IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC03-446

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

*Petitioners*,

v.

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

*Respondents*.

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# AMENDED BRIEF ON JURISDICTION OF RESPONDENT FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

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

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# INTRODUCTION

Petitioners invoke the Court's jurisdiction under Article V, section 3(b)(3) of the Florida Constitution to review a decision of the Fourth District Court of Appeal upholding the constitutionality of section 581.184, Florida Statutes (2002), a part of the Citrus Canker Law, which directs the Department to destroy all citrus trees within 1,900 feet of a citrus tree infected with canker, because such trees are exposed to the disease and further its spread. *Florida Dep't of Agric. & Consumer Servs. v. Haire*, 836 So. 2d 1040 (Fla. 4th DCA 2002). A copy of the decision is appended hereto.

## STATEMENT OF THE CASE AND FACTS[1]

In 2000, the Florida Legislature found that the citrus industry was vital to the state's economy, that scientific studies established that canker spreads as far as 1,900 feet from infected trees, and that the spread of canker created a state-wide emergency requiring quick eradication. *Haire*, 836 So. 2d at 1051-52. In 2002, the Legislature revisited the citrus canker crisis and enacted the Citrus Canker Law based on "Florida's practical experience with the disease," and a study measuring the spread of canker by Dr. Tim Gottwald, "a nationally recognized expert in the field of plant pathology," which had been published, peer-reviewed, and provided to the Florida Citrus Canker Technical Advisory Task Force. *Id.* at 1051. The Legislature directed the Department to remove all citrus trees located within 1,900 feet of a tree infected with the disease. *Id.* at 1046.

Petitioners brought suit and sought a temporary injunction, contending that the 2002 Citrus Canker Law violated substantive and procedural due process, constituted a taking of property without just compensation, and permitted unreasonable searches and seizures. *Id.* at 1044-45. The trial court granted "an extensive hearing." *Id.* at 1045. Dr. Gottwald and other experts from the Department testified, and petitioners put forward two experts neither of whom "had

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[1] Petitioners improperly include in their statement purported "facts" that are not within the decision's four corners, which exceeds the constitutional limitation on the Court's review under Article V, section 3(b)(3) of the Florida Constitution, of a decision that *expressly* declares valid a state statute. Of course, there is no record before the Court to verify these extra-decision facts, because the Court's review is limited solely to the district court's decision. Fla. R. App. P. 9.120(d)

any training in applying their fields of expertise to plant epidemiology." *Id*. at 1052.[2] Relying on petitioners' experts, the trial court granted a temporary injunction, holding, in pertinent part, that section 581.184 was unconstitutional, on the ground that Dr. Gottwald's study was not "a sound basis for legislative action." *Id.* The trial court also held that there must be a single warrant application for each parcel of property sought to be searched. *Id.* at 1045-46.

The Department appealed, and the district court accepted the appeal on the basis that the trial court's constitutional determinations were "final," in light of the trial court's holding "that after appellate review, all of the questions of law resolved in the order would become law of the case." *Id.* at 1047, n.2.

After analyzing the governing principles and precedents for determining whether a statute has violated substantive or procedural due process, the district court held that the legislature's enactment of section 581.184 "was amply supported by the scientific studies and Florida's practical experience with citrus canker." *Id.* at 1052. The court also held that procedural due process was not violated inasmuch as a pre-deprivation hearing is not a constitutional imperative where only money is at issue, and that the statute provides for compensation and complete judicial review. *Id.* at 1053.

The district court also held that the trial court erred in imposing a single parcel requirement on the Department's search warrant applications, determining

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[2] Petitioners assert that the hearing was conducted without discovery, and that the state had refused to disclose data underlying the Gottwald report (Petitioners' brief at 1-2), but neither of these purported "facts" are *expressly* referenced in the district court's decision.

that all constitutional and statutory requirements are satisfied so long as an affidavit provides probable cause and particularity as to the properties to be searched. *Id.* at 1058-59.

## SUMMARY OF THE ARGUMENT

The district court held that section 581.184 does not deny procedural or substantive due process of law to property owners, and that the trial court erred in enjoining the Department's use of one search warrant application for more than one parcel of property. There is no reason for the Court to exercise its discretionary jurisdiction to review the district court's decision declaring section 581.184 valid, and there is no authority for the Court to review the district court's decision on search warrant applications.

## ARGUMENT

### I. Substantive due process.

In its continuing effort to provide statutory tools for the Department to eradicate canker, the 2002 Legislature directed the Department to destroy all citrus trees within 1,900 feet of a citrus tree that is infected with canker. § 581.184(2)(a), Fla. Stat. (2002). At petitioners' request, the trial court enjoined the Department from proceeding with its legislatively-mandated eradication program by declaring that section 581.184 constituted a "taking" without just compensation, and a violation of substantive due process, because "the Gottwald report was not . . . 'constitutionally acceptable as a basis for legislative abrogation of a property owner's right to the full panoply of protections by our State and Federal constitutions.'" *Haire*, 836 So. 2d at 1046.

The district court reversed the trial court's order. Tracing the use of the state's police power to protect the state's citrus industry since 1930, including its use when it had become necessary to destroy citrus trees under a prior canker eradication program, the court carefully analyzed three decisions of this Court examining the interaction between due process and "taking" concerns in the context of the use of the police power to destroy agricultural products: *Corneal v. State Plant Bd.*, 95 So. 2d 2 (Fla. 1957); *State Plant Bd. v. Smith*, 110 So. 2d 401 (Fla. 1959); and *Department of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988). *Haire*, 836 So. 2d at 1047-50.

From the rationale, language and holdings of those decisions, the court determined that the Fifth Amendment does not limit governmental interference with property rights *per se*, but rather requires compensation when healthy trees are destroyed for a public benefit. *Id.* at 1049. Relying on *Miller v. Schoene*, 276 U.S. 272 (1928), involving the destruction of healthy apple trees, and from *express* language in *Corneal*, the court held that the test for determining whether a statute violates substantive due process is the "reasonable relationship" test and not, as petitioners argued, the "narrowly tailored least restrictive means" test. *Haire*, 836 So. 2d at 1050. The court's decision directly follows repeated decisions of this Court which have held that substantive due process is determined under the rational basis test. *E.g., Ilkanic v. City of Ft. Lauderdale*, 705 So. 2d 1371, 1272 (Fla. 1998); *Lane v. Chiles*, 698 So. 2d 260, 262-63 (Fla. 1997); *Lite v. State*, 617 So. 2d 1058, 1059-60 (Fla. 1993); *In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d 233, 235 (Fla. 1992).

Applying that test, the court held that "legislatures are not limited to acting only where there is scientific certainty," that the Florida Legislature had before it both scientific studies and its own practical experience in fighting citrus canker for more than 20 years, and that legislative choice is not subject to "courtroom fact-finding." *Haire*, 836 So. 2d at 1052. The court concluded that, despite petitioners' courtroom criticisms of the Gottwald report, the Legislature's action was "amply supported" by science and its own practical experience. *Id.* The court went on to hold that the statute *also* meets the "narrowly tailored least restrictive means" test that petitioners contend should have been applied, because petitioners offered no evidence of an alternative method to meet the Legislature's goal of *eradication*, rather than mere containment. *Id*. at 1053.

Petitioners ask the Court to review the district court's substantive due process determination on the basis of three arguments.

They first assert that the district court "circumvented" *Corneal* by applying the rational basis test, because the Legislature provided what they claim is inadequate rather than "full" compensation for citrus trees destroyed under the Department's eradication program. Petitioners' brief at 4-5. This argument provides no basis for discretionary review, however. The argument is dependent on purported "facts" which are not before the Court; namely, that the Department estimated the value of healthy residential citrus trees at $468, and that an alleged inadequacy of an inverse condemnation award is "borne out by the evidence." *Id.* at 5 & n.1.[3]

[3] Petitioners persistently exceed the constitutional limitation on the Court's review by referencing "evidence" from the trial proceeding, a trial court

(continued...)

Even if the Court were to consider this argument, however, it would find that the district court directly addressed and rejected this argument by holding that section 581.1845 provides for compensation for the destruction of trees and that the statutory amount of compensation is not controlling in any event. *Haire*, 836 So. 2d at 1054. The very statute which sets a minimum floor for compensation also states that those amounts are not determinative and "does not limit the amount of any other compensation that may be paid . . . pursuant to court order." *Id.* (quoting § 581.1845(4), Fla. Stat. (2002)). The availability of inverse condemnation proceedings (which, in this case, remain pending in the trial court) provides a vehicle through which such "other compensation" may be awarded.

Petitioners' contention that the availability of inverse condemnation claims does not "nullify *Corneal*'s exacting scrutiny because an inverse claim is always available" (Petitioners' brief at 5), simply misses the point. Here, the legislature has authorized "other compensation." § 581.1845(4), Fla. Stat. (2002). Inverse condemnation is an available remedy. This is in sharp contrast to a forfeiture, for which neither inverse condemnation nor statutorily authorized compensation is available. *Piper Navajo*, 592 So. 2d at 234-35. The legislature cannot be more precise on the compensation amount, in any event, because that is a judicial function. *Department of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 30-31 (Fla. 1990). And of course, the issue of the amount of compensation to be

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(...continued)

finding "supported by testimony," what the "record shows," what a state expert allegedly "touted" in the proceeding, and what they "can demonstrate when briefing the merits" — none of which is *expressly* referenced in the decision. *Id.* at 7.

awarded to citrus tree owners is not before the court in this case, but rather in *Patchen v. State, Dep't of Agric. & Consumer Servs.*, Case No. SC02-1291.

Petitioners next assert that even if full compensation is available under the statute, the district court has misread the Supreme Court's *Miller* decision because it dealt with "infected" cedar trees rather than, as here, apparently healthy citrus trees. Petitioners' brief at 6. It appears that petitioners, not the district court, have misread *Miller*, however. That decision quite clearly approved the destruction of cedar trees which "may be" the source of the communicable plant disease, and held that a state need not wait "for absolute infection" before the trees may be destroyed. 276 U.S. at 277-78. Given the nature of citrus canker, that its symptoms are not fully seen until 107 to 108 days after infection, and that it is uncontrollably spread through wind-driven rain or contamination of equipment or plant material (*Haire*, 836 So. 2d at 1043), the district court properly determined that the substantive due process analysis in *Miller* was fully applicable here.

Petitioners also argue that the district court's determination of the constitutionality of the 2002 Citrus Canker Law was premature, because (i) the "ultimate constitutional merits" were not at issue, (ii) the findings and conclusions of a "temporary injunction" are "never binding," and (iii) they were "penalized" by not having a trial "preceded by reasonable discovery." Petitioners' brief at 6-7. These arguments fly in the face of the district court's express holding that the constitutional issues adjudicated in the trial court's order *were* final and binding for all purposes in this proceeding. In any event, these arguments go the district court's jurisdiction, and do not provide a basis for invoking this Court's

jurisdiction on the only ground that petitioners have presented – namely, that the district court's decision has held a state statute valid.

## II. Procedural due process.

Petitioners argue that procedural due process is denied by the 2002 Citrus Canker Law, because *Smith* requires the development of "facts" for a showing of imminent danger, and the district court "disregarded the facts developed "at the trial proceeding." Petitioners' brief at 8-9. They also assert that "the evidence showed" that the statutorily-required, 10-day, pre-destruction hearing opportunity provided by Immediate Final Orders issued by the Department to every property owner "is not a meaningful hearing." *Id.* at 8, n.3.

The obvious problem with these arguments is that neither provides a basis for invoking the Court's discretionary jurisdiction. Both arguments are dependent on evidence developed at the "extensive hearing" in the trial court, none of which is *expressly* identified or discussed in the district court's decision. The Court thus has no record on which to evaluate the accuracy of petitioners' contentions, and the Department has no record from which to discuss the quantity, quality, or nature of the evidence adduced at that hearing.[4]

[4] Petitioners take out of context the district court's observation that "these trees do not pose an immediate danger." Petitioners' brief at 8 (*quoting* 836 So. 2d at 1058). The court there was only commenting that the few days that it would take to obtain a warrant would not pose the type of exigent circumstances required to dispense with a warrant. The untold months it would take to litigate an eminent domain action before removing a tree, however, is a wholly different matter.

More fundamentally, petitioners do not challenge the district court's rationale for holding that, based on United States Supreme Court precedent, mere "postponement" of a judicial inquiry is not a denial of due process where only property rights are involved, and that inverse condemnation provides an adequate judicial proceeding for that purpose. *Haire*, 836 So. 2d at 1053-54.

The Court should reject the invocation of its jurisdiction on this challenge to the district court's decision. There is no "fact" basis for the Court to review the evidence of which petitioners complain, and they make no complaint of the legal basis for the district court's careful analysis of the trial court's misanalysis.

## III. Single search warrant affidavits for multiple properties.

Petitioners invoked Article V, section 3(b)(3) of the Florida Constitution, which authorizes the Court's review of decisions which expressly declare a state statute valid, as the *only* jurisdictional basis for Court review. Petitioners' brief at 4. Petitioners argue, however, that the district court erred in overturning the trial court's restriction on the number of properties that can be identified in a search warrant application. This argument is not a basis for court review.

The only provision in the 2002 Citrus Canker Law that addressed search warrants was section 933.07(2), which authorized area-wide warrants for the Department's canker eradication program. The district court held that provision to be unconstitutional. Petitioners' challenge to the court's ruling with respect to the search warrant affidavits, however, is that it violates the principle of "strict construction applicable to search warrant statutes." Petitioners' brief at 9-10. The

Constitution does not authorize the Court to exercise its discretionary jurisdiction to review district court decisions that construe statutes, though.

## CONCLUSION

The petition for discretionary review should be denied.

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## CERTIFICATE OF COMPLIANCE

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

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