IN THE SUPREME COURT OF FLORIDA

Case No. 89,018

JUAN LUIS GARCIA, JR. and
DARLENE GARCIA, minors,
by their father and next friend,

Petitioners,

v.

CRISTOBAL REYES and
THE CITY OF FORT LAUDERDALE,

Respondents.

BRIEF AMICUS CURIAE OF BROWARD COUNTY

JOHN J. COPELAN, JR.
County Attorney for Broward County
ANTHONY C. MUST0
Chief Appellate Counsel
TAMARA MCNIERNEY SCRUDDERS
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600
Telecopier: (954) 357-7641

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STATEMENT OF THE CASE AND OF THE FACTS

Broward County adopts the Statement of the Case and Facts as set forth by Respondents in their brief.

SUMMARY OF ARGUMENT

The Supreme Court has never recognized a liberty interest in familial right of companionship in situations where family members claim they have been only incidentally and temporarily affected by the deprivation of constitutional rights of a family member. To do so would not serve to deter wrongful conduct by state actors or protect family relationships. It would simply expand section 1983 actions to a myriad of inappropriate situations.

ARGUMENT

I. THE LAW SHOULD NOT BE EXPANDED TO ALLOW DAMAGE CLAIMS PURSUANT TO 42 U.S.C. 1983 FOR TEMPORARY LOSS OF COMPANIONSHIP.

Petitioners invite this court to do what the United State Supreme Court, the Eleventh Circuit Court of Appeal, and the Florida Supreme Court have never done, and many federal circuit courts have expressly refused to do.[1] That is, they ask this Court to recognize a cause of action for damages under 42 U.S.C. 1983 based on state interference with the right of familial association. Moreover, they ask this Court to do so in a case where the alleged deprivation of the right of familial association was "indirect" and only temporary in nature. For the reasons set forth below, this court should decline the invitation.

A. PETITIONERS DO NOT HAVE A CONSTITUTIONALLY-PROTECTED LIBERTY INTEREST ACTIONABLE UNDER 42 U.S.C. 1983.

In order to prevail on their action brought under section 1983, the Petitioners must have suffered a loss to a constitutionally protected interest. Petitioners claim that

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[1] See Shaw v. Stroud, 13 F.2d 791 (4th Cir. 1994); Harpole v. Arkansas Department of Human Services, 820 F.2d 923, (8th Cir. 1987); Ortiz v. Burgos, 807 F.2d 6 (1st Cir. 1986); Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986).

they have been deprived of a liberty interest in their familial association and companionship with their father while he was imprisoned. As Petitioners must acknowledge, the Supreme Court has never recognized a liberty interest in this context. The precedent cited by the Petitioners establishing constitutional protection for various aspects of family life falls far short of establishing **that** the Supreme Court would recognize such a liberty interest in this case,

It has been generally recognized that the Supreme Court cases involving familial liberty interests, upon which Petitioners rely, fall into two categories, neither of which applies to this case. Ortiz v. Burgos, 807 F.2d 6 (1st Cir. 1986). In the first category are cases protecting the right to make private decisions affecting the family, such as whether to bear children. "The emphasis in these cases on choice suggests that the right is one of preemption; rather than an absolute right to a certain family relationship..." Id.; Hat-pole v. Arkansas Department of Human Services. 820 F.2d 923 (8th Cir. 1987). Thus, they are inapplicable to the case at hand, The second category contains cases dealing with governmental attempts to directly affect the parent-child relationship by means such as determining paternity or terminating parental rights. In these cases, the Supreme Court has required strict adherence to procedural due process before the state may deliberately infringe on the parent-child relationship. Ortiz, 807 F.2d at 8. Again, these cases do not concern the same

interests involved in the instant case.

Contrary to Petitioner's assertions, the Supreme Court holdings in the types of cases discussed above do not imply that family relationships are, in the abstract, protected against all state encroachments, direct or indirect. The protection given to familial relationships in the above limited circumstances does not compel the conclusion that a constitutional right of "familial association" must or should exist in the present case. In fact, the focus of the Supreme Court's recognition of the rights of familial association in the above situations has been only upon governmental, not individual, involvement with the sanctity of the family. That is, the familial right of companionship that has been recognized by the Supreme Court is simply the right to be free from pervasive, broadly-focused governmental activity directed at the family units in the community as a whole or applicable to all families within the purview of the governmental entity, See Willard v. Citv of Myrtle Beach, 728 F.Supp. 397 (D.S.C. 1989). The Supreme Court has never addressed, nor has it created, a right of constitutional magnitude which protects individuals from particular acts of governmental agents focusing upon specific family members and potentially affecting the continuity of the intrafamily relationship. Jackson v. Marsh, 551 F.Supp. 1091 (D.Colo. 1982). Thus, the recognition of liberty interests in "familial right of companionship" has not been extended by the Supreme Court to encompass situations

such as the instant case where family members in essence claim that they have been indirectly and temporarily affected by the deprivation of the constitutional rights of a family member. Nor should it be.

B. THIS COURT SHOULD NOT EXPAND SECTION 1983 LIABILITY TO CREATE CLAIMS FOR TEMPORARY LOSS OF COMPANIONSHIP.

Petitioners argue that the fundamental importance of the family in civil society is reason to recognize a liberty interest in familial association in the context of this case, and to create a cause of action under 42 U.S.C. 1983 for their temporary loss of their father's companionship. However, at least one court has found that the creation of a right such as this would not serve to deter wrongful conduct by state actors. Broadnax v. Webb, 892 F.Supp. 188 (E.D. Mich. 1995). If the state actors are to be deterred from wrongful conduct, presumably they would be so (if at all) by the threat of an action by the intended victim and the availability of punitive damages. The thought that the victim may in fact have a large family, each member of which could institute additional constitutional claims, would likely never cross the minds of state actors prior to their actions, and even if it did, would provide little or no additional deterence. Therefore, it would not serve to protect the family relationship, as was the case in the Supreme Court's decisions that have recognized a right of familial association in the limited areas already noted. The creation of a claim in this case

would simply provide a mechanism for family members of victims of constitutional deprivations to collect damages in addition to those collectable by the victim. The protection of familial relationships and the ability to collect damages for the interference with those relationships are simply two different things. As one court noted, "Protecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct." Hat-pole v. Arkansas Department of Human Services, 820 F.2d 923 (8th Cir. 1987).

Petitioners state that the expansion of section 1983 to include claims such as the instant case "may not affect a large number of potential plaintiffs..." (Petitioners' brief, p.10). This is simply not the case. To recognize claims for loss of companionship would be to greatly expand the scope of governmental liability under 42 U.S.C. 1983. See Broadnax v. Webb, 892 F.Supp. 188 (1995)("Even were such claims limited to close family members like parents or children, the fact remains that liability would be handsomely expanded"). Section 1983 litigation is already at its flood stage. As one court noted, 'There appears to be no valid reason to open another dam." Id. Indeed, several courts have noted that recognizing a protected liberty interest in circumstances similar to the instant case "would constitutionalize adjudication in a myriad of situations we think inappropriate for due process scrutiny."

Id. at 928; Ortiz v. Burgos, 807 F.2d 6 (1 st Cir. 1986).

In fact, the recognition of a liberty interest in familial association in cases where a family member has been only indirectly and temporarily affected would lead to a flood of additional litigation. Clearly, any unlawful detention of a family member, no matter how short in time, would be actionable by all family members. But the flood of new litigation would not be limited to wrongful detention cases. For instance, children of divorced parents would be able to assert a claim for damages when one parent is wrongfully discharged or suffers virtually any constitutional deprivation at work which forces him/her to seek employment in another area, thereby cutting off the amount of time that parent and child spend together.

The claims would not even be limited to cases where family members are deprived of physical familial association of another. The courts would have to cope with claims from every family member of victims who suffer a constitutional deprivation which affects their emotional state, thereby infringing upon the quality of their familial association with their family members. The scenarios are endless.

It has been said that the courts must provide logical stopping place for section 1983 claims. Trujillo v. Board of County Commissioners, 768 F.2d 1186 (10th Cir. 1985). By refusing to expand Section 1983 liability to cases that involve only indirect temporary deprivation of companionship, this court would be ratifying the logical

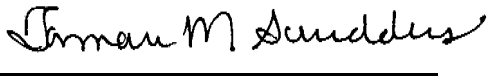
stopping place that now exists.

CONCLUSION

For the reasons stated above, this Court should approve the decision of the District Court of Appeal, Fourth District, and affirm the dismissal of Count III of Petitioner's Complaint.

Respectfully submitted,

JOHN J. COPELAN, JR.
County Attorney for Broward County
ANTHONY C. MUST0
Chief Appellate Counsel
Government Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (954)357-7600
Telecopier: (954)357-7641



TAMARA M. SCRUDDERS
Assistant County Attorney
Fla. Bar No. 0868426

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished via U.S. Mail this 7th day of January, 1997 to: Steven Wisotsky, Counsel for Petitioners, 3050 Jefferson St., Miami, FL 33133; Raoul G. Cantero, III, 2601 South Bayshore Drive, Suite 1600, Miami, FL 33 133; Andrew Kayton, Counsel for amicus curiae ACLU, 225 NE 34 St., Suite 102, Miami, FL 33137; and Prof. Steven G. Gey, Co-counsel for amicus curiae ACLU, Florida State University, College of Law, Tallahassee, FL 32306.

Tamara M Scrudders

TAMARA M. SCRUDDERS
Assistant County Attorney