

12-22-1972

## 12-22-1972 Justice Stewart, Memorandum

Potter Stewart  
*US Supreme Court Justice*

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To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
✓ Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-575

From: Stewart, J.

Circulated: DEC 22 1972

Linda Gomez, Individually and } On Appeal from the  
as Next Friend of Zoraida } Court of Civil Ap-  
Gomez, Appellant, } peals for the Fourth  
v. } Supreme Judicial  
Francisco Ocasio Perez. } District of Texas.

Recirculated: \_\_\_\_\_

[January —, 1973]

Memorandum of MR. JUSTICE STEWART.

This case came here as an appeal, on the representation that the Texas courts had sustained the constitutionality of § 4.02, c. 4, of the Texas Family Code and Articles 602 and 602a of the Texas Penal Code, over a challenge to those statutes under the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction, 408 U. S. 920, to consider whether the alleged discrimination between legitimate and illegitimate children in terms of the support obligations of their biological fathers denied equal protection to illegitimate children under the principles of *Weber v. Aetna Cas. & Surety Co.*, 406 U. S. 164, *Gloria v. American Guarantee and Liability Insurance Co.*, 391 U. S. 73, and *Levy v. Louisiana*, 391 U. S. 68.

Upon the submission of briefs and oral argument, it became clear that neither statute had been the actual subject of litigation in the courts of Texas. Hence this is not properly an appeal under 28 U. S. C. § 1257 (2), and I would, therefore, dismiss the appeal for want of jurisdiction, and treat "the papers whereon the appeal was taken" as a petition for writ of certiorari. 28 U. S. C. § 2103.

The parties were not prepared to submit this case as one challenging the common law treatment of illegiti-

mates in Texas, and failed to provide this Court with a sufficient understanding of Texas law with respect to such matters as custodial versus noncustodial support obligations, legitimation, common law marriage, and the effect of a Texas statute, § 4.02 of the Family Code, which became law after this litigation had begun. With the issues so vaguely drawn and the alleged discriminations so imprecise, I would dismiss the writ of certiorari as improvidently granted.