IN THE SUPREME COURT OF FLORIDA

CAPTAIN LOUIS S. LIVINGS,
District Nine Supervisor,
FLORIDA MARINE PATROL, and
STATE OF FLORIDA DEPARTMENT
OF NATURAL RESOURCES,

Petitioner,

v. CASE NO. 63,001

WENDELL DAVIS, GILBERT GREY,
and HARRY ROBERT JONES,

Respondents.
_____/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

REBUTTAL

The vulnerability of Respondents' position in this cause is dramatically illustrated by the failure of Respondents to reckon with the judicial authority directly ruling on the issue on appeal. Anderson Seafood, Inc. v. Graham, 529 F.Supp. 512 (N.D. Fla. 1982) is shunted aside because it was "merely an interlocatory ruling on a motion for preliminary injunction . . .". People v. Weeren, 607 P.2d 1979 (Cal. 1980), cert. den. 449 U.S. 839 (1980) is waylaid because the coast of California has a different configuation than the coast of Florida. Department of Natural Resources v. Southeastern Fisheries Association, Inc., 415 So.2d 1326 (Fla. 1st DCA 1982), the decision certified to this Court as being in conflict with the case at bar, is not even mentioned much less addressed in the Brief For Respondents.

If case authority is unpalatable to the Respondents it is incumbent upon them to analyze those decisions and explain their error. To ignore judicial decisions which are "on all fours" is to concede their correctness. Lengthy references to "legislative history" (which do not conflict with subsequent case authority) in no way diminish the persuasive and controlling nature of decisional law.

The Supreme Court of Rhode Island is yet the latest court to join all others (with the exception of Tingley v. Allen, 397 So.2d 1169 (Fla. 3d DCA)) in ruling that states retain extra-

territorial jurisdiction over their fisheries in the absence of conflicting federal regulations. In State v. Sterling, 448 A.2d 785 (R.I. 1982), there did exist federal regulations which conflicted with state law. Before reaching the issue of conflict, however, the Court addressed the question of extraterritoriality:

> "By enacting the FCMA, [Fishery Conservation and Management Act], Congress has preempted state regulation of commercial fishing in the area between the states' boundaries and 200 miles seaward when federal regulations governing such fishing have been promulgated. See Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230-31, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947). If no federal regulations regarding a certain species of fish apply, a state may regulate fishing of that species by its citizens beyond its boundaries when a legitimate state interest is served by the regulation. See People v. Weeren, [citation omitted] . . . .448 A.2d at 787.

It is instructive that Anderson Seafoods, Weeren, Southeastern Fisheries and Sterling all contain an analysis of state jurisdiction in the absence of federal regulations. Tingley v. Allen, supra, is alone in ruling on extraterritorial jurisdiction without considering the existence or nonexistence of federal regulations. This oversight precluded a proper determination of state jurisdiction.

CONCLUSION

WHEREFORE, THE Petitioners respectfully request the Court to confirm the holding in Southeastern Fisheries, supra, to disapprove the holding in Tingley v. Allen, supra, and to reverse and remand the decision in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief For Petitioners has been furnished by U.S. Mail to DAVID PAUL HORAN, Esquire, 608 Whitehead Street, Key West, Florida 33040 and JAMES C. KILBOURNE, Esquire, Department of Justice, Todd Building - Room 639, Washington, D.C. 20530 this 14TH day of March, 1983.

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