

# The Burger Court Opinion Writing Database

## *Gomez v. Perez*

409 U.S. 535 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



*wrote you Jan. 10, 1972  
I have heard of you*

✓

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 23, 1972

No. 71-575 -- Gomez v. Perez

Dear Lewis:

This will confirm assignment to you  
of appointment of counsel in the above case.

You are not confined to 5th Circuit.  
Circuit Justices sometimes appoint a Washing-  
ton lawyer.

Regards,

*WB*

Mr. Justice Powell

✓ *M*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 13, 1972

Re: 71-575 - Gomez v. Perez

MEMORANDUM TO THE CONFERENCE:

My records show there were five (5) votes to  
Dismiss as Improvidently Granted.

If anyone proposes to dissent, please advise.

Regards,

*WLB*

Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
THE CHIEF JUSTICE

December 21, 1972

PERSONAL

Re: No. 71-575 - Gomez v. Perez

Dear Lewis:

With four dissents I am very reluctant to DIG any case. That process is one to be used with care as is so flagrantly illustrated in our current Toolco case.

I will memo the conference to this effect and perhaps a brief Per Curiam along Byron's lines will do.

Regards,

LSB

Mr. Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 21, 1972

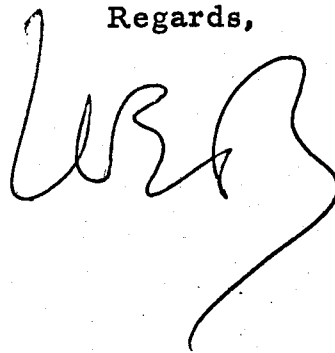
Re: No. 71-575 - Gomez v. Perez

Dear Byron:

There are four firm dissents to DIG in the above  
and I am reluctant to DIG a writ in that posture.

If you are willing to cast your dissent into a Per  
Curiam, you might pick up a few "new members" since on  
the merits there will be support for that result.

Regards,



Mr. Justice White

Copies to the Conference

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SECRET NO ADVANCE IN

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 2, 1973

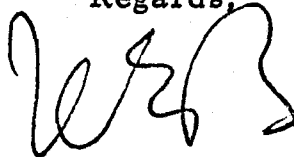
Re: No. 71-575 - Gomez v. Perez

Dear Potter:

As little as I like a DIG with four dissents

I am prepared to join your disposition of the case.

Regards,



Mr. Justice Stewart

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U.S. DEPARTMENT OF JUSTICE

3

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 8, 1973

Re: No. 71-575 - Gomez v. Perez

Dear Byron:

I think your revised approach is a sound one  
and I join you.

Regards,

WES

Mr. Justice White

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SSSERNOC EO UTD ADV L IN

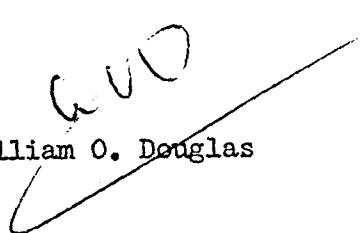
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

December 15, 1972

Dear Byron:

Please join me in your dissent  
in 71-575, Gomez v. Perez.

  
William O. Douglas

Mr. Justice White

cc: Conference  
Law Clerks

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

LIBRARY OF CONGRESS



B  
M  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 15, 1972

RE: No. 71-575 - Gomez v. Perez.

Dear Byron:

Please join me in your dissent in  
the above.

Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

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U.S. DEPARTMENT OF JUSTICE  
LIBRARY OF CONGRESS

30

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 8, 1973

RE: No. 71-575 Gomez v. Perez

Dear Byron:

I agree with the Per Curiam you  
have prepared in the above.

Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

3

You joined BREW's dissent

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-575

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

From: Stewart, J.

Circulated: DEC 22 1972

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

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]

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, *Glon 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-

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U. S. SUPREME COURT RECORDS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 14, 1972

Re: No. 71-575 - Gomez v. Perez

Dear Chief:

I shall have a few words to say in  
dissent.

Sincerely,



The Chief Justice

Copies to Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

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

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 12-15-72

No. 71-575

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

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, 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.<sup>1</sup> Moreover, although there are many reasons why the Court may be forced, after oral

<sup>1</sup> In 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.

B  
1  
M

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

2nd DRAFT  
SUPREME COURT OF THE UNITED STATES

From: White, J.

No. 71-575

Circulated: \_\_\_\_\_

Recirculated: 12-16-72

Linda Gomez, Individually and as Next Friend of Zoraida Gomez, Appellant, v. Francisco Ocasio Perez.	}	On Appeal from the Court of Civil Ap- peals for the Fourth Supreme Judicial District of Texas.
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[January —, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN 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.<sup>1</sup> Moreover, although there are many reasons why this Court may be forced, after oral

<sup>1</sup> In 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.

14  
M  
p. 1

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

From: White, J.

Circulated: \_\_\_\_\_

No. 71-575

Recirculated: 12-18-72

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.<sup>1</sup> Moreover, although there are

<sup>1</sup> In 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.

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

*Please join me*  
*M*

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 1-5-73

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

No. 71-575

Linda Gomez, Individually and as Next Friend of Zoraida Gomez, Appellant, v. Francisco Ocasio Perez.	}	On Appeal from the Court of Civil Ap- peals for the Fourth Supreme Judicial District of Texas.
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[January —, 1973]

PER CURIAM.

The issue presented by this appeal is whether the laws 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.

In 1969, appellant filed a petition in Texas District Court seeking support from appellee on behalf of her minor child. After a hearing, the state trial judge found that appellee is "the biological father" of the child, and that the child "needs the support and maintenance of her father," but concluded that because the child was illegitimate "there is no legal obligation to support the child and the Plaintiff take nothing." The Court of Civil Appeals affirmed this ruling over the objection that this illegitimate child was being denied equal protection of law. 466 S. W. 2d 41. We noted probable jurisdiction. 408 U. S. 920.

In Texas, both at common law and under the statutes of the State, the natural father has a continuing and primary duty to support his legitimate children. See *Lane v. Phillips*, 6 S. W. 610, 611 (Tex. 1887); *Vernon's*



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

From: White, J.

2nd DRAFT

Circulated: \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

Recirculated: 1-13-73

No. 71-575

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

[January 17, 1973]

PER CURIAM.

The issue presented by this appeal is whether the laws 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.

In 1969, appellant filed a petition in Texas District Court seeking support from appellee on behalf of her minor child. After a hearing, the state trial judge found that appellee is "the biological father" of the child, and that the child "needs the support and maintenance of her father," but concluded that because the child was illegitimate "there is no legal obligation to support the child and the Plaintiff take nothing." The Court of Civil Appeals affirmed this ruling over the objection that this illegitimate child was being denied equal protection of law. 466 S. W. 2d 41. The Texas Supreme Court refused application for a Writ of Error, finding "no reversible error." We noted probable jurisdiction. 408 U. S. 920.

In Texas, both at common law and under the statutes of the State, the natural father has a continuing and primary duty to support his legitimate children. See

  
CHAMBERS OF  
JUSTICE BYRON R. WHITE

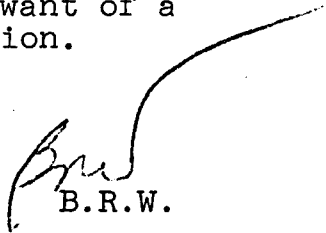
Supreme Court of the United States  
Washington, D. C. 20543

March 14, 1973

MEMORANDUM TO THE CONFERENCE

Re: Colorado, In the Interest of L.B., M.B.  
a/k/a V.B.

This case was held for Gomez v. Perez, No. 71-575, and involves a five year statute of limitations on actions to establish paternity. Absent judgment in a timely action and absent acknowledgment or prior support, an illegitimate may not obtain support. On the merits I would be inclined to dismiss for want of a substantial question; but there may be an adequate state ground, and I could dismiss for want of a properly presented federal question.

  
B.R.W.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 18, 1972

Re: No. 71-575 - Gomez v. Perez

Dear Byron:

Please join me.

Sincerely,

  
T.M.

Mr. Justice White

cc: The Conference

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SSSERNOC 20 ADV 11 IN

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 9, 1973

Re: No. 71-575 - Gomez v. Perez

Dear Byron:

Please join me in your per curiam  
of 1-5-73.

Sincerely,

  
T.M.

Mr. Justice White

cc: Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

3

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 5, 1973

Re: No. 71-575 - Gomez v. Perez

Dear Potter:

I would be willing to join your memorandum proposed  
for this case.

Sincerely,

H. A. B.

Mr. Justice Stewart

Copies to the Conference

+ PC - BEW 1/5  
Y 2/2 Mike

3  
This has  
been jumping  
around but  
you joined Black  
on 12/18  
CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

Supreme Court of the United States  
Washington, D. C. 20543

January 8, 1973

Re: No. 71-575 - Gomez v. Perez

Dear Byron:

Your proposed per curiam, circulated late Friday, convinces me, and I would now like to join it and to withdraw my tentative vote to DIG.

Sincerely,

H. A. B.

Mr. Justice White

Copies to the Conference

December 21, 1972

No. 71-575 Gomez v. Perez

Dear Chief:

I am having some trouble with our decision to DIG the above case. After reading Byron's draft of a dissent (in which three other Justices have joined) I have spent a couple of hours going back over the briefs and my notes on the oral argument. I voted to DIG on the assumption that the Texas statute (§ 4.02) was not involved in this case. I now have doubt whether this assumption is necessarily correct.

It is true that counsel for appellant conceded in oral argument that he was attacking Texas common law, \* and that he is not asking to hold 4.02 unconstitutional. It is also true that the Texas Court of Appeals did not specifically mention 4.02. Yet, upon further reflection, and in light of the time sequences involved, it is difficult to believe that the statute was not in fact before the Court. It was passed on May 4, 1969, several months before this action was commenced on September 18, 1969. The statute was not mentioned in petitioner's complaint, possibly because it did not become effective until January 1, 1970. But the trial took place March 23, 1970, after the effective date of the statute, and the court may be presumed to have taken judicial knowledge of its existence.

- Moreover, Joe Jaworski (appointed by us to support the judgment below) states in his brief that: "The issue here is the constitutionality of Tex. Fam. Code § 402 (1969)."

\*Byron assumes this and thinks it makes no difference whether the statute is before us.

During oral argument, Jaworski disagreed with counsel for appellant. He expressed the view that § 4.02 was considered by the Texas courts, although not specifically mentioned.

In sum, I now ask myself whether we are not entitled to assume that the court below, construed § 4.02 as comporting with the common law - which also is expressly adopted by statute in Texas. (Article I, Vernon's Annotated Texas Statutes).

My guess is that we would all agree that 4.02, as so construed, violates the equal protection clause. I consider that Weber (which I wrote last term) is controlling on this point.

I wonder whether those of us who voted to DIG should not consider joining a court opinion - which could be almost as brief as Byron's - holding the Texas statute is before us and that it is unconstitutional.

I am sending this note only to you at this time, as I relied at the Conference primarily on views expressed by you and Potter to the effect that there was really nothing properly before us.

Sincerely,

The Chief Justice

lfp/ss



3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 7, 1973

Re: No. 71-575 Gomez v. Perez

Dear Byron:

Please join me.

Sincerely,

*Lewis*

Mr. Justice White

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 27, 1972

Re. No. 71-575 - Gomez v. Perez

Dear Potter:

Please join me in your memorandum.

Sincerely,



Mr. Justice Stewart

Copies to the Conference

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U.S. SUPREME COURT RECORDS