John M. Haire v. Florida Dep't of Agriculture

CHIEF JUSTICE: YOU MAY BE SEATED. ALL RIGHT. WE APPRECIATE YOUR BEING READY ON THE FIRST TWO CASES WHICH ARE CONSOLIDATED. COUNSEL HAS WORKED OUT THE TIME ARRANGEMENTS. WITHOUT ANY FURTHER ADO, YOU MAY PROCEED.

THANK YOU, CHIEF JUSTICE. MY NAME IS ANDREW MYERS. I REPRESENT THE COURT. I REPRESENT BROWARD COUNTY AND THE HAIRS, THE LEAD PLAINTIFFS IN THIS ACTION. WITH ME AT COUNSEL TABLE TODAY ARE MR. ROBERT DUVALL, WHO WILL BE ADDRESSING CERTAIN SEARCH AND SEIZURE ISSUES A LITTLE BIT LATER AND MR. MISURACA, WHO REPRESENTS BROOKS TROPICALS, AND I HAVE RESERVED THREE MINUTES FOR REBUTTAL AND WILL BE REPRESENTING.

CHIEF JUSTICE: WE HAVE JUST A LITTLE BIT OF TIME, SO LET'S GET TO IT.

FIRST, IN PLENARY REVIEW, INSTEAD OF DECIDING WHETHER THE TRIAL COURT SHOULD HAVE USED -- WHETHER THE TRIAL COURT USED ITS DISCRETION IN ISSUING THE TEMPORARY INJUNCTION.

IT SEEMS THE TRIAL COURT CAME TO A FINAL CONCLUSION, EVEN THOUGH IT WAS IN THE NATURE OF A TEMPORARY INJUNCTION, SO THAT ISSUE SEEMS TO HAVE BEEN TOTALLY RESOLVED.

JUSTICE, I DON'T THINK IT HAS BEEN TOTALLY RESOLVED. WE HAVEN'T HAD THE OPPORTUNITY TO SEE THE GOT WHAT WOULD, WHICH IS THE -- THE GOTTWALD, THE ENTIRE STATUTORY SCHEME. THE DISTRICT SAID THAT THE STATUTORY SCHEME WAS SUPPORTED BY CERTAIN PRACTICAL EXPERIENCE. I DON'T THINK THAT A VAGUE NOTION OF PRACTICAL EXPERIENCE CAN SURVIVE SCRUTINY ANALYSIS.

ISN'T THAT THE ISSUE WE HAVE GOT TO FIRST ADDRESS, THAT IS WHETHER THIS STATUTE AS WRITTEN, IS SUBJECT TO EITHER RATIONAL BASIS REVIEW OR STRICT SCRUTINY. IF IT IS RATIONAL BASIS REVIEW, YOU WOULD AGREE THAT GOING BEHIND THE GOTWALD STUDY AND LOOKING AT THE DATA AND HAVING A FULL-BLOWN TRIAL IS NOT REALLY THE TYPE OF INQUIRY THE COURTS MADE, WHEN THE STATUTES ARE SUBJECT TO ONLY RATIONAL BASIS REVIEW.

YES, JUSTICE PARIENTE. WE WOULD AGREE THAT, IF IT WAS RATIONAL BASIS REVIEW, THAT WE COULD NOT GO BEHIND THE STUDY. WE DON'T THINK THAT IT CAN POSSIBLY BE RATIONAL BASIS, WHEN DEALING WITH THE FUNDAMENTAL INTERESTS.

UNLESS THE STATE CHOOSES TO PAY FAIR AND JUST COMPENSATION. ISN'T THAT THE CAVEAT WITH ALL OF THE CASES?

WE DON'T KNOW IN CORNEAL, THAT THE STATE SAID THAT IT CAN GO INTO THE BACKYARDS AND TAKE AS MANY CITRUS TREES AS IT WANTS, MERELY BY PAYING FULL COMPENSATION IN A COMMERCIAL SETTING. FULL COMPENSATION WOULD SEEM TO BE FARRELLY ADEQUATE, BECAUSE THE PROPERTY IS -- WOULD BE FAIRLY ADEQUATE, BECAUSE THE PROPERTY IS FOR SALE, AND YOU WOULD BETRAYEDING ONE FORM OF MONEY.

ESSENTIALLY THE STATE CAN TAKE PRIVATE PROPERTY, AS LONG AS THEY PAY FULL AND JUST COMPENSATION. IT DOESN'T MATTER WHERE IT IS ON THE PERSON'S PROPERTY.

UNDER IMMINENT DOMAIN, THERE IS SOME OPPORTUNITY TO LOOK AT THE PROPRIETY OF IT UNDER THE REASON ALAN PUBLIC PURPOSE STANDARDS, AND OF COURSE COMPENSATION IS ADDRESSED IN ADVANCE AND AS THIS COURT RECOGNIZED IN JOINT VENTURES, THE CONDEMN KNEE IS SITTING IN THE POSITION OF A -- POLICE POWER, ESPECIALLY WHEN THERE IS NO OPPORTUNITY AT ALL TO ADDRESS THE JUST COMPENSATION OR THE PROPRIETY.

YOU SAID THAT THEY DIDN'T USE AN ABUSE OF DISCRETION STANDARD, BUT ONE OF THE BASIS FOR WHICH YOU CAN GET A TEMPORARY INJUNCTION, IS THAT YOU HAVE A SUBSANCTION LIKELIHOOD ON THE MERITS, CORRECT?

YES, MA'AM.

AND THAT GOES BACK TO WHETHER THE STATUTE IS CONSTITUTIONAL OR NOT AND WHAT LEVEL OF REVIEW THAT WE EMPLOYEE, SO REALLY THE INQUIRY STILL GOES BACK TO WHETHER THE FOURTH DISTRICT, IN USING A RATIONAL BASIS STANDARD, ERRED IN APPLYING THAT STANDARD, VERSUS STRICT SCRUTINY.

YES, MA'AM. IF THE COURTROOM FACT FINDING IS NOT PROPER ON A RATIONAL BASIS AND IF THE COURT NEEDS TO DEFER TO THE LEGISLATURE, WHICH IS THE OPPOSITE OF WHAT THE COURT DOES UNDER STRICT SCRUTINY, THEN IT DOESN'T MATTER IF THE COURT CONDUCTED PLENARY REVIEW, BECAUSE THE COURT WAS NOT BOUND TO EVEN HONOR THE TRIAL COURT'S FINDINGS UNDER THAT CERTAIN CIRCUMSTANCE, AND THE REST OF IT IS A MATTER OF LAW.

BUT HAVEN'T WE SAID, IN COCA-COLA COMPANY VERSUS THE DEPARTMENT OF CITRUS, THAT IN THESE ECONOMIC SITUATIONS WHEN THE STATE IS DOING THESE ACTS UNDER POLICE POWER, THAT THAT IS IN FACT THE STANDARD THAT YOU USE, THAT IS WHETHER IT BEARS A RATIONAL OR REASONABLE RELATIONSHIP TO A LEGITIMATE STATE OBJECT. HOW DO YOU GET AROUND THE COCA-COLA CASE?

WELL, THERE IS CERTAINLY A DIFFERENCE WHEN YOU ARE DEALING WITH A NONECONOMIC INTEREST OR A GENERAL SITUATION.

BUT ISN'T THIS WHOLE CITRUS CANKER SCENARIO BASED ON THE FACT THAT CITRUS IS, IN FACT, WITHIN THE ECONOMIC WELL-BEING OF THE STATE, AND THAT IS WHY THE STATE CAN USE ITS RELEASE POWER TO TRY TO ERADICATE CITRUS CANKER?

WE DON'T DISPUTE THAT THE STATE HAS VERY BROAD LATITUDE TO USE ITS POLICE POWER TO PROTECT THE CITRUS INDUSTRY. WHERE WE DRAW THE LINE IS WHERE THE STATE IS DESTROYING PRIVATE PROPERTY, WHICH IS AN EXTREME EXERCISE OF THAT POLICE POWER. WHAT WE ARE DEALING WITH HERE, JUSTICE QUINCE IS FUNDAMENTAL RIGHTS. WHEN YOU ARE DEALING WITH FUNDAMENTAL RIGHTS, INCLUDING THE DESTRUCTION OF PROPERTY IN BACKYARDS, WHICH ARE AREAS THAT THIS COURT HAS RECOGNIZED MERIT CONSTITUTIONAL PROTECTION, THE STATE ESSENTIALLY INTRUDES INTO BACKYARDS WHENEVER IT WANTS TO AND WILL DO SO REPEATEDLY. IT HAS NOT DECIDED TO PAY FULL --

UNDER THIS STATUTE, DOESN'T THE STATE STILL HAVE TO FILE AN IMMEDIATE FINAL ORDER AND THE PROPERTY OWNER DOES, IN FACT, HAVE SOME TIME BEFORE THE ACTUAL DESTRUCTION OF THE PROPERTY TAKES PLACE, TO BRING THIS TO THE ATTENTION OF THE COURT?

WELL, I WAS TALKING ABOUT THE STATE INTRUDING EVEN BEFORE THE IMMEDIATE FINAL ORDER, WITH CONSTANT SEARCHES ON TO THE PROPERTY, TO DETERMINE WHETHER THE PROPERTY HAS AN INFECTED TREE, AND WE ARE NOT ARGUING WITH INFECTED TREES BUT OUR PROBLEM IS WITH THE SO-CALLED TREES THAT ARE LABELED BY THE STATE IN THE SURROUNDING 260 ACRES, BUT OUR PROBLEM ESSENTIALLY IS THAT THE STATE CAN GO IN THERE

AS MUCH AS IT WANTS. NOW, DURING THIS TEN-DAY PERIOD THAT THE TREE OWNER HAS TO BRING THIS MATTER TO THE ATTENTION OF THE DISTRICT COURT OF APPEAL, ABSOLUTELY NOTHING CAN BE ACCOMPLISHED. THE IMMEDIATE FINAL ORDER DOES NOT OFFER AN OPPORTUNITY FOR A MEANINGFUL PREDEPRIVATION HEARING. THERE ARE ONLY TWO THINGS THAT YOU CAN HOPE TO DO AND THAT YOU HAVE A FUNDAMENTAL RIGHT TO DO AS A FLORIDA CITIZEN, WHEN THE STATE IS ACTING IN A WAY THAT DENNIS YOUR FUNDAMENTAL -- THAT DENIES YOUR FUNDAMENTAL RIGHTS, AND WE ARE DEALING WITH A STATUTE HERE AND NOW A PLENARY REVIEW BY THE COURT AND DENYING US THE OPPORTUNITY TO PRODUCE EVIDENCE, AND WE HAVE BEEN DENIED THE OPPORTUNITY TO CHALLENGE THE STATUTORY SCHEME, BUT THE REASON YOU CAN'T CHALLENGE THE APPROPRIATE HERE IS BECAUSE, TO CHALLENGE THE APPROPRIATE, YOU HAVE TO GET A STAY. THE ONLY PEOPLE ENTITLED TO A STAY UNDER THE FOURTH DISTRICT'S REAL ROOULING ARE THOSE WHO DO NOT HAVE TREES WITHIN 1900 FEET OF AN INFECTED TREE. IF YOU ARE WITHIN 1900 FEET, THEN YOU CANNOT GET A STAY. SECONDLY, CHALLENGING THE APPROPRIATE OF THE STATUTE, YOU KNOW YOUR -- THE PROPRIETY OF THE STATUTE, YOU KNOW YOUR TREE IS GOING TO BE DESTROYED, AND NOW THE ONLY THING THE STATE CAN DO WHICH THEY HAVEN'T DONE HERE IS TO RESOLVE COMPENSATION, AND THE IFO'S HAVE NOTHING TO DO WITH RESOLVING COMPENSATION. THE THIRD DISTRICT COURT OF APPEAL IN MARCUS, USED VERY STARK LANGUAGE TO DESCRIBE THE FUTILITY OF IFO REVIEW, AND THE LANGUAGE AND THOSE FACTS ARE BORNE OUT BY THE FACTS IN THE RECORD,, BUT IT IS NOT A MEANINGFUL PREDEPPVATION -- PREDEPRIVATION HEARING.

CAN WE GO BACK. IT SEEMS TO ME THAT THE STATE HAS GIVEN EITHER THE PRESUMPTIVE FLOOR OF $55 OR $100 FOR THOSE TREES BUT HAS SAID THAT THIS DOES NOT PRECLUDE ANY OTHER RIGHT THAT THE PROPERTY OWNER MIGHT HAVE. YOUR BEEF WITH THIS SEEMS TO BE THAT THEY HAVE, THE STATE HAS TO SAY WE WILL PAY FULL AND FAIR COMPENSATION, BEFORE THE STATUTE CAN BE CONSTITUTIONAL. IS THAT, I MEAN, AGAIN, DOES IT BOIL DOWN TO THAT?

JUSTICE PARIENTE, WE THINK THAT THAT IS NECESSARY BUT NOT SUFFICIENT BECAUSE OF THE OTHER INTERESTS INVOLVED, BUT WE DON'T BELIEVE THAT THE STATE --

OTHER INTERESTS JUST BEING THE FACT THAT THE STATE SHOULDN'T BE ABLE TO COME INTO SOMEBODY'S BACKYARD, UNLESS THE THREAT IS, WHAT? WHAT DO THEY HAVE TO SHOW?

THE STATE CERTAINLY HAS A LOT OF LATITUDE, WHERE THERE IS AN IMMINENT THREAT TO A COMPELLING STATE INTEREST. FOR INSTANCE, IF WE ARE DEALING WITH AN IMMINENT THREAT TO HEALTH AND HUMAN SAFETY, A BUILDING IN THE PATH OF A FIRE OR BUILDING ABOUT TO COLLAPSE OR SOMEONE ABOUT TO PUT A DANGEROUS PRODUCT INTO COMMERCE AND IT CAN HARM HUMANS. A GOVERNMENT OFFICIAL HAS TO MAKE A SNAP DECISION AND CERTAINLY THE STATE HAS LATITUDE THERE. WHAT WE HAVE BEEN DEALING WITH IS A STATUTORY SCHEME AND WE HAVE FOR THE IT FOR THREE YEARS AND HAVE BEEN THWARTED AT EVERY OPPORTUNITY AND IN THE MOST RECENT HEARINGS, AND DESPITE THE FACT THAT THE STATE HAS NOT BEEN ABLE TO DESTROY THE TREES IN SOUTH FLORIDA FOR THE PAST THREE YEARS, THEY STILL REPRESENT SUCH AN IMMINENT THREAT TO THE CITRUS INDUSTRY, THAT THERE ISN'T ENOUGH TIME FOR A PREDEPRIVATION HEARING.

AGAIN, GIVEN THE REASONABLENESS OF THE CHOICE IN PROTECTING THE CITRUS INDUSTRY OR PROTECTING A TREE IN SOMEONE'S BACKYARD, AND I DON'T MEAN TO DEMEAN THAT THAT IS AN IMPORTANT INTEREST ALSO, GOING BACK TO THE CORNEAL CASE, THE CITATION IS THAT, WHEN PROPERTY IS DESTROYED IN ORDER TO SAVE PROPERTY OF GREATER VALUE, WHICH IN THIS CASE WOULD BE THE CITRUS INDUSTRY'S PRODUCTION, IT IS A PRINCIPLE THAT THE STATUTORY POWER TO DESTROY SOMETHING IS ALWAYS ACCOMPANIED BY THE STATUTORY DUTY OF COMPENSATION, AND THAT IS WHAT WAS STATEED IN CORNEAL, AND I AM STILL HAVING A PROBLEM IN UNDERSTANDING WHY, IF THERE IS AN AGREEMENT TO PAY COMPENSATION, WITH A FLOOR OF THE AMOUNT THAT HAS BEEN SET, WHY THAT IS AN ADEQUATE -- WHY THAT ISN'T

ADEQUATE FROM A CONSTITUTIONAL POINT OF VIEW.

LET ME ADDRESS THAT, JUSTICE PARIENTE. FIRST OF ALL, CORNEAL AND SMITH AND EVERY OTHER DESTRUCTION CASE THAT THIS COURT HAS EVER DECIDED HAS BEEN IN THE COMMERCIAL SETTING, SO WE HAVEN'T DEALT WITH THESE OTHER PRIVACY INTERESTS. AGAIN, I THINK THAT CORNEAL DEALS WITH THE COMPENSATION BEING A FULL REMEDY IN THE COMMERCIAL SETTING, BUT LET'S LOOK AT THIS STATUTE, AS FAR AS THE STATUTE SAYING THAT THE $55, WHICH ISN'T EVEN REALLY PROVIDED BECAUSE IT IS SUBJECT TO LEGISLATIVE APPROPRIATION AND NOTHING IS PROVIDED FOR THE FIRST TREE ON EACH PROPERTY THAT IS DESTROYED, EXCUSE ME, SOME SORT OF NON-CASH CON TRIF ANSWER CALLED A SHADE CARD -- CONTRIVANCE CALLED A SHADE CARD WHICH WE DON'T EVEN KNOW WHAT THAT IS HEAR, SEEKING A COMPENSATION REMEDY IS NOT EVEN PROVIDED. IT DOESN'T MATTER THAT THE LEGISLATURE RECOGNIZES THAT INDIVIDUALS CAN SEEK THAT REMEDY, SO WHAT WE HAVE IS A STATE THAT, AT MOST, AT MOST, IS PAYING $55 FOR A TREE, THAT IT ADMITS IS WORTH $400-SOMETHING, AND WE HAVE A SITUATION, CLEARLY IT IS TOKEN COMPENSATION AT MOST.

DOESN'T THE OTHER CASES LIKE SMITH SAY THAT THE LEGISLATURE REALLY COULDN'T SET WHAT THE VALUE WAS, BECAUSE THAT IS A JUDICIAL OBLIGATION?

YES, MA'AM. IT CANNOT SET A CAP ON VALUE, BUT WHAT THEY NEED TO DO AS WAS DONE IN SMITH AND BONE AND-, WAS TO SAY THAT -- IN BONN AND-, WAS TO -- IN BONANO, WAS TO SAY THAT WE WILL PAY FULL AND JUST COMPENSATION.

THE WAY I LOOK AT IT IS IT WOULD BE THE STATE'S BURDEN TO SHOW THAT THE TREE THAT THEY DESTROYED HAD LESS THAN FULL VALUE. WOULD THIS BE SOMETHING WHERE WE COULD UPHOLD THE CONSTITUTIONALITY OF THE STATUTE CONTINGENT ON, OR DOES THAT FACT THAT IT DOESN'T SAY FAIR AND FULL COMPENSATION, DOES THAT RENDER THE WHOLE STATUTE UNCONSTITUTIONAL?

I THINK THE LACK OF SAYING, OF COMMITTING TO PAYING FULL AND FAIR COMPENSATION WITHOUT CONDITION, RENDERS THE STATUTE UNCONSTITUTIONAL. I DON'T THINK THAT, INCLUDING THAT IN THE STATUTE, WOULD RENDER IT CONSTITUTIONAL, GIVEN THE OTHER FUNDAMENTAL INTERESTS THAT ARE AT STAICK STAKE UNDER THIS STATUTE. -- AT STAKE UNDER THIS STATUTE.

THE LANGUAGE AND THE STATUTE THAT TAKES ABOUT -- THAT TALKS ABOUT THIS $50 BEING IN ADDITION TO ANYTHING ELSE -- THIS $55 BEING IN ADDITION TO ANYTHING ELSE THAT YOU CAN GET OUT OF COURT PROCEEDINGS, THAT IS NOT THE FUNCTIONAL EQUIVALENT OF PROVIDING FOR JUST COMPENSATION?

NO, MA'AM, BECAUSE JUSTICE QUINCE, AS WE KNOW FROM THE PACHEN ARGUMENT WHICH IS EARLIER THIS YEAR, THE STATE IS NOT ADMITTING THAT THERE IS ANYTHING COMPENSABLE. ONLY TWO THINGS ARE GUARANTEED UNDER THIS SCHEME. NUMBER ONE THE TREE IS GOING TO BE DESTROYED AND THERE IS NOTHING THAT A HOMEOWNER CAN DO ABOUT IT.

BUT IN A REVERSE CONDEMNATION ACTION, YOU WOULD BE ABLE TO DEMONSTRATE THE VALUE OF THE PROPERTY AND BE COMPENSATED FOR IT, ISN'T THAT CORRECT?

YES, BUT I WAS GOING TO SAY THAT IF YOU SEEK DAMAGES AGAINST THE STATE, AS WE FOUND OUT IN PACHEN, YOU ARE IN FOR THE FIGHT OF YOUR LIFE. THE STATE IS NOT CONCEDING THAT THE TREE HAS --

JUSTICE QUINCE'S QUESTION ASSUMES THAT, IS IT NOT? THAT IS ASSUMING THAT YOU ARE ENTITLED TO OTHER COMPENSATION BESIDES THE $55?

YES, SIR. THAT IS THE ESSENTIAL DIFFERENCE IS THAT THE STATE HERE, IS SAYING THAT THESE TREES ARE WORTHLESS, AND THE STATUTE THAT WAS AT ISSUE IN THE OTHER CASES IN BONANNO AND SMITH --

COUNSEL, I HATE TO INTERRUPT YOU, BUT AS FAR AS THE TIME SHARING, YOU NEED TO BE VERY CAREFUL, IF YOU ARE GOING TO HAVE ANY TIME LEFT.

I WILL RESERVE THE REST FOR REBUTTAL. THANK YOU VERY MUCH.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. I AM MELVIN MISURACA FOR BROOKS TROPICALS. I AM PICKING UP WHERE MR. MYERS LEFT OFF. NUMBER ONE, IT IS THE INVERSE RULE OF CONDEMNATION, THAT YOU ARE NOT PERMITTED AS OWNER, TO CHALLENGE THE PUBLIC NECESSITY OF PROPERTY THAT HAS ALREADY BEEN TAKEN FROM YOU, IN THIS CASE DESTROYED, SO IT WOULD HAVE TO BE MADE VERY, VERY CLEAR THAT THAT RULE WHICH ORDINARILY CONTAINS AN INVERSE, WOULD NEVER BE APPLIED WHERE THE OWNERS HAVE NEVER BEEN GIVEN AN OPPORTUNITY BEFORE THE DESTRUCTION OF THEIR TREES, TO DEMONSTRATE THAT THE DESTRUCTION WAS NOT APPROPRIATE. SECONDLY --

IS IT YOUR POSITION THAT THAT SHOULD BE DONE IN EVERY INDIVIDUAL CASE, LIKE THE ONE BEFORE, 7600-SOME PROPERTY OWNERS COULD CHALLENGE WHETHER THEIR INDIVIDUAL TREES COULD BE DESTROYED, SO THE REALITY WOULD BE HUNDREDS OF THOUSANDS OF OWNERS? THAT IS WHAT YOU ARE ARGUING, ISN'T IT?

IT IS, BUT I HAVE CERTAINLY ACKNOWLEDGED THAT, FOR THE STATE TO HAVE TO BRING INDIVIDUAL IMMINENT DOMAIN CASES BEFORE EVERY TREE IS CUT DOWN IS A CONUNDRUM. IT IS A VERY DIFFICULT THING TO FIGURE OUT. ON THE OTHER HAND, IF YOU ARE LEAVING AN INVERSE REMEDY, YOU ARE LEAVING EACH LANDOWNER WHO MAY OWN ONE OR TWO TREES, THE BURDEN OF COMMENCING AN INVERSE CASE AND CARRYING THROUGH WITH THE SCIENCE AND STATISTICS AND THE VALUE, AND SO THE BURDEN, IT SEEMS TO ME, IS EVENTUALLY BROUGHT HOME ON THE LANDOWNERS, AS MUCH AS IT WOULD HAVEBEIN ON -- HAVE BEEN ON THE STATE.

ISN'T THAT A VERY CORE PROBLEM THAT HAS BEEN PRESENTED HERE IS, YOU KNOW, IT STRIKES ME THAT CORNEAL AND SMITH CAME DOWN AT A TWHIM ALL OF THESE CITRUS TREES WERE IN CITRUS GROVES? AND NOW COMMERCIAL, RESIDENTIAL DEVELOPMENT HAS TAKEN OVER THESE GROVES, AND SO THE LEGISLATURE HAS COME UP WITH A PLAN TO TRY TO DEAL WITH WHAT IS A, HAS BEEN RECOGNIZED BY THIS COURT BEFORE AS A REAL PROBLEM, CITRUS CANKER, AND SO --

RIGHT.

-- ISN'T THIS REALLY THE LEGISLATIVE PREROGATIVE TO DO IT THIS WAY?

AT SOME POINT THERE HAS TO BE. THERE IS A CRISIS THAT THE LEGISLATURE IS THE ONLY BODY ABLE TO DEAL WITH IT. WHAT I AM TRYING TO DO IS TO MAKE SURE THAT, IF LANDOWNERS DON'T EVENTUALLY GET THE INVERSE REMEDY, WHICH APPEARS TO BE AWAY OF PERMITTING THE PROBLEM TO BE HANDLED ON THE SPOT, WITHOUT DEPRIVING PEOPLE OF THEIR ULTIMATE REMEDY, THAT WE ARE CLEAR THAT THE STANDARD OF REVIEW IN THE INVERSE CASE, IS SET BY LUCAS VERSUS SOUTH CAROLINA COASTAL COMMISSION AND ALSO BY THIS COURT'S DECISION IN CASHBOROUGH.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED US THAT, IF YOU WANT TO SAVE SOME TIME FOR REBUTTAL, HOW MUCH TIME IS LEFT OF THE 20 MINUTES? IF YOU ALL WANT TO SAVE SOME TIME FOR REBUTTAL, WE HAVE ALREADY GONE OVER --

I UNDERSTAND.

CHIEF JUSTICE: YOU KNOW, SO -- OBVIOUSLY THESE ISSUES HAVE BEEN THOROUGHLY BRIEFED AND WE ARE AWARE OF THAT, BUT IF YOU WANT TO SAVE TIME FOR REBUTTAL, THIS MAY BE A PRETTY GOOD TIME.

I THINK I HAVE ALREADY SAID, IT IS A STANDARD ISSUE OF INVERSE, MAKING SURE THAT THERE IS NO PRESUMPTION IN FAVOR OF THE STATE'S SCIENCE AND ENFORCING THE RULE THAT THE STATE HAS THE BURDEN OF PROOF ON BOTH THE SCIENCE AND THE VALUE.

CHIEF JUSTICE: THANK YOU VERY MUCH. OKAY. RESPONDENT?

GOOD MORNING. MAY IT PLEASE THE COURT. ARTHUR ENGLAND AND WITH ME AT COUNSEL TABLE IS MR. DAVID ASHBURN, WHO WAS PRESENT AT THE TRIAL. YOUR HONOR, WE HAVE IDENTIFIED THREE ISSUES DISCOVERED WITH THE SEARCH WARRANT, AND I WON'T DISCUSS THEM BECAUSE THAT IS ADEQUATELY BRIEF. SUBSTANTIVE PROCESS AND PROCEDURAL PROCESS AND JUSTICE LEWIS, THE RIPENESS WITH WHICH THIS CASE TOUCHED UPON AND JUSTICE PARIENTE DID, AND LET ME FIRST DO THAT QUICKLY. THIS IS NOT A USUAL TEMPORARY INJUNCTION CASE. THE TEMPORARY INJUNCTION, AS ALL OF YOU KNOW, IS AN AFFIDAVIT, SHORT HEARING, ARGUMENT OF COUNSEL AND OUT THE DOOR, TO FREEZE THE STATUS QUO. WE HAD A TRIAL HERE. THAT TEN VOLUMES ARE JUST APPENDIX TO THE DEPARTMENT'S INITIAL BRIEF IN THE FOURTH DISTRICT TO START THIS CASE. THIS CASE HAD TEN DAYS OF JUDICIAL HEARINGS AND EVIDENCE. IN THIS PROCEEDING, THE HINGERATION OF AN ADDITIONAL THREE DAYS -- THE HINGE OF AN ADDITIONAL THREE -- THE IN CORPORATION OF AN ADDITIONAL THREE DAYS --

LET ME STOP YOU THERE. THE ADDITIONAL STRICT SCRUTINY, WHICH WOULD HAVE BEEN FACT FINDING, RATHER THAN DIFFERENCE OF THE LEGISLATURE, THEN WE WOULDN'T PREMATURELY PROVIDE THE PETITIONERS OF A RIGHT TO DEMONSTRATE FOR A PERMANENT INJUNCTION, FURTHER EVIDENCE THAT THE GOTTWALD DATA WAS UNRELIABLE? DON'T WE HAVE TO FIRST CROSS THAT, AS TO WHETHER THIS IS A RATIONAL BASIS?

YOU CAN ARGUE THAT, AND I WILL ARGUE A RATIONAL BASIS THIS. THAT IS SUBSTANTIVE DUE PROCESS, BUT I NEED TO TELL YOU WHY THIS IS A FULL-BLOWN TRIAL. THE PLAINTIFFS, AND YOU WILL FIND NOTHING ANYWHERE IN THEIR BRIEFS OR IN THE RECORD, WERE PREVENTED FROM PUTTING ANY WITNESS IN OR CALLING ANY WITNESS OR DOING ANY DISCOVERY. FROM DECEMBER 2000. NOT ONE ORDER PREVENTED THEM FROM DOING THAT. THERE WAS NO LIMITATION OF DISCOVERY. THE ONLY COMPLAINT WAS THEY DIDN'T HAVE A DEPOSITION OF ABOUT GOTTWALD AND HIS DEPOSITION. HE WASN'T AN EMPLOYEE OF THE DEPARTMENT. HE WORKS FOR THE FEDERAL GOVERNMENT! WE COULDN'T PRODUCE HIM. THEY TRIED TO GET HIS DEPOSITION, AND THEY NEVER SET IT, NEVER CALLED HIM OVER THREE YEARS AND NEVER COMPLETED THEIR REQUEST. IT WAS NOT OUR PROBLEM. JUDGE FLEET DID NOT LIMIT ANY ONE THING THAT THEY WANTED TO DO, BUT PERHAPS JUSTICE PARIENTE, MORE IMPORTANT TO YOUR POINT, THEY PREVAILED WITH JUSTICE FLEET. THEY WON EVERY SINGLE ISSUE THEY RAISED AND A FEW THEY DID NOT FORM THEY COULD NOT DO BETTER THAN -- THEY DID NOT. THEY COULD NOT DO BETTER IN THE COURT AND IN THE TRIAL, BECAUSE THEY WON. THIS WAS THE CONSTITUTIONALITY OF OF A STATUTE ISSUE. MORE EVIDENCE, AND THE DISTRICT COURT DID NOT REVERSE BECAUSE THERE WAS NO ADEQUATE EVIDENCE WITH RESPECT TO THE CONSTITUTIONALITY. THE GROUND WAS SEPARATION OF POWERS.

ONE OF THE CONCERNS I HAVE, AND YOU AGREE, MR. ENGLAND, THAT THERE WAS NO EVIDENCE PREVENTED BY THE PETITIONERS, AS TO AN ALTERNATIVE REMEDY FOR THE CANKER PROBLEM.

THERE WAS EVIDENCE. THERE WAS ADEQUATE EVIDENCE OF ALTERNATIVE REMEDIES, NOT BEING AVAILABLE. LET ME TELL YOU WHAT THOSE ADEQUATE REMEDIES ARE. SPRING. THERE WAS

TESTIMONY THAT SPRING, THE MITIGATION, THE LESIONS, WAS STILL SUBJECT TO QUARANTINE BY THE FEDERAL GOVERNMENT. WIND BREAKS WERE NOT HELD TO BE EVIDENT BECAUSE THE PLANT PATHOLOGISTS, BECAUSE THE WIND, THIS DISEASE GOES IN THE AIR, WINDOW DRIVEN, RAIN AND SO ON. BUFFER ZONES WERE SPECIFICALLY HELD, DR. GRAHAM, NOT TO BE ADEQUATE, FOR THE SAME REASON. THIS DISEASE TRAVELS AIRBORNE OVER --

MY QUESTION IS, WERE THE PETITIONERS PROVIDED AN OPPORTUNITY TO SUGGEST AND PROVE ALTERNATIVE REMEDIES WERE LESS INTRUSIVE?

ABSOLUTELY. YES, JUSTICE BELL, THEY HAD EVERY OPPORTUNITY. THEY WERE NOT LIMITED IN ANYTHING THEY WANTED TO DO, BUT THEY CALLED NO ONE TO PROVIDE AN ALTERNATIVE REMEDY, AND WE PUT OUR EXPERTS ON AND ASKED THEM AND THEY ASKED THEM THESE QUESTIONS. BY THE WAY, THEY EVEN BROUGHT IN SAN PAOLO, BRAZIL, WHERE IT WAS PROVEN EFFECTIVE. NO EVIDENCE OF IT WAS TO THE CONTRARY. ALL OF THE PLANT PATHOLOGISTS AND EPIDEMIOLOGISTS SAID THAT THE ONLY WAY TO DO THIS IS THROUGH THE ERADICATION THROUGH THE ELIMINATION OF TREES.

MR. ENGLAND, WOULD YOU ADDRESS ONE CONCEPT THAT I AM HAVING SOME TROUBLE HANDLING. AM I CORRECT THAT THERE WILL BE, WITHIN THIS ZONE, SOME HEALTHY TREES THAT WILL BE SACRIFICED?

IF YOU DEFINE HEALTHRY AS NOT SUBJECT TO GETTING LESIONS.

WELL, NO, THAT DON'T HAVE THE CONDITION AT THE TIME.

THEN THEY ARE NOT HEALTHY. IF THEY ARE WITHIN 1900 FEET OF THE STUDY, IF THE LEGISLATURE IS CORRECT AND THAT IS THE ISSUE --

TREES THAT DO NOT HAVE EVIDENCE OF THE DISEASE?

THE ANSWER IS YES. EVERYTHING WITHIN 1900 FEET WOULD BE CUT.

BECAUSE THE ARGUMENT IS THAT THERE ARE TREES. THAT DO NOT HAVE THIS CONDITION THAT WILL BE DESTROYED, AND THERE IS NOT ADEQUATE COMPENSATION, SO MY CONCERN IS WE DO HAVE TREES THAT DO NOT HAVE THE CONDITION, IS THE STATUTORY COMPENSATION THAT IS SOME TYPE OF WAL-MART CERTAIN ICKTS.

CORRECT.

THAT -- CERTIFICATES. THAT IS EVEN SUBJECT TO SOME STATEMENT ABOUT APPROPRIATION, IS THAT ADEQUATE COMPENSATION, AND IF SO, HOW SO, UNDER THE CORNEAL KIND OF ANALYSIS?

SURE, JUSTICE BELL ASKED TWO -- JUSTICE LEWIS ASKED TWO QUESTIONS, BOTH OF THEM VERY GOOD. IF THEY ARE HEALTHY, ARE THEY TO BE CUT? IF THEY ARE WITHIN 1900 FEET, THEN YES, BUT THE SCIENCE IS, WHEN IS NOT DISPUTED BY THE LEGISLATURE, THAT ANY TREE WITHIN 1900 FEET IS SUBJECT TO INFECTION. IT MAY NOT SHOW BUT IT IS THERE IN AN INCUBATION PERIOD. EVERYBODY AGREES WITH THAT, ALL SCIENTISTS, SO HEALTHY IS NOT A TERM TO USE. THESE ARE EXPOSED AND WILL BE, AND THAT POINT OF ERADICATION IS TO ELIMINATE THAT AREA.

THERE WILL BE WHAT? THERE IS NOT A SHOWING THAT THEY WILL, IN FACT, GET CITRUS CANKER, WITHOUT --

NO, THERE IS NO GUARANTEE OF THAT, THAT'S CORRECT.

SO LET'S ASSUME THAT WE ARE GOING TO SAY THAT EXPOSED TREES DOES NOT NECESSARILY

MEAN THAT THEY ARE GOING TO GET CITRUS CANKER, BUT SAY THAT THE STATE HAS DECIDED THAT, WITHIN THE ZONE, THERE, THAT IT IS NECESSARY IN ORDER TO PROTECT THE GREATER GOOD OF THE CITRUS INDUSTRY.

YES.

NOW, I JUST WANTED TO MAKE SURE --

THAT IS A PERFECT STATEMENT OF IT. THE SECOND PART OF YOUR QUESTION, THE COMPENSATION, THE STATUTE MANDATES COMPENSATION. THE STATUTE SPECIFICALLY SAYS COMPENSATION SHALL BE PAID! SUBSECTION ONE OF THE STATUTE.

ISN'T IT SUBJECT TO LIMITATIONS?

NO, IT IS NOT. IN TWO SENTENCES LATER, IT SAYS COMPENSATION SHALL BE SUBJECT TO APPROPRIATION BY THE LEGISLATURE. FIRST OF ALL, WE PUT IN, AS A SUPPLEMENTAL RECORD, THERE IS $17 MILLION PRORATED AND CARRIED OVER FROM ONE YEAR TO THE NEXT, BUT MORE IMPORTANTLY, EVERY PAYMENT BY THE STATE OF FLORIDA, FOR ANY PURPOSE, COMPENSATION FOR TREES, YOUR SALARIES, ALL HAS TO BE DONE BY APPROPRIATIONS. PLEASE TAKE A LOOK AT SECTION 11.066, SUBSECTION 3, WHICH MANDATES THAT NO MONEY SHALL BE SPENT BY THE STATE, EXCEPT APPROPRIATION BY THE LEGISLATURE. IPSA FACT-, JUSTICE -- IPSA FACTO, JUSTICE LEWIS. THE STATE SAYS THEY HAVE TO PAY COMPENSATION ALREADY. DOES THAT MEAN THAT THEY HAVE TO BE PAID? OF COURSE NOT. THE APPROPRIATION IS AN ANNUAL CYCLE OF A LEGISLATIVE CYCLE WHICH MUST TAKE PLACE TO WRITE CHECKS.

HOW ABOUT THE 50 AT WAL-MART?

IT IS $55.

THAT IS SETTING A CAP, AND THAT IS WHAT THE CASE SAYS, THAT YOU CAN'T SET A CAP.

NO, BECAUSE INVERSE CONDEMNATION IS PRESERVED. IT SETS THE STATE OF FLORIDA, USING THAT WORD.

THAT PRESUMES THAT CONDEMNATION IS SUFFICIENT.

OF COURSE. IT IS CONSTITUTIONALLY A PROVISION, AS YOU POINTED OUT. LET ME TELL YOU WHY THE ARGUMENT FAILS, WITH RESPECT TO WE HAVE TO HAVE THE INVERSE CONDEMNATION TRIALS, ALL OF THEM, JUSTICE BELL, BEFORE YOU CAN DID CUT OUR TREE. WHAT IS WRONG WITH THAT IS THAT THEY HAVE A FULL AND FAIR ADEQUATE OPPORTUNITY BEFORE THAT, TO DEMONSTRATE THAT THERE IS NO HARM. THEY KEEP SAYING NO STAY WILL BE ISSUED. THIS IS THE PROCEDURAL DUE PROCESS, BUT THAT IS INACCURATE.

IF THE TREE IS WITHIN 1900 FEET, WHAT PROPERTY OWNERS TO DO TO REBUT THE FINDING THAT THAT IS ACTUAL HARM?

HE IS TO DO WHAT NATHAN TYLER TESTIFIED, THEIR WITNESS IN THIS PROCEEDING, GO GET A STAY. FILE AN APPEAL -- BY THE WAY THERE IS MORE THAN THIS, BUT GET A STAY. IF YOU READ THE POMPANO BEACH DECISION.

AREN'T WE GOING AROUND IN CIRCLES, BECAUSE IF WE UPHOLD THE REASONABLENESS OF THE 1900-FOOT REGULATION, AS SOMETHING THAT THE LEGISLATURE HAD THE PREROGATIVE TO DO --

YES, MA'AM.

-- UNDER RATIONAL BASIS SCRUTINY, AS LONG AS THERE IS AN OBLIGATION OF THE STATE TO PAY FAIR AND JUST COMPENSATION.

YES.

THEN THE LANDOWNER ISN'T GOING TO, ON A CASE-BY-CASE BASIS, BE ABLE TO CHALLENGE IN A COURT, THE 1900 REGULATION.

WHY NOT? LET ME TELL YOU WHAT WRITING FOR THE COURT IN POMPANO BEACH, JUST IZURI SAID. HE SAID THAT THE REVIEW IS ADEQUATE, BECAUSE STAYS CAN BE SOUGHT AND A FULL HEARING CAN BE AVAILABLE ON REMAND.

WHAT WOULD BE THE BASIS OF A STAY, UNDER THIS STATUTE, WHEN YOU HAVE THAT TEN-DAY PERIOD, YOU GO TO THE COURT, IF, IN FACT, IT IS WITHIN 1900 FEET, WHAT WOULD BE THE BASIS FOR THE COURT ISSUING A STAY?

THERE IS A FORM PROVIDED TO EVERY TAXPAYER, EVERY TREE OWNER WITH THE IFO. IT IS IN THE RECORD. IT SAYS HERE IS A MOTION FORM FOR AN IMMEDIATE STAY. IT HAS THREE BLANKS THAT CAN BE CHECKED. MY TREE IS MORE THAN 1900 FEET. CHECK THAT. THE CITRUS TREE THAT YOU SAY IS INFECTED ISN'T, AND THERE IS A LAB REPORT WITH THIS THAT INDICATES IT IS. FOR OTHER. WHAT IS OTHER? OTHER COULD BE A HOMEOWNER SAYING, I HAVE TAKEN A VIDEO. I HAVE CALLED AN EXPERT. HE HASN'T COME OUT YET. I HAVE SCRAPED A LESION OFF MY TREE AND PUT IT IN A BAG. I CAN'T BRING IT TO THE DISTRICT COURT OF APPEAL. I WANT AN OPPORTUNITY FOR A HEARING TO SHOW THAT THAT IS NOT AN INFECTION LESION BUT SOMETHING ELSE. THEY CAN TAKE PICTURES. THEY CAN HAVE EVIDENCE. THEY CAN CALL WITNESSES, AND ALL THEY HAVE TO DO IS SIGNAL THE DISTRICT COURT.

THAT IS TRUE FOR AN INFECTED TREE, BUT A TREE DOESN'T HAVE AN OUTWARD MANIFESTATION.

NO, BUT IF IT DIDN'T HE COULD SAY IN THIS FORM, THE OTHER IS THAT THEY SAY WITHIN 1900 FEET. I CAN'T ACCEPT THAT. I WANT TO GO AND CHALLENGE THE LAB REPORT AND CHALLENGE THE REPORT ON THE TREE IN MY NEIGHBOR'S BEYOND A REASONABLE DOUBT. THEY CAN SAY ANYTHING AT ALL AND ARE STAYS GRANTED? WELL, YES. KIRSHINGANGER AND CAROLYN SIEGELMAN, ONE OF THEIR PLAINTIFFS, GOT A STAY IN THIS.

IS THAT BEFORE THE DISTRICT COURT OF APPEAL'S OPINION?

YES.

HOW ABOUT AFTERWARD, AFTER THE FOURTH DISTRICT COURT OF APPEAL'S OPINION? HE WASN'T ALLOWING THE STATE TO CUT DOWN INFECTED TREES. I WOULD AG ASSUME THAT THE PLAINTIFF GOT STAYS AFTER THE FOURTH DISTRICT COURT OF APPEAL DECISION. LET'S TALK ABOUT THE DUE PROCESS RULE, WHICH IS MY GREATEST CONCERN HERE, WHICH IS THAT WOULD YOU AGREE THAT THIS IS AN ABSOLUTE SDRUCK DESTRUCTION OF A PRIVATE CITIZEN -- AN ABSOLUTE DESTRUCTION OF A PRIVATE CITIZEN'S PROPERTY?

OF COURSE. IT IS JUST A TREE.

IT IS NOT JUST A TREE. THEY SAY YOU HAVE TO GO INTO THE BACKYARD TO GET IT, WHICH IS A DIFFERENT QUESTION ALL TOGETHER, OF SEARCH AND SEIZURE AND INTRUSION, BUT IT IS JUST A TREE, PROPERTY JUST LIKE THE CITRUS GROVE OWNER'S TREE.

SO WE ARE JUST DEALING WITH PROPERTY. WE ARE NOT DEALING WITH SOMEBODY'S LIVE.

THERE IS HIGHER SCRUTINY.

RIGHT. THE ONLY WAY IT GETS HIGHER SCRUTINY, IS IF THE STATE DOESN'T AGREE TO PAY FULL AND FAIR COMPENSATION.

BUT YOU DIRECTLY DID IN THE STATUTE THAT YOU ARE ASKED TO DECLARE UNCONSTITUTIONAL, WHEN IT SAYS SHALL PAY.

WHEN IT SAYS SHALL PAY, IT SAYS, ACTUALLY DOES NOT LIMIT THE AMOUNT OF ANY OTHER COMPENSATION THAT MAY BE PAID BY ANOTHER ENTITY OR --

THAT'S CORRECT.

THAT IS NOT QUITE THE SAME LANGUAGE THAT WAS IN THE SMITH CASE THAT WAS UPHELD, WAS IT?

JUSTICE PARIENTE, YOU FLESHED THAT OUT WHEN THERE WAS A DIALOGUE THAT OPPOSES. ARE THERE MAGIC WORDS THAT SAID WE HAVE TO PAY YOU FULL AND JUST COMPENSATION AND ACKNOWLEDGED THAT IS WHAT THIS IS ALL ABOUT?

YOU WOULD AGREE THAT THAT IS WHAT HAS TO BE READ INTO THE STATUTE IS FULL AND JUST COMPENSATION?

HOW CAN THAT BE DONE FOR THE FISCAL YEAR 2002, 2003, WHEN IT SAYS THAT IT SHALL BE NO MORE THAN $55.

BUT IT ALSO SAYS IN SUBSECTION 4, JUSTICE LEWIS, AND THE INVERSE REMEDY OF COMPENSATION IS STILL AVAILABLE. THERE IS A FLOOR. YOU ARE GOING TO GET, AS A TREE OWNER, AT LEAST $55, AND WE PUT THAT MONEY ASIDE AS AN ANNUAL APPROPRIATION, AND THAT IS WHAT WE WILL DO. WE WILL AUTHORIZE A CHECK, BUT THAT IS NOT THE LIMIT. IT IS NOT THE EARLIER CASES AFTER CAP, THE EARLIER CASE OF $1,000 PER ACRE FOR TREES. IT IS NOT THAT. THIS IS THE FLOOR. I BELIEVE --

ALL RIGHT. THEN, THE KEY IS, AND I THINK IT WAS POINTED OUT BY COUNSEL FOR BROOKS PROP CALLS, REALLY WHAT THIS -- FOR BROOKS DROP CALLS -- FOR BROOKS TROPICALS. REALLY WHAT THIS BOILS DOWN TO IS A HEALTHY TREE AS OPPOSED TO AN INFECTED TREE.

AND THE CONSTITUTIONALITY OF THE IT STATUTE DOESN'T ADDRESS, DOESN'T DEPEND ON --

NO, IT DOES NOT, BECAUSE IN AN ORDINARY SITUATION, WE HAVE GOT TO ASSUME THAT, IF A A STATE IS ALLOWED TO COME INTO SOMEONE'S BACKYARD AND TAKE A PERSON'S PROPERTY, THEY HAVE THE BURDEN TO PROVE THAT THAT PROPERTY HAD NO VALUE. WOULDN'T YOU AGREE THAT THAT WOULD BE --

THE STATE WILL STILL HAVE -- WHY WOULD THAT BE ANY DIFFERENT IN THE INVERSE CONDEMNATION PROCEEDING? BY THE WAY, I HAVE TO COMMENT THAT THIS NOTION THAT THE TREES ARE WORTH $438 IS NONSENSE. WHAT THEY HAVE CITED TO IN THEIR APPENDIX FOR THAT NUMBER, IS A DEPUTY OR ASSISTANT DIVISION DIRECTOR OF THE DEPARTMENT, IN 1999, MINUTES OF A MEETING IN WHICH THE COMMENT WAS MADE THAT IT COULD BE $438. THAT DOESN'T SET A VALUE. IT COULD BE ANYTHING. WE DON'T KNOW BUT THAT THE STATE IS GOING TO GIVE $50 IN AN INVERSE CONDEMNATION. THAT IS THE REST. THIS NOTION THAT THEY CAN CHALLENGE AND SAY THE LEGISLATURE HAD NO RATIONAL BASIS TO DO THIS, SUPPOSE THERE WERE A CONSTITUTIONAL CHALLENGE TO SECTION 601.95, FLORIDA STATUTE, ON THE SAME BASIS AS WE HAVE HERE. WE HAVE GOT A GEO STATISTICIAN AND APPLIED ECOMATRICIAN, BOTH OF THEM KNOWING NOTHING ABOUT THE DISEASE, AND THE DEPARTMENT FOUND THAT THEY HAD A FLAWED STUDY, WHEN IT FOUND THAT ARSENIC IS DANGEROUS TO HUMAN BEINGS. THAT IS SECTION 601.95. THAT IS THE VERY STATUTE, SECTION 4 OF THE 1927 STATUTE, UPHELD IN MAXEY

VERSUS MAYO, WHEN IT WAS HELD THAT YOU COULD RELY ON THAT SO IENS -- ON THAT SCIENCE, BECAUSE ARSENIC, THEY DIDN'T SPECIFICALLY SAY THAT BUT ARSENIC WAS FOUND TO HARM HUMANS, AND RELYING ON THE SUPREME COURT'S DECISION IN MILLER VERSUS SHOWN FROM 1928. -- VERSUS SCHOEN FROM 1928. CAN THEY CHALLENGE THAT IN A SUIT TOMORROW AND SAY THAT THE SCIENCE SAYS THAT ARSENIC ISN'T BAD? ACTUALLY IT IS HEALTHY. IT IS ONE OF THE NEW DRUGS FOR HUMAN BEINGS. CAN THEY CHALLENGE THAT AND SAY THAT THE LEGISLATURE, WHEN ENACTING A LAW, CAN SAY THAT CITRUS MAY NOT BE SPRAYED WITH ARSENIC, THAT THE LEGISLATURE WAS PROHIBITED FROM DOING THAT BECAUSE THE SCIENCE ON THE DEVELOPMENT OF ARSENIC WAS WRONG? OF COURSE NOT. THE ANSWER IS THAT THE LEGISLATURE HAD A SOUND BASIS AS IT ACTED, WHEN IT DID HERE, AND IT RECITED THAT SOUND BASIS. IT WASN'T JUST DR. GOT WHAT WOULD'S RECORD. -- IT WASN'T JUST DR. GOTTWALD'S REPORT. IT HAD THE CITRUS CANKER ADVISORY COUNCIL OF EXPERTS, WHICH REPORTS THAT THE 1900-FOOT RANGE, BY THE WAY, WAS ACTUALLY SET. DR. GOTTWALD HAD A RANGE AND THEY CAME OUT WITH THAT, THE EXPERTS, AND HAD CITRUS CANKER, NOT AN IDLE LOOK BUT ALL OF THE CASES AND GENERATIONS OF THIS DISEASE IN THE STATE WHICH THEY HAD BEEN TRYING TO ADDRESS. THEY HAD THE SCIENCE. THEY HAD THE HISTORY. THEY HAD CASE LAW DECISION, INCLUDING SAP, WHICH HAD SAID, NOT SAP FROM TREES, THE SAPP CASE, WHICH SAID THAT THIS IS A MAJOR PROBLEM. THERE IS NO DOUBT, JUSTICE PARIENTE, AND JUSTICE QUINCE, YOU WERE ALSO CONCERNED ABOUT SUBSTANTIVE DUE PROCESS, THAT THERE WAS A VALID BASIS FOR THE LEGISLATURE TO ACT, AND THAT THERE WAS NO NECESSITY, BECAUSE THERE WAS COMPENSATION IN THE FORM OF A FLOOR, PLUS THE ADVERSE, THE AVAILABILITY FOR COMPENSATION AND INVERSE CONDEMNATION, AND PLENTY OF TIME TO DO IT UNDER THE PROCEDURAL DUE PROCESS ROUTE.

DID THE LEGISLATIVE FINDINGS THAT YOU ARE REFERRING TO, WERE THE FINDINGS THAT WERE, PROCEEDED THE ENACTMENT OF THE 2000 LAW, CORRECT?

CORRECT.

AT THAT TIME, THE GOTTWALD STUDY HAD NOT BEEN COMPLETED AND HAD NOT BEEN PUBLISHED. IT WAS PUBLISHED IN APRIL 2002.

OKAY. AND SO AT THAT POINT, THEY REALLY, THESE, THE STATUTE IN 2000, DIDN'T SET A 1900-FOOT, THAT WAS ONLY DUB DONE IN 2002. -- THAT WAS ONLY DONE IN 2002.

THAT WAS DONE IN 2002.

WHAT DIFFERENT INFORMATION DID THE LEGISLATURE HAVE OR DOES THE RECORD REVEAL IN 2002, THAT WOULD HAVE LED, RATHER THAN A GENERAL STATEMENT ABOUT THE CITRUS CANKER --

THEY WOULD HAVE HAD THE PUBLISHED REPORT. IT WOULD HAVE BEEN PEER REVIEWED, WHICH THEY CRITICIZED BY THE WAY AS A PEER REVIEW BASIS. THE 2002 SITUATION SAID THAT, WHEREAS PREDICATE FACTS OF AN EMERGENCY AND ALARMING SPREAD IN SOUTH FLORIDA, AND, QUOTE, RECENT SCIENTIFIC STUDIES HAVE SHOWN, END QUOTE, THAT CITRUS TREES WITHIN 1900 ARE AFFECTED AND THAT IS IN 2000. THEY COME ALONG IN 2002 AND LOOK WHAT THE STATUTE DID BY THE WAY, NOT ONLY MANDATED THE DESTRUCTION OF TREES WITHIN THE 1900, BUT IT TOOK AWAY, JUSTICE BELL, IT TOOK AWAY THE BUFFER ZONE AND DELETED THE ABILITY OF THE DEPARTMENT TO CREATE A BUFFER ZONE, BECAUSE THE SCIENCE IS NOW ESTABLISHED THAT THAT IS NOT SUCCESSFUL. CANKER JUST DOESN'T RESPECT THE WIND AND THE RAIN LIMITATIONS. THAT THESE PLAINTIFFS WOULD LIKE TO PUT ON IT. JUSTICE, BY THE WAY, CITRUS CANKER DOES NOT RESPECT AN ORDER OF JUDGE FLEET ATTEMPTING TO, QUOTE, FREEZE THE STATUS QUO, WITH A TEMPORARY, SOMETHING HE CALLED A TEMPORARY INJUNCTION. CITRUS CANKER HAS ITS OWN LIFE AND ITS OWN TRAVEL SPREAD.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO BRING IT TO A CLOSE ON THAT.

THANK YOU, YOUR HONOR.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME IS LEFT ON THE REBUTTAL? WE WILL GIVE YOU A COUPLE OF MINUTES. WE WENT OVER A LITTLE BIT ON THE RESPONDENT.

THANK YOU, CHIEF JUSTICE. WE ASKED FOR THREE HOURS IN THE ORIGINAL RECORD, TO PRESERVE THE STATUS QUO. WE NEVER SAW THAT. WE NEVER SAW THE GOTTWALD TODAY, A THE COMPUTERS NEVER SAW IT AND THE TASK FORCE NEVER SAW THE GOTTWALD DATA AND THEIR RECOMMENDATIONS WERE MADE THREE YEARS BEFORE THE GOTTWALD DATA, AND EVEN THOUGH WE HAVE BEEN SEEKING IT FOR YEARS, BECAUSE THEY, THEMSELVES, DIDN'T HAVE THE DATA. THEY WANTED TO PUT ON A FULL TRIAL WHEN THEY DIDN'T HAVE A FEAR OF A RESULT THROUGH DISCOVERY.

DO YOU CONTEST THAT THE LEGISLATIVE FINDING, AS FAR AS WHY THE EMERGENCY EXISTS, THAT CITRUS CONTAINING CERRA BACTERIAL DISEASE THAT DAMAGES FRUIT AND WEAKENS TREES AND IS HIGHLY CONTAGIOUS, AND THE PRESENCE OF WHICH CAUSES GUARANTEENS TO BE IMPOSED ON THE SHIPMENT? IS THAT A FACT THAT YOU ACCEPT? THAT IS, IF, ABOUT CITRUS CANKER, NOT WHICH TREES WILL EVENTUALLY GET THEM, BUT AS FAR AS THE EFFECTS OF CITRUS CANKER ON ORANGE TREES?

NO, JUSTICE PARIENTE. WE DON'T ACCEPT THAT.

WHY IS THAT?

WELL, WE KNOW THE DEPARTMENT NO LONGER EVEN SAYS IT KILLS TREES, SINCE THAT HAS BEEN DEBUNKED. THEY HAVE NEVER FOUND A TREE THAT IT HAS KILLED IN THE UNITED STATES, SO NOW THEY ARE SUBSTUTED THIS YIELD LOSS, BECAUSE IF IT WASN'T FOR KILLING TREES OR YIELD LOSS, IT WOULDN'T HAVE AN IMPACT ON THE CITRUS INDUSTRY WHICH PRODUCES FRUIT FOR JUST, SO BLEMISHES DON'T MATTER.

WOULD IT BE IMPOSED ON THE DEPARTMENT OF AGRICULTURE?

YES, MA'AM. THE U.S. DEPARTMENT OF AGRICULTURE AND THE DEPARTMENT OF AGRICULTURE IMPOSEED QUARANTINES, AND IT HAS DONE SO IN BREVARD -- IN BROWARD COUNTY. DADE AND BROWARD COUNTY HAS NOT BEEN ABLE TO SELL FRUIT FOR YEARS, AND THAT IS WHAT WE ARE GETTING AT HERE. JUSTICE BELL, YOU SAID THAT CONTAINING CERRA BIG PROBLEM, AND IT HAS BEEN FOUND IN A 155-FOOT RADIUS IN THE MIDDLE OF CITRUS GROVE COUNTRY. THIS IS A MATTER OF DESTRUCTION. WHY IS IT THAT THIS ACCIDENT HAS TO DESTROY TREES STATEWIDE, TO CONTROL SOMETHING THAT SPREADS, ACCORDING TO DR. GOTTWALD, TWO MILES? THERE IS NO PROOF IN THE RECORD THAT THIS HAS TO BE DONE, AND WE ARE DEALING WITH DESTRUCTION OF PROPERTY. THE ARSENIC CASE THAT OPPOSING COUNSEL MENTIONED WAS THE REGULATION OF PROPERTY. YOU CAN'T SPRAY ARSENIC ON TREES, BECAUSE IT COULD BE USED TO DECEIVE THE PUBLIC. IT HIDES THE FACT THAT THE TREES AND FRUIT MAY BE INFERIOR. WE ARE NOT DEALING WITH THAT HERE AT ALL.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO BRING IT TO A CLOSE.

IF I MAY, JUSTICE ANSTEAD, ONE FINAL POINT. THE TOLLER CASE, I URGE THAT YOU LOOK AT IT. BEFORE THE RULING, THERE WAS NO PREDEPRIVATION HEARING. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT IS GOING TO STAND IN RECESS FOR FIVE MINUTES, WHILE ONE OF OUR MEMBERS REJOINS THE BENCH. WE WILL IN IN RECESS FOR FIVE MINUTES, UNTIL WE HEAR THE NEXT CASE.

MARSHAL: PLEASE RISE.