded the discretion of the trial court. Trial courts have historically had wide discretion in determining when the status quo should be preserved pending trial

and in making factual findings. Here, the trial court exercised its discretion in granting a temporary injunction, based on its preliminary findings. Without explanation, the district court replaced the trial court's findings with its own.

Although the Canker Law specifically targets citrus trees, it is a direct assault on our must fundamental constitutional rights, including property rights. By relegating state destruction of private property to mere rational basis scrutiny, allowing denial of a meaningful predeprivation hearing based solely on ipse dixit, requiring property owners to present a plenary case without discovery at the temporary injunction stage, and authorizing wholesale state intrusions into private yards, the district court created a class of state action effectively beyond challenge, and rendered impotent the due process and privacy guarantees of Florida's Constitution.

ARGUMENT

Standard of Review.

The district court's decision is subject to de novo review. The district court applied the wrong standard of review, reviewing the temporary injunction de novo instead of for a clear abuse of discretion. *Gold Coast Chem. Corp. v. Goldberg*, 668 So.2d 326, 327 (Fla. 4th DCA 1996) (citation omitted). The choice of legal standard is a pure issue of law. Pure issues of law are reviewed de novo. *Bunkley v. State*, 833 So.2d 739, 741 (Fla. 2002). Alternatively, if the district court properly ruled on the ultimate constitutionality of the Canker Law, its ruling is subject to de novo review. *City of Miami v. McGrath*, 824 So.2d 143, 146 (Fla. 2002).

Point I: THE DISTRICT COURT DENIED DUE PROCESS BY CONDUCTING PLENARY REVIEW.

Temporary injunctions should be reviewed under the abuse of discretion standard. *Goldberg*, 668 So.2d at 327 (citation omitted). Granting a temporary injunction is not an abuse of discretion unless no reasonable trial court would have

preserved the status quo pending trial. *See Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980). Instead of determining whether the trial court abused its discretion, the district court conducted a plenary review based on the limited temporary injunction record, ruled on the ultimate constitutionality of the Canker Law,[8] and denied Petitioners the opportunity for a trial preceded by reasonable discovery.

The district court sought to justify its plenary review by stating that the trial court intended for its order to be final. *Haire*, 836 So.2d at 1047 n.2. Regardless of the trial court's intent, a temporary injunction cannot decide the merits of a case since no full trial has been conducted. *Goldberg*, 668 So.2d at 327. Because temporary injunctions are based on limited evidence, a party is not required to prove its case in full during the temporary injunction hearing, and the findings of fact and conclusions of law made by a trial court are not binding at trial. *Univ. of Texas v. Camerisch*, 451 U.S. 390, 395 (1981) (citations omitted); *Cox v. Florida Mobile Leasing, Inc.*, 478 So.2d 1200 (Fla. 4th DCA 1985). If the trial court improperly sought to attach finality to its ruling, the district court should have instructed the trial court accordingly and remanded for a full merits trial. *Identifax Investigative Serv. v. Viera*, 620 So.2d 1147 (Fla. 4th DCA 1993). Penalizing Petitioners by precluding trial is unwarranted.

The trial court consistently instructed the parties to direct their evidence to the elements of a temporary injunction, including, specifically, why it was necessary to "maintain the status quo ... pending a final hearing on the merits." (T:370, 377-78, 490-91) (underline added). Aside from limiting their presentation of evidence consistent with the trial court's direction, Petitioners did not have the benefit of any discovery in this matter. Petitioners have never had the opportunity to depose

[8] As the concurring Justices noted in this Court's Order denying bypass jurisdiction, the district court had previously recognized that "several constitutional issues involving the statutory scheme [were] not 'ripe for review'." *Haire*, 824 So.2d at 168 n.4. (Citation omitted).

Gottwald, the state's most essential witness, or to review the data he claims supports the 1,900-foot zone. A month after the temporary injunction hearing, the trial court ruled that if the state continued to resist production of that data, the state may be precluded from introducing any evidence related to Gottwald's study at trial.[9]

Petitioners have a due process right to full and fair discovery prior to trial. *Broward County*, 810 So.2d at 1058. All property owners have the fundamental right to protect their private property. Art. I, §2, Fla. Const. By blocking Petitioners from their day in court, and effectively requiring that Petitioners present a full case, without discovery, at the temporary injunction stage, the district court denied due process and created an impossible standard which severely undermines constitutional property rights.

The Canker Law, the statute which is perhaps the most destructive of private property in state history, has never been subjected to meaningful challenge. Administrative challenges were initially thwarted by the state's blatant disregard for rulemaking mandates, and subsequently mooted by enactment of the Canker Law. Reversal of the district court's decision is necessary to permit a full trial preceded by reasonable discovery.

Point II: THE DISTRICT COURT ERRED IN RULING THAT THE CANKER LAW DOES NOT DENY DUE PROCESS.

The district court ruled that, when the state claims an imminent threat to an important interest, that claim cannot be meaningfully scrutinized for purposes of determining whether intended state action would deny due process. Instead, whenever such claim is made, Florida citizens are relegated to seeking compensation after the fact. The district court's ruling is at odds with the authority historically exercised by

[9] To the extent the trial court's "intent" is relevant, as suggested by the district court, this is extremely clear evidence that the trial court intended its ruling to be for purposes of the temporary injunction only.

courts, under the power of judicial review, to meaningfully scrutinize statutes which materially impact fundamental constitutional rights.

A. Substantive Due Process.

The district court, in reversing the trial court's preliminary determination that the Canker Law denies substantive due process, committed three reversible errors. First, it erroneously ruled that *Corneal*'s exacting judicial scrutiny was inapplicable. *Corneal v. State Plant Board*, 95 So.2d 1 (Fla. 1957). Second, it erroneously determined that state destruction of property should only be subjected to rational basis scrutiny. Third, the district court substituted its own factual findings for those of the trial court.

1. The District Court Misapplied *Corneal*.

The district court misapplied *Corneal*, the controlling substantive due process case, and in the process became the first appellate court to subject state destruction of private property to mere rational basis scrutiny. The district court's decision ignored the fundamental difference between regulation and destruction of private property that this Court recognized in *Corneal*:

> In enacting regulatory measures which protect but do not destroy property, the law need not restrict itself to conditions actually harmful but may require precautions within the whole range of possible danger. [Citations omitted]. But the absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation.

Corneal, 95 So.2d at 4 (underline added). *Corneal* recognized the significant role property rights play in maintaining our constitutional democracy:

> We hope we never become insensitive to the clear and indefeasible property rights of the people guaranteed by our state and federal organic law, nor forgetful of the principle of universal law that the right to own property is an indispensable attribute of any so-called 'free government' and that all other rights become worthless if the government

> possesses an untrammeled power over the property of its citizens.[10]

Id. at 6. *Corneal* struck a proper balance between the state's police power and the fundamental constitutional rights of property owners. *Corneal* places a limit on state destruction of private property pursuant to the police power, subjecting such destruction to the strictest conceivable level of judicial scrutiny. Such destruction "is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation." *Id*. at 4.

The district court held that the Canker Law does not deny substantive due process because "compensation is given" within the meaning of *Corneal*. *Haire*, 836 So.2d at 1051. In §581.1845, Florida Statutes, the state chose to pay only token, conditional compensation, not the full compensation required under the Florida Constitution. Art. X, §6, Fla. Const. A homeowner receives no cash compensation, whatsoever, for the first tree destroyed. §581.1845(3).[11] For each additional tree destroyed, the state agreed to pay $55 or $100, depending on the fiscal year. §581.1845(6). The $55 or $100 payment, however, is expressly "subject to the availability of appropriated funds." §581.1845(1). Section 581.1845 is, therefore, nothing more than a legislative choice to pay what it wants, if it wants to pay anything at all.

The district court held that the state's choice to pay token, conditional

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[10] The U.S. Supreme Court has also recognized the danger that would result from the state possessing such untrammeled power over private property. More than eighty years ago, Justice Holmes warned that if the state is permitted, under the guise of the police power, to even broadly restrict (let alone destroy) property without paying compensation, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992), *quoting Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[11] Instead, the owner is eligible for something called a "Shade" card.

compensation satisfied *Corneal* because, if more compensation is due, it can be resolved in an inverse condemnation action. *Corneal* would be toothless if its exacting scrutiny was satisfied by the mere availability of inverse condemnation, since an inverse claim can be raised every time the state destroys private property. To prevent abuse, *Corneal* places a financial check on the state's power to destroy private property. Under *Corneal,* the cost of destroying private property under its police power, when such destruction is not within the narrowest limits of actual necessity, is the state conceding that it is obligated to pay, and agreeing to pay, full compensation, without condition or excuse.

The state agreeing to this unconditional obligation is absolutely essential. Only then does the state have a sufficiently strong incentive to destroy only what is necessary. This strong incentive serves as a surrogate for the exacting judicial scrutiny that would otherwise be applicable under *Corneal*. The certain financial accountability will force the state to exercise its awesome power to destroy private property carefully and conservatively. No adequate surrogate for *Corneal*'s exacting judicial scrutiny exists when the state claims, as it has done here and in the *Patchen* case recently argued before this Court, that the targeted property is a valueless nuisance. *Patchen v. Fla. Dept. of Agriculture*, 817 So.2d 854 (Fla. 3rd DCA 2002), *rev. granted* 829 So.2d 919 (Fla. 2002). Vigorous defense of an inverse condemnation claim is the antithesis of choosing to pay full compensation.[12]

The evidence presented during the temporary injunction hearing shows the danger to property rights resulting from the district court's approach. Here, the state

[12] The state's realization, in §581.1845(4), that it may be court-ordered to pay additional compensation changes nothing. When the state denies compensability, its mere mention of the obvious, that it could be found liable for inverse condemnation damages, is not the same as choosing to compensate. The state must adhere to the Constitution, not merely recognize its existence.

conceded that the destruction zone was greatly expanded because large-scale destruction costs less than periodic inspections. Because it was not forced to confront the true cost of its destruction, and believed no compensation was due, the state felt free to destroy private property on the basis of convenience, rather than only when actually necessary.

The district court reasoned that, since the amount of compensation must be decided in court, the Legislature could do no more than offer minimum compensation with the balance due, if any, to be resolved in a subsequent inverse condemnation action.[13] While the district court correctly noted that a statute cannot conclusively decide value, *State Plant Board v. Smith* requires the Legislature to acknowledge liability for the taking and agree to pay full compensation, things the Canker Law does not do. 110 So.2d 401 (Fla. 1959).

After *Corneal*, the state amended the applicable statute. The amended statute was challenged in *Smith*. That statute, unlike the Canker Law, provided for the payment of just and fair compensation.[14] *Id.* at 406. By agreeing to pay such compensation, the state conceded that its action would effect a taking. When the state is faced with a known outcome on the question of liability, it can be expected to narrowly tailor its destruction decision. In *Smith*, that narrow tailoring resulted in destruction only in groves, not statewide. *Smith*, 110 So.2d at 408.

When the state seeks to destroy healthy trees which could serve as hosts for plant pests which would purportedly endanger the citrus industry, the *Smith* Court

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[13] If, as the district court ruled, the state could circumvent *Corneal*'s exacting scrutiny by agreeing to make a token payment of $55 or by providing a "Shade" card, it could do the same by offering $1 or a peppercorn.

[14] "Just" compensation, not "full" compensation, was the requirement before adoption of the 1968 Constitution. While the *Smith* statute provided for just compensation, the statute contained a cap on the amount awardable. The cap was severed, leaving only the state's agreement to pay just compensation. *Id*. at 408.

stated that legislative provision for full compensation was "a clear requisite to the act of destruction." *Id.* at 407. By agreeing to pay full compensation, the *Smith* Court stated "we do not see how the Legislature could have done more." *Id.* at 406.

Here, to the contrary, the Legislature chose to pay token compensation at most and, at least, nothing. This is the opposite of the statute in *Smith*. Here, there is nothing less the Legislature could have done. Because of the importance of property rights, *Corneal* subjects state destruction of property to the highest conceivable level of judicial scrutiny, unless the state concedes it is liable to pay full compensation, without excuse or exception. Choosing to pay token compensation, or conditional compensation, or merely recognizing the possibility of an inverse claim, is not an adequate substitute for the exacting judicial scrutiny imposed under *Corneal*.

2. There Is No Basis In Law Or Public Policy To Subject State Destruction Of Private Property To Mere Rational Basis Scrutiny.

After concluding that the state "chose to pay compensation" within the meaning of *Corneal*, the district court, based on *Miller v. Schoene*, 276 U.S. 272 (1928), determined the Canker Law should be analyzed under a rational basis test. *Haire*, 836 So.2d at 1051. Subjecting state destruction of private property to mere rational basis scrutiny is not supported by *Miller*, is unprecedented in Florida, and is inherently inconsistent with the fundamental rights of private property owners.

The district court deemed *Miller* "substantially similar" to the instant case. *Id.* at 1050. *Miller* addressed the destruction of infected cedar trees in close proximity to apple orchards. 276 U.S. at 277. Unlike *Miller*, the state here is not destroying just infected trees in close proximity to groves, but instead is destroying trees statewide just because they are potential hosts for citrus canker. This case would have been more similar to *Miller* had the Legislature mandated destruction only to create 1,900-foot citrus-free buffer zones around commercial groves.

The evidence in *Miller* showed the targeted trees were the "deadly enemy of [apple orchards], so deadly that one or the other must go . . .." *Miller v. State Entomologist*, 135 S.E. 813, 814 (Va. 1926). It was undisputed that the infected cedars, unless destroyed, would be fatal to the nearby orchards. *Miller*, 276 U.S. at 278-79. The U.S. Supreme Court noted the state had to make a choice:

> On the evidence we may accept the conclusion . . . that the state was under the necessity of making a choice between the preservation of one class of property and that of the other whenever both existed in dangerous proximity. . . . We need not weigh with nicety the question of whether the infected cedars constitute a nuisance according to the common law or whether they may be so declared by statute. Where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves a denial of due process.

Id. at 279-80 (underline added). Destroying infected trees in close proximity to commercial orchards was shown, by the evidence, to be a matter of actual necessity. The issue of reasonableness concerned only the state's decision that, given there could be no co-existence in close proximity, the orchards would be protected.

Petitioners have never claimed that the state's desire to protect the citrus industry is unreasonable. However, unlike the evidence in *Miller*, there is no evidence that Florida's citrus industry could not co-exist with citrus canker, and certainly no evidence that "exposed" trees far away from groves could not possibly co-exist with the groves. *Miller* simply does not support a rational basis test for the statewide destruction of healthy trees required under the Canker Law.

Aside from its reliance on *Miller*, the district court asserted that a rational basis test is appropriate since eminent domain takings are not subjected to strict scrutiny but rather a demonstration of reasonable necessity. *Haire*, 836 So.2d at 1051. This Court has recognized the strong protections afforded property owners under eminent domain. *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622, 627 (Fla.

1990). The district court's ruling establishes a lower level of scrutiny when the state destroys property under the guise of its police power, with the inferior protections afforded, than when the state acts under its eminent domain powers.

The district court, citing *F.C.C. v. Beach Communications, Inc.*, noted the type of deference it believed applicable. 508 U.S. 307 (1993). *F.C.C.* addressed an economic regulation not infringing upon a fundamental right. *Id*. at 313. Under those circumstances, the U.S. Supreme Court ruled the statute should be upheld "if there is any conceivable state of facts that could provide a rational basis" and "may be based on rational speculation unsupported by evidence or empirical data." *Id*. at 313, 315 (citations omitted). That type of non-scrutiny is patently inconsistent with the basic and inalienable right of Floridians to possess and protect their property.[15]

Even a legislative decision to destroy every backyard citrus tree in the state is rationally related to the goal of eradicating canker, since every citrus tree is a potential host of the bacteria. All trees, not just citrus, can host fruit flies or other pests which could harm the citrus industry. The destruction of those trees is no less rationally related to protecting the citrus industry. The slippery slope introduced by the district court presents a grave threat to the property rights of all Floridians.

Allowing the state to destroy private property whenever such destruction is arguably rational gives the state "untrammeled power over the property of its citizens," in the process threatening "all other rights" and our "free government." *Corneal*, 95 So.2d at 6. Private property cannot be destroyed based on unsubstantiated state claims. "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." *Manley v. State of Georgia*, 279 U.S. 1, 6

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[15] Art. I, §2, Fla. Const. Instructively, this right expressly belongs only to "natural persons," not to the commercial entities whose property is purportedly being protected by the destruction of backyard trees.

(1929). The need for meaningful judicial scrutiny is even greater here, since the state can benefit financially from any legislative finding that the targeted trees present an imminent danger:

> Where government acts in this context, it can no longer pretend to be acting as a neutral arbiter. It is no longer the impartial weigher of the merits of competing interests among its citizens. Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its citizens, the scales will tip in its own favor.

Joint Ventures, 563 So.2d at 626. Even had the state decided to pay compensation within the meaning of *Corneal*, state destruction of private property must still be subjected to meaningful judicial scrutiny.

3. The District Court Erred By Substituting Its Factual Findings For Those Of The Trial Court.

The trial court conducted meaningful, albeit preliminary, scrutiny and found that the Gottwald study was not a valid basis for the 1,900-foot distance, and that the 1,900-foot zone would not achieve eradication:

> According to the Gottwald report, citrus canker can be eliminated only by destroying all citrus trees found within a 1900 foot radius . . .. Evidence presented to the court by Plaintiffs more than adequately demonstrates the fallibility of such approach.

(A:1:28). The trial court also found the state failed to demonstrate why less destructive means could not be used to protect the citrus industry, and that the state did not even try to determine how much destruction would be necessary if reasonable steps were taken to minimize spread. The district court disregarded those findings, ruling that the Canker Law would pass either a rational basis or narrow tailoring test:

> [Petitioners] did not point to any studies or data to show other means were available to *eradicate* citrus canker other than destruction of infected trees and those trees exposed to infection. Nor did they propose any other buffer measure that would prove effective in eradicating the disease.

Haire, 836 So.2d at 1053 (italics in original). The district court misapprehended the burden to prove narrow tailoring, misapplied the strict scrutiny test and substituted its own factual findings for those of the trial court.

If a strict scrutiny test is applicable, it is the state's burden, not Petitioners', to prove that the means are necessary and narrowly tailored to achieve a compelling government interest. *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Duke v. Cleland*, 954 F.2d 1526, 1529 (11th Cir. 1992). Narrow tailoring is only one prong of the strict scrutiny test. The state interest advanced must also be compelling. In parts of its decision, the district court stated that protecting the citrus industry is the compelling goal and eradication the means chosen by the Legislature. *Haire*, 836 So.2d at 1051. Elsewhere, however, the district court stated eradication was the goal. *Id*. at 1053. If statewide eradication of canker is the goal, the state never demonstrated that it is a compelling state interest and that the 1,900-foot zone is necessary and narrowly tailored to achieve eradication. If statewide eradication is, instead, the means of protecting the citrus industry, the state never demonstrated that the impact of canker could not be effectively addressed through less destructive means.

The state failed to demonstrate why statewide destruction of trees is necessary, given that the longest spread documented by Gottwald was only 2.16 miles. Even in the unlikely event "exposed" trees become infected, virtually all of the targeted trees are far removed from the commercial growing region. The state failed to demonstrate why it could not preserve the industry by creating sufficiently-wide buffer zones around groves, as was done in *Miller*. The state also failed to demonstrate why it could not preserve the industry by only destroying "exposed" trees in the commercial growing region, as was done in *Smith*. Chapter 57-365, Laws of Florida. Unlike the targeted programs in *Miller* and *Smith*, a state expert touted that Florida's program may be "the largest regulatory attempt to eradicate a plant disease ever undertaken in

the history of the world." (T:747-48). A statute fails under strict scrutiny when the state fails to use the least restrictive means to achieve the objective. *In re Forfeiture of 1969 Piper Navajo*, 592 So.2d 233, 235-36 (Fla. 1992).

Even if statewide eradication was essential, there is no evidence the 1,900-foot zone is narrowly tailored. To the contrary, the temporary injunction record is replete with evidence the 1,900-foot distance will not work, is completely arbitrary, includes a "fudge factor" and is being used for convenience, not necessity. Initial brief, *supra*, at pp. 8-9. The state is not permitted to destroy property as a matter of convenience. *State v. Leone*, 118 So.2d 781, 784-85 (Fla. 1960).

The trial court is charged with evaluating and weighing testimony based on its observation of the witnesses. *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976). The state's most essential witness was Gottwald. The Gottwald who appeared before the trial court would and did say anything to try to salvage his study. His testimony was full of inconsistencies, and his credibility was severely damaged by the constant shifts in his testimony.

The district court impermissibly substituted its judgment for that of the trial court based on its review of the cold record. *Id.*; *Connor v. State*, 803 So.2d 598, 605 (Fla. 2001) (citations omitted). To the district court, Gottwald's study was largely validated by its publication in a peer-reviewed journal. *Haire* at 1052. The district court found unimportant that Gottwald, prior to peer review, redacted written admissions of faulty study design and unreliable data. (T:637). The district court did not mention that Gottwald did not allow the peer reviewers access to the data underlying his study, (T:603, 619), the same data the state consistently refused to produce to Petitioners. Given Gottwald's sequestering of the data, Gottwald's report would have been no less publishable, and no more subject to peer criticism, had the

numbers in the spread distance tables been pulled out of a hat.[16]

An appellate court may reject the trial court's factual findings only if they are not based on competent, substantial evidence. In determining whether competent, substantial evidence exists, the appellate court must consider only the sufficiency of the evidence, not its weight. *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla. 1981). The district court seemingly rejected the testimony of Petitioners' experts based on concern over whether they were competent to address Gottwald's study:

> Appellees countered with testimony from two experts, one in applied econometrics and one in geostatistics. Neither, however, had any training in applying their fields of expertise to plant epidemiology. . . . Despite these weaknesses, in rejecting Dr. Gottwald's study as a sound basis for legislative action, the court adopted some of the appellees' experts' criticisms.

Haire, 836 So.2d at 1052. The district court's criticism missed the point and ignored other experts presented by Petitioners.

While Drs. Scoggins and Davis are not experts in plant epidemiology, they are experts in the scientific method, including study design, data collection and data analysis. They testified that, even assuming the spread measurements were reliable, Gottwald's analysis of the data, wholesale assumptions and decision to ignore the vast majority of the data he collected violated the scientific method and fundamental principles of statistics, thereby rendering the 1,900-foot distance arbitrary.

The district court's criticism also overlooked the testimony of Dr. Stall, a renowned canker expert who spent his career studying plant epidemiology. While Dr. Stall works for the state, he was presented as Petitioners' witness. Dr. Stall testified that the very design of Gottwald's study prevented spread distance from being reliably

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[16] Only a small portion of Gottwald's published paper related to the 1,900-foot zone. While that portion was not credible, the other issues Gottwald addressed may have otherwise justified publication. (T:113-14).

measured, a condition Gottwald admitted would undermine his conclusions.

The trial court acted within its discretion in permitting Drs. Stall, Scoggins and Davis to criticize Gottwald's study. *Johnson v. State*, 393 So.2d 1069, 1072 (Fla. 1980) (citations omitted); *Mathieu v. Schnitzer*, 559 So.2d 1244, 1245 (Fla. 4th DCA 1990). The district court did not rule that the trial court abused its discretion. The district court, for whatever reason, merely believed Gottwald. The trial court, to the contrary, did not believe Gottwald. His misstatements, and the numerous damaging admissions obtained on cross examination of the state's other witnesses, were considered by the trial court but ignored in the district court decision.

The district court also determined that, apart from Gottwald's study, the Canker Law was supported by Florida's practical experience with canker. *Haire*, 836 So.2d at 1052. Once gain, the evidence supports the opposite conclusion. In the ten counties where the 1,900-foot zone has been applied, (T:480), it was purportedly successful in only one small area.[17] The state's own epidemiological expert admitted that, even in any area where the 1,900-foot zone appears successful, its use may still have caused an unnecessary amount of destruction. (T:1599). The district court's willingness to sustain the mass destruction of private property based on a bald assertion of "practical experience" further demonstrates the inadequacy of the level of scrutiny applied.

Whether the Canker Law and 1,900-foot zone are subjected to *Corneal*'s "narrowest limited of actual necessity" standard or any other meaningful judicial scrutiny, it cannot be said that no reasonable trial court would have preserved the status quo pending a trial preceded by reasonable discovery.

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[17] Gottwald testified that eradication had been successful in two small areas. **(**T:869-70**)**. Only days after Gottwald testified, canker was again found in one, leaving only one tiny alleged success story. (T:1450-51).

B. Procedural Due Process.

Even had the Canker Law provided for the payment of full compensation, and even if the 1,900-foot zone could survive meaningful scrutiny, the temporary injunction is justified by the trial court's preliminarily finding that Petitioners must be afforded the opportunity for a meaningful predeprivation hearing. *Haire*, 836 So.2d at 1046. This ruling is completely validated by a single fact: Even in the unlikely event an "exposed" tree becomes infected, southeast Florida is sufficiently far from the commercial citrus growing region that infected trees here do not constitute any threat, let alone an imminent threat, to the citrus industry. This fact was demonstrated by the state's own conduct.

Because of the limited distance canker can spread from an infected tree, the state left thousands of infected trees standing in southeast Florida for up to two years, while Gottwald purported to study spread.[18] Additionally, despite claiming that "exposed" trees present an imminent danger, the state routinely allows known infected trees to remain standing in southeast Florida for months after detection. This fact was expressly referenced by the district court, which noted that the state's own conduct "suggests that even [the state is] not concerned that these trees pose an immediate danger to the citrus industries." *Id.* at 1058. Despite such recognition, the district court found that "exposed" trees anywhere in the state may be summarily destroyed. In so ruling, the district court erroneously applied *Smith*, and erroneously rejected the trial court's unassailable factual findings.

1. The Actual Facts Developed Are Controlling.

The statute at issue in *Smith* permitted summary destruction of healthy trees.

[18] Gottwald commented that his was the only study where, despite efforts to eradicate the disease, the "regulatory agencies permitted diseased trees to remain undisturbed" while spread was studied. (A:2:12).

Smith, 110 So.2d at 404. The statute addressed a disease called spreading decline. Spreading decline was spread very short distances by worms, or, like citrus canker, could be spread greater distances by human movement. *Corneal*, 95 So.2d at 2. As with canker, the Legislature declared that spreading decline presented a "most serious emergency" to the citrus industry. *Id*. at 3, 5; Chapter 57-365, Laws of Florida.

As it did during the *Haire* temporary injunction hearing, state experts claimed the threat required summary destruction of potential host trees. *Corneal*, 95 So.2d at 5. This claim was challenged. *Id*. at 4. The trial court rejected the state's claim that the targeted trees presented an imminent threat to the citrus industry, and ruled that destruction without a predeprivation hearing denied due process. This Court agreed. *Smith*, 110 So.2d at 408.

The *Smith* Court noted that a compelling public interest may justify the summary seizure of property. *Id*. at 407-08. The state may summarily seize diseased cattle, unwholesome meats, a building in the path of a conflagration and other property presenting imminent public danger. *Id*. at 406-08. However, even when the state chooses to pay full compensation, healthy trees may be summarily destroyed only under very limited circumstances:

> The only possible reason for *summary* destruction of the healthy trees would be the imminent danger of the spread of the disease from an infested to a non-infested grove. Since the facts developed in the Corneal case, and alleged in the complaint in the instant case, show there is no such danger, we cannot find a 'compelling public interest' sufficient to justify making an exception to the basic and fundamental rule of due process, requiring notice and a hearing *before* depriving a person of a substantial right.

Smith, 110 So.2d at 408 (italics in original, underline added).[19]

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[19] The *Corneal* Court used the same reasoning in reversing the denial of an injunction when, despite state claims to the contrary, the actual evidence showed that the state was mandating destruction of some healthy trees, which "certainly offer no *immediate* menace to trees in neighboring groves," for the purpose of

Thus, this Court held that summary destruction may be possible only when the actual facts developed show the targeted property presents an imminent danger to a compelling state interest. The *Smith* Court ruled that it was proper for the trial court to meaningfully scrutinize state claims of imminent danger. Because the actual facts showed the targeted trees did not present an imminent threat to the citrus industry, *Smith* held that the tree owner has the right to be heard, before destruction, on "questions of propriety and compensation." *Smith*, 110 So.2d at 409.

As it did in *Corneal* and *Smith*, the state here presented legislative findings and expert testimony that the targeted trees were an imminent threat to the citrus industry. However, as in *Smith*, the trial court rejected the state's claims and expert testimony since they were belied by the state's own conduct and the limited spread potential documented by Gottwald.

Instead of accepting the trial court's factual findings, as required under *Smith*, the district court found that canker is such an imminent threat that any tree, anywhere in the state, within any exposure zone declared by the state, whether 1.13 acres, 260 acres or 250,000 acres,[20] may be destroyed without providing an opportunity for a meaningful predeprivation hearing. The district court reasoned that two earlier cases, *Denney* and *Nordmann*, established that canker, unlike spreading decline, justified summary destruction. *Haire*, 836 So.2d at 1053. *Nordmann v. Dept. of Agriculture*, 473 So.2d 278 (Fla. 5th DCA 1985); *Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985). Aside from violating *Smith*, there are two main problems with the district

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protecting other healthy trees. *Corneal*, 95 So.2d at 6 (italics in original, underline added).

[20] There are nearly 250,000 acres in an eleven (11) mile radius. In the draft of Gottwald's report current at the time the state initially implemented the 1,900-foot zone in January 2000, Gottwald claimed canker can spread more than eleven (11) miles from an infected tree. (T:108-09).

court's reasoning.

First, *Denney* and *Nordmann* did not involve adversarial fact finding. *Denney* was not a due process challenge. *Denney* addressed a motion to stay an immediate final order ("IFO"). An IFO must be upheld, and the stay denied, merely if the IFO specifically alleges an imminent threat. *Denney*, 462 So.2d at 536-37. Whether an imminent threat actually existed was not at issue or ever established.[21] *Nordmann* merely relied on *Denney*'s rational, and Mr. Nordmann never disputed the state's claim as to the imminent destructive nature of canker. 473 So.2d at 278-79.

Second, and crucially, *Denney* and *Nordmann* involved suspect trees physically transported into the middle of the commercial growing region and planted in the middle of groves. If these trees ever became infected, they would undeniably present an imminent risk of spread into neighboring groves. Therefore, summary destruction of these trees met the specific exception stated in *Smith*. The same cannot be said of trees in distant urban areas, given the limited spread potential of canker.

Simply stated, *Smith* held that the actual facts developed, and not unsubstantiated state claims, control whether extraordinary circumstances justify denial of the fundamental right to a predeprivation hearing. The district court erred when it rejected the trial court's unassailable preliminary findings.[22]

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[21] In fact, it was subsequently established that the canker at issue not only presented no imminent threat but no threat at all. After destroying millions of grove trees in the mid-1980s, the state enacted the Citrus Canker Compensation Trust Fund, Chapter 89-91, Laws of Florida, which recognized that "later scientific information indicated that this strain of citrus canker did not constitute the grave danger to the industry first perceived."

[22] The district court also relied on cases affirming the state's right to summarily seize contaminated food or misbranded food supplements. *Haire*, 836 So.2d at 1053. These items are of no lawful use and, if placed in the stream of commerce, present an imminent threat to human health. "Exposed" trees in southeast Florida are not even an imminent economic threat, let alone any threat to humans.

2. The Canker Law Provides No Substitute For A Meaningful Predeprivation Hearing.

Smith also stated that summary destruction may deny property owners the full and fair hearing on the issue of compensation to which they are entitled. *Smith*, 110 So.2d at 407-08 (citations omitted). The *Haire* trial court, citing *Smith*, found that summary destruction would materially impair the ability to prove value. (A:1:24). The district court disagreed, and held that the availability of an inverse condemnation remedy effectively insulates the Canker Law from a procedural due process challenge. *Haire*, 836 So.2d at 1054. An inverse claim may always be brought when private property is confiscated or regulated. If the district court's statement is taken literally, no one could ever assert a procedural due process challenge to such state action.

The trial court also found that the remedy provided by the Canker Law, appealing an IFO, does not provide a meaningful predeprivation hearing. (A:1:23-4). An IFO is appealed solely to protect targeted trees from imminent destruction. That purpose can be achieved only by obtaining a stay within ten days. §581.184(2)(a), Fla. Stat. (2002). Petitioners presented evidence that stays are virtually impossible to obtain and maintain. (T:1156-80, 1217-20). The district court determined that the only issue relevant to a stay request is a challenge to whether the targeted tree is within a 1,900-foot zone. *Haire*, 836 So.2d at 1053-54. Thus, appeal of an IFO does not offer any opportunity, whatsoever, for owners of trees within such zones to challenge the propriety of the state action or to resolve compensation. *Id*.

In fact, given the limited scope of review of IFOs, stays should never be granted. Review is limited to determining whether the IFO, on its face, "recites with particularity the facts" underlying a finding that an imminent danger to public welfare

exists. *Denney*, 462 So.2d at 535.[23] The IFO forms used by the state clearly meet this standard. Since tree owners cannot ultimately prevail given the limited scope of review, no stay should ever be granted. *State ex rel. Price v. McCord*, 380 So.2d 1037, 1038 n.3 (Fla. 1980).

The futility of appealing an IFO was described in telling detail in *Markus v. Fla. Dept. of Agric.*, 785 So.2d 595, 596 (Fla. 3rd DCA 2001):

> Property owners as well as judicial tribunals are struggling with the issue of how and why the Department of Agriculture embarked on its dogged obliteration of the healthy back (or front) yard citrus tree. The frustrations of challenging this policy, either in a Chapter 120 proceeding or before this court, are staggering. Both infected and condemned trees are removed and ground into dust before any meaningful action can be taken by the property owner. The "final agency order" is nothing but a "Dear Resident" form from the Department of Agriculture. A "record on appeal" is an oxymoron. There is no record. Hence there is no meaningful appeal. We find that situation unacceptable as a matter of law, policy, and principle, yet we must affirm.

If appealing an IFO offered a meaningful predeprivation hearing, an appellate court would not be forced to affirm something which is "unacceptable as a matter of law, policy, and principle." Based on the facts presented, the trial court properly granted the temporary injunction, after determining that IFOs are used as a subterfuge to deny due process and interfere with constitutionally-guaranteed access to courts. Art. I, §21, Fla. Const.

C. Due Process Conclusion.

By combining mere rational basis scrutiny with the right to summarily destroy private property based on unsubstantiated claims of imminent harm, the district court

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[23] IFOs have historically been used, apart from citrus canker cases, as regulatory cease and desist orders to preserve the status quo pending a merits hearing. *See e.g. Fla. Assn. of Health Maint. Org. v. State of Fla., Dept. of Ins.*, 771 So.2d 1222 (Fla. 1st DCA 2000).

rendered the due process clause impotent. The availability of a subsequent inverse condemnation action is not the panacea claimed by the district court. If it was a full remedy, the Constitution would only contain a full compensation requirement, not a guarantee of due process.

The district court showed a tremendous willingness to disturb the trial court's broad discretion in fact-finding and in granting temporary injunctive relief, but an unwillingness to allow any meaningful scrutiny of legislative action. This type of extreme deference to the political branches is inconsistent with the judiciary's essential function of protecting the Constitution and preserving the constitutional liberties of all Floridians. Courts must apply meaningful scrutiny when fundamental rights are materially impacted by state action. The trial court applied meaningful scrutiny, and its rulings, based on the limited record, are consistent with *Corneal* and *Smith*. It cannot be said that the trial court abused its discretion in preserving the status quo while the parties and court sorted out this "complex statutory scheme" and "multifaceted and complex issue."[24]

Point III: THE DISTRICT COURT ERRED BY AUTHORIZING THE BULK ISSUANCE OF WARRANTS TO SEARCH THE CURTILAGE AREA OF HOMES.

"It is almost axiomatic that statutes and rules authorizing searches and seizures are strictly construed and affidavits and warrants issued pursuant to such authority must meticulously conform to statutory and constitutional provisions."[25] *State v. Tolmie*, 421 So.2d 1087, 1088 (Fla. 4th DCA 1982). Indeed, Florida case law

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[24] Justice Pariente and Justice Lewis used these phrases to describe the Canker Law in concurring with this Court's denial of bypass certification. *Haire*, 824 So.2d at 168.

[25] The case law distinguishes pre-seizure protections from post-seizure protections. The former requires strict compliance with statutory requirements, while the latter requires only "substantial compliance." *State v. Laiser*, 322 So.2d 490, 492 (Fla.1975); *State v. Russo*, 389 So.2d 213 (Fla. 4th DCA 1980).

uniformly requires that a search warrant statute be strictly construed. *See e.g. State ex rel. Wilson v. Quigg*, 17 So.2d 697, 701 (Fla. 1944); *State v. Schectman*, 291 So.2d 259, 261 (Fla. 4th DCA 1974); *Stewart v. State*, 389 So.2d 1231 (Fla. 2d DCA 1980); *Martin v. State*, 344 So.2d 248, 249 (Fla. 2d DCA 1976). The strict construction requirement reflects the elevated stature of Fourth Amendment protections:

> Save for the First and Fifth Amendments, the Fourth Amendment, from which we receive Section 12 to Article I of our own Florida Constitution, is probably most important to the liberty of all freedom loving citizens. One cannot sit idly by and observe its meaning be slowly eroded away even by well-meaning police and prosecutors.

Stewart, 389 So.2d at 1233 (citation omitted).

Accordingly, once the district court declared the Canker Law's provision for area-wide warrants "patently unconstitutional," the state should have been required to strictly comply with the statutory provisions applicable to individual search warrants. See §§933.01-933.19, Fla. Stat. (2002).[26] Instead, the district court held that a single warrant application seeking thousands of warrants electronically signed was within the discretion of the issuing magistrate because "nothing in the statutes or case law prohibits [it]."[27] *Haire*, 836 So.2d at 1059.

This ruling violates the strict construction standard. Under that standard, the

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[26] Chapter 933 is divided into two parts. The first lists the requirements for search warrants. §§933.01-933.19, Fla. Stat. (2002). The second part lists the requirements for an "inspection warrant." §933.20, Fla. Stat. (2002). Agricultural inspections are not included within the provisions for an inspection warrant.

[27] The district court also determined the "Florida Constitution impliedly permits" such multiple warrant requests because, unlike its federal counterpart, the Florida Constitution speaks in the plural of "place or places." *Haire*, 836 So.2d at 1055. This reading is contrary to Article I, §12's requirement that it be "construed in conformity with the 4th Amendment." It is unnecessary to reach the issue of compliance with constitutional standards, however, since the state's warrant applications fail to satisfy the statutory requirements.

relevant inquiry is not the absence of a statutory prohibition, but whether the authority is clearly and affirmatively expressed in the statute. *Orange County v. Fordham*, 34 So.2d 438, 440 (Fla. 1948); 48A Fla. Jur. 2d Statutes, §190 (2002). No such affirmative authorization can be found in Chapter 933 for the issuance of multiple warrants on the basis of a single application, or for the use of electronic judicial signatures on warrants.

A. The Issuance of Multiple Warrants Based on a Single Application.

The search warrant provisions of Chapter 933 consistently speak in the singular of "a warrant" or "the warrant." See §§933.01-933.19 (underline added). No prior case construed Chapter 933 as authorizing the bulk issuance of fill-in-the-address warrants on the basis of a single warrant application. In fact, there is no precedent for the issuance of such warrants anywhere in the United States.[28]

Even the more liberal provisions of Chapter 933 governing the issuance of an inspection warrant do not authorize the issuance of warrants in bulk. §§933.20-933.30, Fla. Stat. (2002). To the contrary, §§933.21 and 933.26 allow an inspection warrant to be issued only after "consent to inspect has been sought and refused .... ." *See also Camara v. Municipal Court*, 387 U.S. 523, 539-40 (1967) ("[inspection] warrants should normally be sought only after entry is refused"); *Roche v. State*, 462 So.2d 1096 (Fla. 1985) (upholding a regulatory agricultural inspection scheme requiring denial of consent to inspect prior to issuance of inspection warrants).

The ability to obtain mass-produced fill-in-the-address warrants, coupled with

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[28] Both out of state cases upon which the district court relied involved an individual warrant to search a limited number of connected properties involved in a single criminal enterprise. *State v. Mehner*, 480 N.W. 2d 872 (Iowa 1992) (two adjacent lots under common ownership); *People v. Cyr*, 317 N.W. 2d 857 (Mich. Ct. App. 1982) (16 properties involved in a single criminal conspiracy). To the extent these cases even address the multiple properties issue, they do so only with respect to the constitutional demand of particularity.

the absence of any requirement that the state first seek a homeowner's consent, grants the state the authority to conduct frequent surprise intrusions over large geographical areas.[29] These warrants are particularly intrusive since they authorize the state to search and seize within the curtilage area of private residences, an area entitled to the same heightened Fourth Amendment protection as the "sanctity of the home." *Oliver v. U.S.*, 466 U.S. 170, 178 (1984); *accord U.S. v. Dunn*, 480 U.S. 294, 301 (1987). Unlike most administrative inspection schemes which "involve a relatively limited invasion of the urban citizen's privacy," *Camara*, 387 U.S. at 537, here the inspection program "has as its design the securing of information ... which may be used to effect a further deprivation of ... property." *Roche*, 462 So.2d at 1101, quoting, *U.S. v. Schafer*, 461 F.2d 856, 859 (9th Cir. 1972). Nor do these surprise intrusions into curtilage areas stop when the trees are destroyed. The state continues to search these same yards for years to ensure there has not been regrowth or new planting.

By vesting the authority to issue multiple warrants on a single application in the "discretion of the issuing neutral magistrate," the district court also improperly usurped the Legislature's authority. The Legislature has exclusive authority, subject to constitutional limitations, to establish statutory conditions under which an administrative agency may obtain a warrant. *Telco Commun. Co. v. Clark*, 695 So.2d 304, 308 (Fla. 1997); *Context Development Co. v. Dade County*, 374 So. 2d 1143, 1149-50 (Fla. 3rd DCA 1979) (a statutory agency has only those powers granted by statute). This Court "has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." *B.H. v. State*, 645 So. 2d 987, 991 (Fla. 1994); *Pepper v. Pepper*, 66 So.2d 280, 283-4 (Fla. 1953).

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[29] In the Canker Law's area-wide warrant provision, the Legislature expressed its intent to spare homeowners from surprise intrusions into their backyards, by providing homeowners the right to object in court prior to issuance of warrants. §933.07(2), Fla. Stat. (2002).

B. <u>The Use of Electronic Judicial Signatures</u>.

To facilitate the issuance of so many warrants, the district court, again relying on the absence of any express prohibition, ruled that magistrates may allow their signature to be electronically affixed to warrants. *Haire*, 836 So.2d at 1059. The district court relied on *State v. Hickman*, which involved a warrant issued with a rubber stamp signature. 189 So.2d 259 (Fla. 2d DCA 1966).

The issue in *Hickman* was not the validity of the warrant but, rather, whether the state had commenced its prosecution within the statute of limitations. The *Hickman* court ruled that the stamped signature of the magistrate by his chief clerk, in the presence and at the direction of the magistrate, was sufficient to evidence the state's intent to commence prosecution for purposes of tolling the statute of limitations. However, the court made clear its reservation about the validity of the warrant: "There is a more fundamental reason why the issuance of the warrant in the case sub judice, <u>however defective the signature of the Magistrate thereon</u>, should be held to stop the running of the statute of limitations. *Id*. at 261 (underline added).

When the same court directly ruled on the signature requirements of §933.07, it held that strict compliance was required. *Stewart*, 389 So.2d at 1231 ("Search warrants which do not conform strictly to the statutory requirements are void."); *Martin*, 344 So.2d at 249 ("It is rudimentary that the statutes relating to the issuance of search warrants should be strictly complied with ..."). Neither *Hickman* nor any other case supports electronically signed warrants.

C. <u>The Ruling Undermines the Primary Functions of Regulatory Warrants</u>.

Aside from violating the strict construction standard, the large volume of warrants requested serves to undermine the two essential reasons for requiring a regulatory search warrant:

> In *Camara*, the Court recognized that the warrant in an administrative or regulatory search provided the citizen with two primary assurances: 1) It affirms that the search is authorized by proper authority; 2) It affirms that the search is being conducted for a proper purpose.

Roche, 462 So.2d at 1099. These reassurances have proven false under the state's perfunctory procedure for obtaining the issuance of large volumes of fill-in-the-address warrants using electronic judicial signatures. The record in this case demonstrates that this high volume procedure is prone to mistakes, resulting in unnecessary and unauthorized searches. For example, the state sought and obtained thousands of warrants to senselessly search for citrus trees inside high-rise dwelling units, and obtained hundreds of warrants containing search terms expressly disallowed by the warrant magistrate. Initial Brief, *supra*, at pp. 11-12. Thus, the bulk warrant, electronic signature procedure sanctioned by the district court has produced warrants without "proper authority" and authorized searches having no "proper purpose," contrary to the "two primary assurances" required of such warrants.

D. Search and Seizure Conclusion.

By allowing the issuance of generic, fill-in-the-address warrants covering large geographical areas, the district court effectively permitted the state to re-create the area-wide warrants that the court itself condemned as "patently unconstitutional." The ruling is directly contrary to the strict construction standard applicable to search warrant statutes, authorizes unreasonable searches and violates the separation of powers principle. For good reason, the district court's bulk warrant ruling is without precedent in Fourth Amendment jurisprudence and should be reversed.

Point IV: THE DISTRICT COURT ERRED IN REINSTATING THE AUTOMATIC STAY.

The trial court order vacating the Rule 9.310(b)(2) automatic stay should have been reviewed for an abuse of discretion. *St. Lucie County v. North Palm*

Development Corp., 444 So.2d 1133, 1135 (Fla. 4th DCA 1984). An abuse of discretion requires a determination that no reasonable trial court would have taken the challenged action. *Canakaris*, 382 So.2d at 1203. Here, the automatic stay would have completely gutted the temporary injunction. Having just determined that a temporary injunction was necessary to prevent irreparable harm, no reasonable trial court would have denied a motion to vacate the automatic stay.

The district court initially denied the state's motion to reinstate the automatic stay, but granted a renewed motion after declaring the Canker Law constitutional. The order reinstating the automatic stay, therefore, was based on the district court's substantive ruling. If this Court determines the substantive ruling was erroneous, quashing the district court's order reinstating the automatic stay will be necessary to effectuate the temporary injunction and to preserve the status quo pending trial.

CONCLUSION

The Canker Law has never been, and absent reversal will never be, subjected to meaningful scrutiny. The district court decision will be used to impact the fundamental rights of all Floridians, not just the hundreds of thousands of tree owners immediately impacted. Important constitutional lines should not be drawn in cases where the adversarial process has been stunted. Trial courts must retain the power to preserve the status quo pending resolution of complex constitutional issues.

Petitioners respectfully request that this Court reverse the *Haire* decision, quash the February 10, 2003 order reinstating the automatic stay, and direct the district court to remand the case for trial. Alternatively, if this Court determines that plenary review was proper, Petitioners respectfully request that this Court reverse the *Haire* decision and declare the Canker Law unconstitutional.

CERTIFICATE OF SERVICE

The undersigned certify that copies hereof were hand-delivered on May 9, 2003

to all persons on the attached service list.

CERTIFICATE OF COMPLIANCE

The undersigned certify this brief was prepared in Times New Roman 14-point font.

Respectfully submitted this 9th day of May, 2003.

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