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12-18-1972 Justice White, Dissenting

Byron R. White
US Supreme Court Justice

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES^m: White, J.

No. 71-575

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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.

[January —, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

The issue presented by this appeal is whether the law of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children. We noted probable jurisdiction without restriction, 408 U. S. 920, and have heard oral argument. The majority has now concluded that appeal does not lie in this case and, treating the papers as a petition for certiorari, orders dismissal apparently because it is the common law of Texas that appears to have been directly contested rather than the State's statutory scheme for child support. I will accept that determination, but it by no means follows that this case is over. Under our cases, "the unrestricted notation of probable jurisdiction is to be understood as a grant of the writ" of certiorari on "nonappealable" issues presented in the case. *Mishkin v. New York*, 383 U. S. 502, 512 (1966). The constitutionality of the Texas common law respecting support of illegitimates is, therefore, properly before us.¹ Moreover, although there are

¹In any event, under 28 U. S. C. § 2103, we have the power to treat the appeal as a petition for writ of certiorari, which I would vote to grant.