IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

Lower Court Case No. 4D02-2584

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' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The state has been trying to eradicate citrus canker since the mid-1980s. Petitioners have never challenged the state's destruction of infected trees, the only trees capable of spreading canker. Rather, Petitioners challenged the state's new mandate for destruction of healthy trees. Historically, the state destroyed all trees within 125 feet (about 1 acre) of an infected tree, believing those trees were "exposed" and may become infected. In January 2000, the state changed the exposure zone to 1,900 feet (over 260 acres). On March 18, 2002, Chapter 2002-11, Laws of Florida (the "Canker Law") was enacted, codifying the 1,900-foot destruction zone.

The 1,900-foot zone has never been fully challenged. 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 which the Administrative Law Judge noted was "practically immune" from scrutiny. The DOAH ruling prevented the state from using the 1,900-foot zone. §120.56(4)(d), Fla. Stat. (2001). Claiming the citrus industry faced imminent catastrophe, the state responded by adopting an emergency rule which permitted 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 substantive challenge to the 1,900-foot zone. The state immediately withdrew the emergency rule. Shortly after the state was forced to engage in ordinary rulemaking, the Canker Law was enacted, mooting a newly filed administrative challenge.

Petitioners challenged the Canker Law. After an evidentiary hearing conducted without any discovery, the temporary injunction was granted May 24, 2002. Petitioners relied on public records and limited discovery from the rule challenge. The state's key witness was Dr. Gottwald, author of the study upon which the 1,900-foot

zone is based. The state has consistently refused to disclose the data underlying Dr. Gottwald's conclusions, which has prevented Petitioners from deposing Dr. Gottwald or independently analyzing his conclusions. After the temporary injunction was granted, the trial court ordered the state to disclose the data or risk the exclusion of evidence relating to Dr. Gottwald's study at the permanent injunction trial.

The trial court temporarily enjoined the state from destroying any healthy trees, preliminarily finding that the Canker Law was based on invalid science and denied tree owners due process. These findings were based on substantial expert testimony, including admissions by experts employed by the state. The trial court also prohibited the state from searching private yards without consent or a search warrant, and ruled that the state may not obtain bulk-issued warrants.

The state appealed the temporary injunction, and asked the district court to certify the case for direct review by this Court. The district court certified the case, reasoning that a "substantial number of Florida residents . . . will be significantly and adversely affected" by the decision, the decision "will affect the handling of citrus canker cases filed throughout the state" and, regardless of the outcome, "we will almost certainly certify the case to the Supreme Court as being of great public importance." *Fla. Dept. of Agric. v. Haire*, 832 So.2d 778, 781 (Fla. 4th DCA 2002). This Court denied jurisdiction since the "underlying litigation has been ongoing, and is still pending in the trial court . . .." *Fla. Dept. of Agric. v. Haire*, 824 So.2d 167 (Fla. 2002). Justice Pariente's concurrence, in which Justice Lewis joined, stated:

> To take jurisdiction over a non-final order granting a temporary injunction, in a case that is still being litigated, in order to attempt to decide the constitutionality of a statutory scheme that has not yet been declared unconstitutional in a final order would involve us in a piecemeal approach to a multifaceted and complex issue.

Id. at 168. The concurrence also noted that the district court admitted several constitutional issues were not yet ripe for plenary review. *Id*. at 168 n.4.

On January 15, 2003, the district court, having conducted a plenary review, reversed the temporary injunction. Petitioners' motions for rehearing, rehearing en banc and certification were denied February 17. The district court stated that certification was unnecessary since Petitioners can invoke this Court's discretionary jurisdiction under Rule 9.030(a)(2)(A)(i). On February 26, 2003, Petitioners timely filed a notice invoking this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

The district court's decision redraws the line between permissible state action and the fundamental constitutional rights of all Floridians. For the first time in Florida, state destruction of private property, without compensation, has been scrutinized under the highly deferential rational basis standard. The decision also approved the denial of a predeprivation hearing when the state claims, but does not demonstrate, the requisite imminent danger. By requiring that Petitioners, due to the claimed exigency, present a complete case at the temporary injunction stage, the district court created an impossible standard for Floridians seeking to protect their property from imminent state destruction. In *Corneal,* this Court recognized that all rights in a free society are undermined if the state possesses untrammeled power over private property. The district court's decision grants the state such power.

The district court found that an inverse condemnation action can cure any due process violations. If inverse was a complete remedy, the Constitution would contain only a full compensation clause, not a guarantee of due process. The district court also authorized the bulk issuance of unprecedented generic search warrants which will subject millions of Floridians to constant surprise intrusions, and which have a demonstrated history of jeopardizing core Fourth Amendment protections.

This Court should grant jurisdiction to review the district court's decision.

JURISDICTIONAL STATEMENT

The Court has discretionary jurisdiction since the district court's decision expressly declares valid a state statute. Art. V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(i).

ARGUMENT

THIS COURT SHOULD GRANT JURISDICTION TO REVIEW A DECISION EXPRESSLY DECLARING VALID A STATE STATUTE WHICH WILL IMMINENTLY DEPRIVE MILLIONS OF FLORIDIANS OF THEIR FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The district court never determined whether the trial court abused its discretion in granting the temporary injunction. Instead, the district court ruled on the ultimate merits. Its decision to conduct plenary review, and the substance of its ruling, are both erroneous.

Substantive Due Process. Petitioners do not dispute that the state may act under its police power to protect the citrus industry. The state action, however, must not violate the Constitution. In holding that the Canker Law does not deny substantive due process, the district court circumvented *Corneal* and became the first Florida appellate court to subject state destruction of private property to mere rational basis scrutiny. In *Corneal*, this Court, recognizing the foundational importance of property rights, subjected state destruction of private property to the strictest conceivable level of scrutiny. *Corneal v. State Plant Board*, 95 So.2d 1, 6 (Fla. 1957). Under *Corneal*, the destruction "is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation." *Id*. at 4.

The district court did not state that destroying healthy trees, most of which are in urban areas far from the commercial growing region, is within the "narrowest limits of actual necessity." Instead, the district court found that the state chose to pay

compensation within the meaning of *Corneal*. In §581.1845, Florida Statutes, the state chose only to pay nominal compensation,[1] and expressly conditioned that payment upon future legislative appropriation. Since the Legislature can appropriate whatever amount it wishes, it has reserved the full ability to pay the nominal amount or to even pay nothing for healthy trees destroyed. The Canker Law indisputably does not provide for the full compensation required under Florida's Constitution.[2]

The district court held that token, conditional compensation was acceptable under *Corneal* because, if more compensation is due, it can be resolved in a later inverse condemnation action. This violates *Corneal*'s rationale and would render *Corneal* meaningless. The mere availability of an inverse claim cannot nullify *Corneal*'s exacting scrutiny because an inverse claim is always available. Only when the state chooses to fully compensate, and only when the state recognizes it is obligated to fully compensate, does the state have a sufficiently strong incentive to destroy only what is necessary. The state's agreement to pay full compensation, without condition or excuse, thus serves as an adequate surrogate for the exacting judicial scrutiny that would otherwise be applicable under *Corneal*.

As borne out by the evidence here, no adequate surrogate exists when the state commits to pay little or nothing, especially when the state asserts, as it has done here and in the *Patchen* case recently argued before this Court, that the targeted trees are

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[1] A homeowner receives no cash compensation, whatsoever, for the first tree destroyed. §581.1845(3). For each additional tree destroyed, the state agreed to pay the homeowner $55.00 or $100.00. §581.1845(6). The amount depends on the fiscal year, not on the tree's value. The state estimates that the average healthy residential citrus tree is worth $468.00.

[2] Art. X, §6, Fla. Const.; *State Plant Board v. Smith*, 110 So.2d 401, 407 (Fla. 1959) (legislative provision for full compensation was "a clear requisite to the act of destruction.").

valueless nuisances. The state conceded the destruction zone was greatly expanded because destroying trees was less expensive and more convenient than conducting periodic inspections. Because it was not forced to confront the expense of full compensation, and believed in fact no compensation was due, the state felt free to destroy more than what was actually necessary, impermissibly imperiling private property rights. Under *Corneal*, the state's failure to provide for payment of full compensation renders the Canker Law an invalid exercise of police power.

Even had the state agreed to fully compensate, analyzing state destruction of private property under a rational basis test is unprecedented in Florida and based on a misreading of *Miller v. Schoene*, 276 U.S. 272 (1928). *Fla. Dept. of Agric. v. Haire*, 2003 WL 118257 (Fla. 4th DCA 2003) ("*Haire*") at *8-9. *Miller* addressed the destruction of infected cedar trees within two miles of apple orchards, *id*. at 277, not healthy trees far away from the orchards. It was undisputed that the infected cedars would destroy the nearby orchards. *Id*. at 278-79. The destruction was therefore necessary, not merely rational. Neither *Miller* nor any other case supports mere rational basis scrutiny of state destruction of private property.

Even if rational basis scrutiny was proper, the trial court preliminarily found the 1,900-foot zone was arbitrary. The finding was supported by testimony that Gottwald's study and conclusions were unsound. It was also supported by Gottwald's admission that canker cannot be successfully eradicated. Where there is no reasonable expectation that the state goal can be achieved, the state action serves no public purpose and is arbitrary. *Smith*, 110 So.2d at 409.

The district court further stated that the 1,900-foot radius was narrowly tailored because no less destructive alternatives were shown. The temporary injunction record shows several less-destructive alternatives. For example, unlike Florida, Brazil focuses on timely inspection rather than destruction, resulting in destruction zones about 90%

smaller. The state also failed to demonstrate why it would be insufficient to create citrus-free buffer zones around groves, as was done in *Miller*, or to destroy "exposed" trees only 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 is "the largest regulatory attempt to eradicate a plant disease ever undertaken in the history of the world."

Petitioners can demonstrate when briefing the merits that the district court's findings of rationality and narrow tailoring are inconsistent with the record. More importantly, however, the ultimate constitutional merits were not yet at issue. The true issue, whether the trial court abused its discretion by granting a temporary injunction, was not addressed by the district court.

The district court sought to justify its plenary review by stating the trial court intended for its order to be final. *Haire* at *4 n.2. Even were that so, findings and legal conclusions at the temporary injunction stage are never binding since the evidentiary record is more limited than 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 district court believed the trial court sought to improperly attach finality to its rulings, it should have instructed the trial court accordingly. Penalizing Petitioners by denying a trial preceded by reasonable discovery is unwarranted and without precedent. By requiring that Petitioners present a dispositive case without discovery, the district court denied due process and created an impossible standard which severely undermines constitutional property rights.

Procedural Due Process. Even had the state decided to pay full compensation, the trial court temporarily enjoined the destruction of healthy trees because the Canker Law denies the opportunity for a meaningful predeprivation hearing. After *Corneal*, the Legislature amended the applicable statute to provide for payment of full

compensation. The new statute was challenged in *Smith*. This Court held:

> 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 (underline added). Thus, this Court held that a predeprivation hearing may possibly be denied only if the actual facts developed show the targeted property presents an imminent danger to a compelling state interest.

The compelling state interest is protecting the citrus industry. As with canker, the Legislature declared the citrus disease at issue in *Smith* a "most serious emergency." Chapter 57-365, Laws of Florida. As in the instant case, state experts claimed the emergency required summary destruction. *Corneal*, 95 So.2d at 5. *Smith* allowed these claims to be factually challenged.

Southeast Florida is sufficiently far from the commercial growing region that the state routinely allows even known infected trees, the only trees capable of spreading canker, to remain in place for several months after detection. The state also used Broward and Miami-Dade counties as its living laboratory to conduct the Gottwald study, leaving thousands of known infected trees standing in these counties for up to two years. The district court 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." *Haire* at *15. That statement cannot be reconciled with the district court's holding that every tree the state deems "exposed," anywhere in the state, is so imminently dangerous to the citrus industry that the fundamental right to a meaningful

predeprivation hearing may be denied.[3]

The district court disregarded the facts developed during the temporary injunction hearing, reasoning that *Denney* and *Nordmann* established that canker, unlike the citrus disease at issue in *Smith*, was always an imminent threat that justified denial of a predeprivation hearing. *Haire* at *11. *Nordmann* merely adopted *Denney*'s rationale. *Nordmann v. Dept. of Agric.*, 473 So.2d 278, 79-80 (Fla. 5th DCA 1985). *Denney* was an appeal of an IFO. An IFO must be upheld merely if it specifically alleges an imminent threat. *Denney v. Conner*, 462 So.2d 534, 536-37 (Fla. 1st DCA 1985). No imminent threat was ever established.

The district court also overlooked a crucial distinction. The exposed trees at issue in *Denney* and *Nordmann* were planted in the middle of dense groves. If they ever became infected, they would undeniably present an imminent risk of spread into neighboring groves. The same cannot be said of healthy trees, in distant urban areas, included within a newly-declared exposure zone 230-times larger than that applicable in *Denney* and *Nordmann*. Even if they became infected, they certainly present no imminent threat to spread canker to the distant commercial growing region.

Search Warrants. The district court held that the Canker Law's authorization of area-wide warrants up to the size of a full county was "patently unconstitutional." Yet the district court permitted the state to effectively re-create such warrants by authorizing the state to obtain thousands of warrants to search private yards based on a single warrant application. This ruling is without precedent in the United States.[4]

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[3] The Canker Law provides the state may deliver an immediate final order ("IFO") 10 days before destruction. The evidence showed appeal of an IFO is not a meaningful hearing. The futility of such appeal was described in telling detail in *Markus v. Fla. Dept. of Agric.*, 785 So.2d 595, 596 (Fla. 3rd DCA 2001).

[4] The out-of-state cases cited by the district court involved one warrant to search a small number of properties connected by a single criminal enterprise.

The district court justified its ruling by stating that no Florida statute or case expressly prohibits such warrants. *Haire* at *16. This justification violates the strict construction standard applicable to search warrant statutes. *State v. Tolmie*, 421 So.2d 1087, 1088 (Fla. 4th DCA 1982) ("affidavits and warrants . . . must meticulously conform to statutory and constitutional provisions."); *accord*, *State ex rel. Wilson v. Quigg*, 17 So.2d 697, 701 (Fla. 1944). Under the strict construction standard, the relevant inquiry is not the absence of a statutory prohibition but rather the existence of an express statutory authorization. Nothing in Chapter 933 expressly authorizes the issuance of multiple warrants from a single application. To the contrary, the search warrant provisions of Chapter 933 speak consistently in the singular of a warrant or the warrant. *See*, §§933.01-933.19, Fla. Stat. (2002).

The district court's ruling will subject millions of Floridians to repeated state intrusions into their private yards. The record contains concrete examples of unnecessary warrants being authorized under the bulk warrant procedure, including the state obtaining thousands of warrants to search high-rise dwellings for citrus trees.

CONCLUSION

The Canker Law has never been, and absent reversal will never be, subjected to meaningful challenge. 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 grant jurisdiction.

CERTIFICATE OF SERVICE

The undersigned certify that copies hereof were served on March 10, 2003, in the manner listed on the attached service list, to each person listed thereon.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted this 10th day of March, 2003.

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