In the

Supreme Court of the United States

Ramon Martin Fiallo, etc., et al.,

Appellants,

v.

Edward H. Levi, individually and as Attorney General of the United States, et al.,

Appellees.

No. 75-6297

Washington, D. C.
December 7, 1976

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Washington, D. C.,

Tuesday, December 7, 1976.

The above-entitled matter came on for argument at 1:56 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MISS JANET M. CALVO, of counsel, The Legal Aid Society, Civil Appeals & Law Reform Unit, 11 Park Place, Suite 811, New York, New York 10007; on behalf of the Appellants.

HAROLD R. TYLER, JR., ESQ., Deputy Attorney General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-6297, Fiallo against Levi.

Miss Calvo, you may proceed whenever you're ready.

ORAL ARGUMENT OF MISS JANET M. CALVO,

ON BEHALF OF THE APPELLANTS

MISS CALVO: Mr. Chief Justice, and may it please the Court:

This case is an appeal --

MR. CHIEF JUSTICE BURGER: Would you draw that microphone a little closer to you? There. And perhaps raise the lectern a little. That will get you in better communication with the Court. Very well.

MISS CALVO: Thank you.

This case is an appeal from the judgment of a divided three-judge court in the Eastern District of New York. The challenged statutes in this case afford a statutory right to United States citizen parents which makes it possible for them to live in this country with their alien children. It does so by allowing the parent to request an exemption of his alien child from restrictive numerical quota and labor certification requirements.

As fully explained in our Reply Brief, the recent Amendments to the Immigration Act narrow the scope of this case perspectively to the issue of a United States citizen

parent seeking the classification of his alien child as an immediate relative and thus exempt from labor certification and quota requirements.

While other similarly situated parents may prove their family relationship with their children and thereby obtain their entry into the United States, citizen fathers of illegitimate children are completely precluded from proving their parent-child relationship. Thus, Cleophus Warner, even though he has formally acknowledged his child, always supported his child, lives with his child, loves and cares for his child, is completely unable to prove his relationship with his child and to achieve his goal of living with his child in this country.

This case is a unique one in Immigration Law context on several grounds.

First and foremost, this case involves the rights of citizens, not of aliens. The challenged statutes were designed to achieve the benevolent result of allowing a United States citizen parent to live together with his child. But the statute discriminates against some United States citizen parents, the fathers of illegitimate children.

In doing so, the statutes infringe on these citizens' fundamental interests in their parent-child relationship. And, as a possible consequence, the incidence of their citizenship.

Mr. Warner is put to an impossible choice. He may give up his desire to care for and live with his child, and be able to live in this country, the country of his citizenship.

QUESTION: Well, is that an impossible choice? A great many American citizens live in other countries. So isn't "impossible" a rather strong word to apply to it?

MISS CALVO: For Mr. Warner, it is a serious -- by "impossible", a very serious infringement on his choice to live in the United States, the country of his citizenship. In fact, his citizenship was a very hard-earned one, as Mr. Warner is a naturalized citizen of the United States.

He chooses to live in this country, and he has made that known by becoming a naturalized citizen and living here for many years.

Another factor which makes this case a unique immigration case is that the legislative history discloses the total absence of any foreign policy concerns, or a congressional choice to exclude or expel a group of aliens who are perceived to pose a threat to our national security or to our general welfare.

Illegitimate children are not an excludable class under the statute, and therefore there is no determination that they are any danger to us.

These factors demonstrate that this case is funda-

mentally different from any of those prior immigration cases upon which the government relies.

There is no question but that the actual and express congressional purpose in passing the challenged statutes was to allow citizen parents to choose to live with their alien children in this country. But the statute presumes that a citizen father will never have close ties with his alient illegitimate child and will never want to choose to live with him in the United States.

QUESTION: How can -- I find it a little difficult to understand the argument in this case and, indeed, in many other cases that it was the -- in view of the fact that Congress did what it did, how can you argue that Congress' purpose was to do something else? This is not a novel argument in this case, we get it in a good many cases. And I find it always very difficult to follow.

MISS CALVO: I think there's a -- maybe the difference is between classification and purpose. There is nothing in the legislative history which evidences any other intention as an overriding purpose on behalf of Congress, other than allowing parents to live with their children.

Of course, to the extent that a certain group is left out of the classification system, they, therefore, intended it, by omission, to leave them out.

QUESTION: Unless this is wholly inadvertent, this

statute reflects the intent and purpose of Congress, does it not?

MISS CALVO: Well, I --

QUESTION: Unless it was accidental or inadvertent, and I don't understand that to be any part of your argument.

MISS CALVO: No, we feel that if, in consideration of the overriding purpose of Congress, if they knew that a man like Mr. Warner, who has acknowledged his child and always cared for his child and lives with his child, would be totally barred from proving his relationship with his child and completely barred from living with his child, they wouldn't have intended that result. Because what Congress was basically concerned with was allowing citizen parents to be united with their children in the United States.

QUESTION: But that isn't the way we usually construe statutes, is it, to say that if Congress just had known that this precise language that it adopted had this effect on this particular man they wouldn't have passed it in those terms?

MISS CALVO: Pardon me? I didn't understand the question.

QUESTION: Well, you're saying -- are you suggesting that because you think that Congress, if it had seen the effect of this statute on your client, would have passed a different statute, that we ought to construe it in a different way?

MISS CALVO: No, I'm not arguing that. I'm just arguing that, with regard to the overriding purpose of Congress, the classifications as drawn are irrational and don't serve that purpose.

QUESTION: Well, what do you mean when you're talking about the overriding purpose of Congress? Surely, there is no place where congressional purpose is better found than in the language Congress has chosen to enact into a statute, is there?

MISS CALVO: I think that there's a confusion between classification and purpose. You could say, in a case in which a Legislature said that, "We're building a school for white children; we don't want black children to attend it", that that basically fulfilled their purpose, because that was the way the classification was drawn.

What we're saying is that from the legislative history Congress specifically stated that by creating this statute they were intending to promote the family unit of the United States citizen. And we are further contending that the classification which leaves out the fathers of illegitimate children does not promote family unity. In fact, --

QUESTION: Well, but isn't the logical inference from that, then, that Congress did not intend to promote family unity with respect to that particular class of individuals, since it expressly excluded them?

MISS CALVO: But you could say that about any statute.

QUESTION: Well, we usually do.

MISS CALVO: I think there's confusion between classification and purpose. I mean, the -- I think that in its recent cases this Court has looked very closely at what Congress said itself was doing, in its legislative history. And that's --

QUESTION: Do you think that's better evidence of what Congress intended by the legislation than the language that it chose?

MISS CALVO: I think that there's a confusion with intent and purpose. I'm not arguing that there was any -- that it is any other than the classification leaves out fathers of illegitimate children.

QUESTION: But, at least, Miss Calvo, even on your theory, Congress went part of the way.

MISS CALVO: Yes, it is go part of the way. It did go part of the way by presuming that parents similarly situated to a citizen father of an illegitimate child will always have close ties with their children.

For example, under the step-parent provision of the law, if Mr. Warner married, he would be presumed to have close ties with his wife's illegitimate child, ties that he is presumed never to have with his own child. And, on the other

hand, his wife would be presumed to have close ties with Serge, his illegitimate child, ties that the father himself is presumed never to have.

This is similarly true under other provisions of the statute. A father who fortuitously lived in a place where an action on his -- by himself, he was capable of legitimating his child, for example, by a simple acknowledgement, would be presumed to always have close ties with the child; while a man like Mr. Warner, who has not only acknowledged the child but always supported the child and lives with the child, because he doesn't happen to live in such a place, is completely precluded from even proving his parent-child relationship.

Also, an adoptive parent, a prospective adoptive parent, and the mother of an illegitimate child, under the statute, are presumed to always have close ties with their children, while the father of an illegitimate child, no matter how close his ties may be in reality, is totally barred from proving his close ties, and is presumed not to have these close ties.

Basically, what we are contesting is this total barring under the statute. Especially in this case, where the fundamental interest of a parent in the care and companionship of his child is involved.

Mr. Warner's case illustrates it. He is, because of the abandonment of the mother, the only parent his child

has, and he is willing to take responsibility for that child, as he always has, and wishes to live with the child in this country, in order to do so.

QUESTION: How old is Serge now?

MISS CALVO: Now I think he's about sixteen. He was much younger, of course, when the case began. It's been around for quite a long time.

The government attempts to defend the discrimination in this case on the ground of purported administrative inconvenience in the prevention of spurious claims. There were absolutely no congressional expressions that vis-a-vis unwed fathers they were concerned about administrative inconvenience.

But, in any event, the challenged potential, the alleged potential for spurious claims does not justify the discrimination in this case. This is because any potential for spurious claims in the case of a father of an illegitimate child is no different than the potential for spurious claims for many other parents who are covered by the challenged statutes.

For example, under the step-parent provision, the immigration and consular officials would have to make the same exact determination as they would have to make in this case, the paternity of an illegitimate child.

Practically, if I may point out, they already have

routine methods of doing so. They have a system set up. They have forms. They know what kind of proof they want, to prove these relationships.

We do not contest or contend with any rigorous burdens of proof that are imposed, what we seek in this case is only the opportunity of the unwed father of an illegitimate child to prove his relationship by whatever proof the immigration or consular officials impose upon him. It is clear under the law that the burden of proof lies with the parent of seeking the benefit for his child.

In summary, and I would like to reserve the rest of my time for rebuttal, --

MR. CHIEF JUSTICE BURGER: Very well.

MISS CALVO: -- it cannot be over-emphasized that what is involved here is the rights of citizens who, like Mr. Warner, have always acknowledged and supported and taken care of their children, and who wish only to be treated like other parents, and given an opportunity to prove this relationship.

QUESTION: I suppose, Miss Calvo, the government disagrees with your focus, it puts the focus on the child, doesn't it, rather than the citizen parent?

MISS CALVO: Yes, that is an entirely erroneous focus, Your Honor. If the parent does not request that the child enter the States, the child does not enter the States; that's by statute at Section 204 of the Immigration and

Nationality Act.

The benefit is given only to the citizen parent. The child cannot claim entry under the challenged statutes merely because he is related to a citizen. The citizen has to specifically request that this be done on behalf of his child.

The citizen also has to further agree that he will take care of the child, support the child. He must reveal his assets, his -- and he must meet specific limitations which demonstrate that he is capable and willing to support the child while the child is in the United States.

QUESTION: Incidentally, suppose that it weren't Mr. Warner we were speaking of, but his parents who lived here and were citizens; would they be in a position, under the Act, to bring in,have Serge stay here?

MISS CALVO: The grandparents?

QUESTION: Yes.

MISS CALVO: No, Your Honor, the special provisions of the Act relate to parents of the children.

QUESTION: So that siblings also would not be benefitted?

MISS CALVO: No. No. This is a very narrow situation. It's a situation that deals only with the parent-child relationship.

QUESTION: Miss Calvo, it occurs to me that when you emphasize that the discrimination is between parents of

illegitimate children on the one hand, and parents of legitimate children on the other, you really are not entitled to rely on the cases that rely on the unfairness of visting the sins of the parents on the children.

Do you understand my point?

MISS CALVO: I believe that there are -- that there are cases in which illegitimacy discrimination has also -- and I believe it was in the companion case to Levi, the Glona case, the illegitimacy discrimination was against the parent as well.

Here there is -- the party is a parent, and the parent is discriminated against in several different ways in comparison with several other similarly situated parents.

QUESTION: It's on account of his own conduct, whereas, in the case we just heard before, the child was being discriminated against on account of his natural parents' conduct.

MISS CALVO: That's true.

QUESTION: Yes.

MISS CALVO: If you have no further questions, I'd like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well, Miss Calvo.

MISS CALVO: Thank you.

MR. CHIEF JUSTICE BURGER: General Tyler.

ORAL ARGUMENT OF HAROLD R. TYLER, JR., ESQ.,

ON BEHALF OF THE APPELLEES

MR. TYLER: Mr. Chief Justice, and may it please the Court:

I think it is of the commonplace, of course, and as a backdrop to this case, that Congress need not allow the admission of any aliens, much less need Congress grant immigration preference to any aliens.

The core of this case, of course, has to do with the latter, that is, with preferences which Congress attempted to achieve by classifications adopted first in 1952 and, most importantly for this case, in 1957, in Section 101(b)(1) and (2).

Very briefly, the government claims that these are classifications which Congress has the primary jurisdiction to adopt, they are rational, and they are related to a legitimate immigration purpose; and thus they do not offend the due process clause.

Preliminarily, I might say that there are certain things which the government contends are really not involved in this case, though one might assume so if you were to listen to some of our arguments.

I think, as the plaintiffs concede, although I'm not certain, but I think Miss Calvo said this, this is not a case where illegitimacy, standing alone, or fathering an

illegitimate son or daughter, standing alone, works an exclusion or a bar under the statute. Nor is it a case where classification is simply a routine distinction or a simplistic distinction, if you will, between men on the one hand, and females on the other hand.

And, finally, I might note, this is not a case, as plaintiffs apparently still argue, where the preference provisions were designed to unify all families.

We contend, rather, that the apparent intent of Congress, if you just look at the plain language of the statute, was to re-unify families to the extent rationally feasible, where there have been separations particularly caused by our immigration laws, or some of them, and especially where those separations were most likely to cause unusual hardship.

In short, we urge that Congress acted not haphazardly but discreetly and with care.

For example, as has already been brought out, Congress decided that children, legitimate or otherwise, over 21 or married, get no preference at all. Congress similarly decided that children who have been legitimated, after they are 18 years of age, get no preference. Similarly, Congress decided that children adopted after they are 14 years of age get no preference.

They decided that stepchildren, made such by a marriage, after they are 18, get no preference for admission

to these shores.

And, of course, for this case, as the Court well knows, preferences by virtue of the definition of parent and child go only to the mother and her illegitimate child, and not to the father.

Now, obviously, I assume, once we look at it with reasonable care, we have to accept that,if nothing else is clear, a mother has once been united with her child; but, surely congress had in mind that fathers necessarily never were united. And I think this is legitimate concern, particularly where you are dealing with a father who has never chosen to legitimate his child prior to some point where an attempt can be made to petition for entry.

Now, there can be no doubt about it, as the plaintiffs argue, and as the Court knows, what Congress did here was set up a presumption. But we urge that it is a presumption based upon a rational empirical judgment or classification.

Furthermore, we urge that Congress quite obviously made this judgment or cut on the basis of difficulties of proof of paternity, and there's no lawyer with a smidgen of experience who doesn't know what the difficulties are of proof of paternity; and of course the likelihood of spurious claims, as Miss Calvo has pointed out.

Now, we do not urge here that just because this is an

immigration case, or it's a case arising under the INA, that this Court has no right to look at the case; of course it does. What we do urge is that the plaintiffs have the burden of proof of showing that the classification or cut by Congress in deciding who was to be preferred and who was not to be preferred, by defining children and parents, that this classification or cut is irrational.

They fail in this burden, we submit, for several reasons.

First, as has been pointed out to you early and often this afternoon alone, by others in the Illinois case, illegitimacy has never been held squarely by this Court to be what is called a suspect classification.

For this reason, and because we are concerned with the admission of aliens, a matter obviously of primary jurisdiction of the Legislatures, strict judicial scrutiny is neither necessary nor appropriate.

As the Court has held recently, in domestic cases, drawing of lines is peculiarly a legislative task and it's a task where perfection is neither possible nor necessary.

Now, this is a rule, of course, that has been enunciated for cases involving citizens who have the full panoply of constitutional protection. A fortiori, we would urge it is probably the outermost limit that one could reasonably ask for an alien who is seeking preference for admission

to our country.

Let me conclude, if I may, with two points.

As if almost to recognize their difficulties in the main issues, plaintiffs seem to resort to the claim that the parent and child definitions here in issue somehow invidiously impact upon the constitutional right of a citizen. Apparently that is a right which I guess they call, as I read their brief, a right to a unified family.

Well, I have two arguments to raise against that, if the Court please.

First of all, I'm not sure that this is a right which has been recognized in the Constitution, and perhaps in a more specialized argument, it seems to me that one reason we urge upon the Court consideration of the fairly recent case of Kleindienst vs. Mandel, which, to be sure, involved First Amendment rights of a citizen in an alien context to an extent, simply because Professor Mandel, as you'll remember, was seeking to be admitted to speak here and to converse with academic people and others who wanted to hear him. And there, as I understand this Court, it recognized that if the constitutional rights of citizens were to prevail in cases which involve the decision by the Legislature or the Executive under delegation by the Legislature to exclude or keep out aliens, then the congressional power to determine such exclusion, which we all, I think, concede exists, would really

work out to be annulled.

And, finally, if it may please the Court, I notice that on oral argument, as in their brief, plaintiffs once again contend that somehow this case presents no foreign policy issues or choices. In other words, in 1957, as I understand the argument, Congress didn't sit down and in some way, either in the actual statutory language or in something that we all are trained to call legislative history, utterances that this is a great matter of foreign policy or some foreign policy choices.

I thought that argument had been put to rest by Mr. Justice Jackson 24 years ago in Harisiades, when he pointed out that when Congress makes these cuts and when Congress determines who is excluded and who is admitted, and on the reasons why, that that kind of a cut or that kind of classification, by necessity, goes to the heart of our relation with other governments. This is a good illustration, as Miss Calvo has properly stated.

One of the problems here is that a good deal depends upon the laws of other jurisdictions, who gets admitted under this statute or other sections of the Immigration and Nationality Act.

QUESTION: Well, General Tyler, you say in your brief that the basis for this action in not giving preference to an illegitimate child of an unmarried father is that the child is

among a class -- or that the classification -- that the father and the child are members of a class, among whom it's unlikely that there would be any real close identification. And it's on this basis that the legislature, Congress, decided which families to try to re-unify and which families not.

Now, why -- I suppose you would concede that there would be a good many father-child relationships, even though the child is illegitimate, --

MR. TYLER: Oh, yes.

QUESTION: -- where there has been a very close relationship.

MR. TYLER: Oh, yes, we have to.

QUESTION: Well, why not let them prove it?

MR. TYLER: Well, the difficulty is, as I said earlier, Congress apparently was relying on two propositions which even the plaintiffs' sociological and statistical studies which they mention in their briefs don't really dispose of, as I see it. First of all, even the studies of a recent vintage, referred to by them and referred to by Judge Weinstein in his dissent, show that the overwhelming number of families, the natural relationship, as Congress obviously opted for here, is with the mother.

But you're quite right, we can't claim, and perhaps the Cleophus Warner family situation is a good illustration -- there will be, because of these classifications or cuts, as

I somewhat simplistically call them, situations which tug at the heart-strings of any one of us.

QUESTION: Well, suppose the person seeking admission, or the person for whom the parent seeks admission for, alleges in a piece of paper certain facts that would indicate to anybody that there has been a close relationship down through the years, and suppose the government, in answering that, knew what the facts were and said, Yes, we agree. Now the law would still exclude the child, the illegitimate child. Why not let them prove it? I mean, why not --

MR. TYLER: Because Congress --

QUESTION: Why doesn't the government want to sort them out, one after -- in an individual case, rather than as a group?

MR. TYLER: Well, I would urge very simply that Congress made a choice with full recognition there would be special cases where, hardship, where, as you say, might be easy to prove. But I think Congress was thinking of the bulk of the cases.

QUESTION: Well, I know it was, but why not -- is it just the administrative cost or difficulty or sorting them out on an individual basis?

MR. TYLER: Well, as the argument has been made, in the legislature as recent as a few months ago, where Congress is considering a bill to achieve the result which the

plaintiffs urge, and which you're really talking about, and one of the considerations, of course, is: Would it really be that hard?

But our argument very simply is that congress has the right and the power to decide this. And as long as it's rational, even though you or I or anyone else could think of a better method, it really doesn't solve the problem, on a constitutional basis.

QUESTION: But you say it's -- what is the rationale of the -- in excluding the -- in the particular child's case, if there has been a close association down through the years, and the government admits it?

What is the rationale for that?

MR. TYLER: Well, that isn't the determination as I understand it that Congress made here. Congress approached this from another angle.

QUESTION: Well, I know what Congress said. I'm just trying to see what -- you say it is a rational decision.

MR. TYLER: Well, it seems perfectly rational judgment, although it's been --

QUESTION: Is it rational because it's too hard to prove it in some other cases, and therefore you don't want to ask for --

MR. TYLER: Well, in a great number, apparently.

Partly because of the differing laws about legitimate

children as opposed to illegitimate children; partly because of different laws as to records; partly because of the horrible problems of proving or disproving paternity. And that's true whether you're dealing with an alien or a citizen.

I can't deny that there are cases. Of course. But our argument basically comes down to this:

First of all, it's Congress that makes the choice, particularly when we're dealing with questions of alienage.

And second of all, it isn't irrational to make the cut as Congress did it.

And I would have to concede to you or anybody else that there will be these individual cases. I'd have to concede that if you went down carefully on a case-by-case basis there would be some that the government would concede on, as you point out.

But then there would be many, many that the government would not concede on.

But, as Congress has tried to --

QUESTION: Wasn't it Mr. Justice Holmes who said once that every line drawn by legislative action excludes some that could well have been left in, and includes some that might well have been left out?

MR. TYLER: I think Mr. Justice Blackmun said it even more recently. But that's correct.

And here we have to accept, as Mr. Justice White's

point, there is no doubt that there are individual cases. And you know we only heard about one of the plaintiffs' case here this afternoon. This is perhaps the most appealing to many of us. I agree with Miss Calvo. The cases of the other plaintiffs are not so appealing.

But I don't think Congress was unaware of that problem. I think what they decided to do was to take the problem on a natural basis, as they understood it, and as the immigration laws have presumed for many, many years, that the rational or most rational place for a child was with the natural mother. And that illegitimate, or the fathers of illegitimate children, of course, in some instances, are very close to their children. But in many more instances, they are not.

Also, if I may say, a father does have a chance to legitimate his child under the laws of most every jurisdiction, whether within or without the United States.

Thank you very much.

QUESTION: But that cannot be done in this --

MR. TYLER: No. Unfortunately, in that case, --

QUESTION: -- one case, because the mother has remarried, and --

MR. TYLER: Yes. And that presents a problem.

QUESTION: -- and apparently under the local law of wherever it is, in the Caribbean, legitimation could occur only

by marriage of the parents. That's my understanding.

MR. TYLER: That's my understanding, too. And I'm sure there are other cases, going back to Justice White's point. There's no doubt of it.

But our argument is that the Congress is entitled to make the cut, even where it leaves out some and creates individual hardships.

Indeed, if one looks at other sections of the immigration laws, I'm sure this Court knows, you will see other forms of classifications that surely tug at the heart-strings of any one of us, I assume; and if we were doing it, or if I were doing it, I admit I'd probably try to do it differently.

But we urge that that's Congress' province, as long as they have some reasonable basis so to do.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Miss Calvo?

REBUTTAL ARGUMENT OF MISS JANET M. CALVO,

ON BEHALF OF THE APPELLANTS

MISS CALVO: Yes, Your Honor.

What the government attempts to justify here is a determination made on the basis of a bare stereotype which allows total foreclosure of a group of people, and,in doing so, infringes on a fundamental interest, in a parent-child relationship.

Now, maybe a reference to a recent case would be helpful. In Mathews vs. Lucas, distinctions were upheld, specifically because they did not completely and totally foreclose a group from proving the objective or the necessary object in that case, which was dependency.

This was compared to the case of Jimenez, in which the classifications were very similar, but the group of people in that case were totally precluded from proving dependency which was the object in that case also.

In this case there is a stereotype that fathers of illegitimate children don't care a whit about their children. I believe that we have shown in our briefs that this stereotype just isn't valid, that there are many, many fathers who do care about their children and our particular concern in this case is with our plaintiffs who do care about their children.

QUESTION: Well, isn't Congress entitled to legislate on the basis of the generality of human experience?

MISS CALVO: I believe that their concept of the generality of human experience results in a stereotype here, and I don't believe that legislating on the basis of the stereotype, when it totally forecloses a group of people from proving the object, which is in this case a family relationship, is constitutionally justified.

I also might point out in that regard that the classifications in this case aren't only just mother-father,

although we do say that that is discriminatory, you also have another classification like the step-parent classification, which is completely and totally irrational. You can't presume that a man is going to have close ties with his wife's child, but not with his own, and that she is going to have close ties with his child that he never has.

That is the most irrational example in that situation.

QUESTION: Miss Calvo, can I interrupt you for just a second? You suggest that the stereotype here is that there is not a very close relationship between a natural father and his illegitimate child, and that it's wrong to legislate on the basis of stereotypes. I think you would probably acknowledge, however, that there are a good many instances in which there is not a close relationship between a natural father and an illegitimate child, and I'm just wondering, how does one decide when that becomes a stereotype. Because there's some cases that fit and some that don't.

MISS CALVO: I think in this case that it's -- there has been sufficient proof brought to show that it isn't a stereotype --

QUESTION: Well, I understand, in this particular case --

MISS CALVO: Yes.

QUESTION: -- this doesn't fit the stereotype. But how do I know that we're dealing with a stereotype at all,

that's what I mean. In other words, that the classification itself doesn't have sufficient generality to be a legitimate legislative decision.

MISS CALVO: Well, there are several classifications that are comparable here. It's comparing the father with the mother, but also comparing the father in the step-parent situation, or fathers with fathers.

QUESTION: Well, taking the father and mother, would you not acknowledge that more frequently there is a close relationship between the mother and the illegitimate child than there is between the father and the illegitimate child?

MISS CALVO: In that situation, there may be; but that does not justify totally --

QUESTION: Well, does that not justify --

MISS CALVO: -- it doesn't justify totally foreclosing the father. Maybe it might justify imposing differing burdens of proof upon him, but it doesn't justify completely and totally wiping him out, when his fundamental interest in his parent-child relationship is involved.

QUESTION: I'm just trying to figure out -- you acknowledge there's some difference, but yet you say that the one relationship is a stereotype, and I've often wrestled with this problem, when does something become a stereotype? And that's what I don't quite understand.

MISS CALVO: Well, I think that this Court has

had before it many cases in which fathers have -- fathers of illegitimate children have been close with their children. The most recent one is the Jimenez case, in which Mr. Jimenez was the sole caring parent of those children. And I also believe that the statistics that we presented show that there are a substantial number of fathers who live with their children, that those fathers who don't live with their children very often support them and visit them, and perform the sociological functions of their fatherhood, and take responsibility for the children.

QUESTION: Miss Calvo, could Congress pass an Act denying citizenship to any illegitimate alien?

MISS CALVO: Would you repeat that? I'm sorry, I didn't hear you.

QUESTION: Could Congress pass an Act denying citizenship to any illegitimate alien? Period.

MISS CALVO: That would be a different case from this one, because in that case there would only be the rights of aliens involved. That case -- a determination in this case that this law is unconstitutional would not necessitate in that case a determination.

QUESTION: Then I understand your answer is --

MISS CALVO: There are different considerations in that situation.

QUESTION: And your answer to my question is?

MISS CALVO: I think it would -- I have not thought about it. I think that it would have to be resolved on the basis of its own merits. And I would have to think about it more before I could give you a specific answer on that.

QUESTION: Miss Calvo, General Tyler referred to the fact that sometimes in the country of origin a child may be legitimated. Does this record show whether that was possible in the French West Indies, where Serge was born?

MISS CALVO: Yes, it shows that the only way that the child could be legitimated in Guadalupe was by marriage of the parents. And this mother did not choose to marry Mr. Warner, she chose to marry someone else.

QUESTION: That was the only way?

MISS CALVO: Yes, that is the only way. And that's fairly common in many places. This concept of legitimation or legitimate, some children are legitimate when born, even though they are born out of wedlock. Some children of adulterous relationships are legitimate also. In other places, children are legitimate only if the parents marry.

For example, in some places a father could have custody of the child and be supporting the child and always live with the child, but he is totally incapable ofmaking the child legitimate under the law of the area.

QUESTION: Of course you have cases other than the Warner case here, don't you?

MISS CALVO: Yes. Those -- we didn't focus on those, only because of the change in law. We --

QUESTION: Are they moot now, do you think?

MISS CALVO: No, we don't think -- they are not moot, because the recent amendments contained a savings clause which provided that if an application were made before the effective date of the law, which is not yet, that those people would be entitled to whatever benefits they would have been entitled to under the old law.

QUESTION: Well, I wondered, because neither of you has mentioned any case other than Mr. Warner. But they are here.

MISS CALVO: That's right. We did not focus on that case because basically the issue that those other cases presented is not really an issue, except for those two people at this point.

QUESTION: Well, you probably didn't focus on them, because the Warner case is the best case by far that you have.

MISS CALVO: Well, I think the other cases have --

QUESTION: It's also all you need, isn't it?

MISS CALVO: I think that I'd like to --

QUESTION: When you speak of these stereotypes, Miss Calvo, I'm not sure I know what you mean. Who determines that some situation is a stereotype? Who decides that?

MISS CALVO: I think, Your Honor, that the govern-

ment tries to claim that it is common experience, and I am saying that it's not common experience, because we have shown that there is enough evidence and the individual fact situations of the case show it, and also the sociological data and the empirical data show it. Even the Census Bureau data shows it.

And all the studies that were cited in the brief are all government studies. They show it. That fathers do care about their illegitimate children.

QUESTION: Well, are judges to assume that the 535 Members of Congress either are unaware of all of those factors or are not capable of finding out about them?

MISS CALVO: I think that what the problem in this case is that it's a total foreclosure. I think that when there is an individual, or a substantial number of individuals who have close ties with their children, you can't completely and totally wipe them out, foreclose them, on the basis of some presumptions.

I believe my time is up.

MR. CHIEF JUSTICE BURGER: Your time has expired.

MISS CALVO: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

[Whereupon, at 2:44 o'clock, p.m., the case in the above-entitled matter was submitted.]