Twitter Thread by Chase Strangio



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I will be live tweeting starting in a few minutes. Follow here. Background on Fulton below. SCOTUS arguments are livestreamed here: https://t.co/lRlq9udKyB.

Argument is underway. CSS is claiming that applying non-discrimination law is interfering with agency's religious practice. Total distortion of what is happening.

Breyer asking what is the religious objection to just evaluating the families without taking into account whether family is same or different sex couple. CSS claiming it cannot make statements validating LGBTQ families because it would violate their religious beliefs.

Breyer again explaining that the agency doesn't even have to consider the marital status of the couple.

CSS is saying it burdens their religious beliefs to even assess the homes of LGBTQ families.

Alito of course zeroing in on the numbers of couples denied placements due to LGBTQ status. But this isn't the question. The question is whether the government *must* provide government contracts to organizations that will discriminate.

Important to note that polling shows that public broadly (and across political party) opposes religious entities discriminating against LGBTQ prospective foster and adoptive parents.

Sotomayor asking about the status of the agency as a government contractor. Noting that there is no such thing as a license in which government pays entities to take a license.

Important point about Justice Alito's question. https://t.co/OVngtiLyri

> But even Alito recognizes that CSS is confusing the processing of screening foster parents to join the pool and the very different process of matching up kids to families that have already been screened.
>
> — Josh Block (@JoshABlock) November 4, 2020

Sotomayor: dangerous that a contractor with a religious belief could exclude people with other religious beliefs, or people with disabilities, or inter-racial couples. Again pointing out that the certification process is different than the placement process.

Kagan goes back to Roberts's question. Hypothetical about private prisons. Contract says that no employee can use drugs of any kind but agency wants an exemption for Peyote use. Invoking Smith standard.

CSS claiming government interests different because prisons are public function but this is not. But that isn't true.

Gorsuch's question getting at whether this is just about government contracts or more broadly about City enforcement of its non-discrimination law.

Gorsuch highlighting long-term practices of Catholic agencies providing these services. Should be a warning of (a) how sympathetic this Court is to religious entities providing public functions; and (b) how powerful religious entities are in delivering critical services.

Kavanaugh highlighting facts to try to show sympathy for CSS's position and claiming that LGBTQ people aren't injured. But again, this is about whether the government can be FORCED to contract with discriminating entities for vital government services.

And here is Barrett. Asking about whether Smith should be overruled.

Important fact clarification on the Kavanaugh questions. https://t.co/8SDqV37L2E

> Kavanaugh says CSS is just one of 29 agencies, and that CSS says that if a same-sex couple came to CSS it would refer the couple to another agency, and that no same-sex couple has come to CSS. (Actually there isn't anything in the record where CSS has promised to refer).
>
> — Josh Block (@JoshABlock) November 4, 2020

Hard to tell if Barrett is eager to overrule Smith or where she is going with these questions. Now she is asking about exemptions to discriminate against interracial couples.

Agree with @JoshABlock that it doesn't seem like there is much appetite to overrule Smith but hard to tell based on the questions.

This is a generally applicable rule and it is being neutrally applied. The idea that CSS is being targeted or that religious entities are the victims here is a wholesale distortion of what is happening.

Important point from @JoshABlock here: "As recently as Masterpiece, the Court has consistently held that government has a compelling interest in eradicating discrimination bases sex and sexual orientation. CSS is asking the Court to roll back those precedent."

We are continually hearing these arguments that if any exemption exists then a law isn't neutral and generally applicable.

Breyer zeroing in on the alleged different government interests in eradicating discrimination based on race vs. religion vs. sex/sexual orientation.

SG arguing that there is a compelling interest in eradicating race discrimination that doesn't exist in other contexts. Breyer pushing hard on this. SG highlights Pena-Rodriguez in response.

Alito claiming that Obergefell leaves room for discrimination based on sexual orientation. Eradicating anti-LGBTQ discrimination not a compelling interest, according to Alito, because reasonable people could oppose queers. Basically.

SG again saying that City is not acting in a neutral and generally applicable way. This is a big and dangerous argument that would allow any exemption to undermine civil rights protections more broadly.

Sotomayor asks about the compelling state interest in race discrimination is not just about eradicating discrimination but also in protecting against the injury of being denied equal treatment. Asks of SG is diminishing that as a compelling state interest.

Sotomayor not accepting idea that LGBTQ people not facing discrimination.

Just a reminder that the Trump administration is before the Supreme Court arguing that states do not have compelling interests in preventing discrimination against LGBTQ people.

Though there are questions about how many LGBTQ families have been turned away, the rule they are seeking would apply even if we were talking about services where queer and trans people had no other options. A religious shelter for example.

Kagan is asking whether there is a compelling state interest in eradicating discrimination based on sex.

Kagan will not let SG get out of question about what are compelling state interests in eradicating discrimination based on different characteristics.

Gorsuch asking about whether CSS should be treated as an employee or an agent.

Now SG claiming that statements in record suggest hostility to religion citing Masterpiece.

Important to note that all of the answers from the SG here are about placement not about certification. Again obscuring the type of discrimination that is happening against LGBTQ families.

Please be alarmed about the fact that the federal government (and much of the Court) seems to think that governments may not have a compelling interest in ending discrimination against LGBTQ people. An erosion of Obergefell and Masterpiece.

Barrett asking about when a law is generally applicable. Hard to figure out where she is going here.

Likely that Barrett interested in finding many laws not generally applicable.

Wow gross closing from SG. Claiming that City is punishing kids to punish the Catholic Church. Foster youth are harmed here not massive religious institutions.

Now @neal_katyal is up for the City.

City arguing that this is the City's program and the government has broad powers to regulate government contractors where they are performing government services.

Katyal pointing out that the agency's position would undermine the delivery of foster care services in devastating ways. Open the door to turning away families who are not of the same faith.

This case is about the pool of families eligible to be foster parents and the consideration at the placement phase is about best interests of the child.

CJ asking about whether a foster child could refuse to be placed with LGBTQ families. But again as Katyal points out that is a best interests question not a question about the application of non-discrimination law at the certification stage.

Thomas asks City about CSS being a contractor and whether the analysis would differ if CSS were a private organization (solely regulated by City). Katyal says yes, that would be a very different case.

Katyal doing a great job distinguishing different factual and legal contexts and pointing out what is actually going on here with CSS being a contractor and the discrimination happening at the certification and not the placement stage.

Thomas asks whether it is in the best interests in the child to have a pool that is in their best interests. He clearly thinks excluding LGBTQ families is in the best interests of all children. He hates us.

Breyer asking Katyal about fact that no LGBTQ family has ever applied. Is there any way that this is relevant to ultimate decision. Katyal clarifies that this *HAS* happened. And City has taken CSS at its word and just doesn't want to force City to facilitate discrimination.

Katyal noting that CSS is getting $26million for foster services STILL. There is just a limited action by City to protect its interest in issuing government contracts.

Again this is not a case of City acting as regulator. This is City contracting for purposes of government services. They do not need to await discrimination they are setting up their contracts.

Katyal rejecting Alito's reframing of this case as being about the City's disdain for CSS's position about marriage equality. Katyal is again pointing out that CSS is getting $26million from the City, which can hardly be an example of religious discrimination by the gov't.

Alito very invested in the "you can just go somewhere else when government actors reject you" argument. This is such a horrible and painful argument.

Katyal is doing a great job in response. The government does not need to wait in order to act when it is contracting for services. And the government has a compelling interest in having the largest pool of prospective parents.

Kagan asks whether CSS not being in program has led to fewer placements of children in foster care. Katyal explains that NO, there have been an INCREASE in number of families available.

Now Kagan asking about whether there has been a reduction in Catholic families. Katyal does not have faith data but again pointing out that ending these discriminatory contracts just INCREASES the number of placements for children in care.

Kagan now asking about "tolerance" for Catholic services. And asking about Smith's application to the two different pools.

Katyal says that Smith gives the government wide latitude at the pool stage in particular.

Side note that we should be concerned about discrimination against disabled parents that is a sidebar to this entire argument. The scrutiny and distrust of disabled parents is itself a huge problem.

Kagan asking about whether the presence of the exemption in the contract to the non-discrimination provision undermines the government interest.

Gorsuch returning to questions about whether we are at matching or screening stage.

Katyal explains that this is about the parenting screening stage. If you are a married gay couple doors are closed.

At screening stage, non-discrimination ordinance has no exemptions. In government contracting context, screening stage is particularly different than placement stage. The city interest is in having the broadest possible pool of parents & not stigmatizing LGBTQ families & children

Kavanaugh now asking Katyal about Free Exercise rights and same-sex marriage rights recognized under Obergefell. "Very strong feelings on all sides that warrant respect". This is a horrible way to frame anti-LGBTQ government action.

Kavanaugh clearly believes that City "created clash" and was "looking for a fight" that it brought to SCOTUS. Kavanaugh wants queer people to go find somewhere else to go. He really "appreciates" the stigmatic harm. Huge eye roll from me and memories of his Bostock concurrence.

Kavanaugh calling a City's desire not to contract with discriminating entities extreme.

Katyal explaining that this is not a case about religion vs. LGBTQ equality. It is about religion vs. religion. This is about foster care agencies being balkanized (not just in foster care but in all government services).

Katyal also explains that once you do this for one objector you do it for all.

Katyal also clarifying that City is not looking for a fight. They won below after a 3 day hearing.

Private entities have never does "this" before because this is about wards of the state where the City has the highest interest. This is NOT a licensee. The agency is carrying out the government's work, the city's kids.

Barrett asks about whether City takes over hospitals and takes over a Catholic hospital and contract requires all hospitals to perform abortions. If monopolization exists where hospital can only exist with government control.

Katyal is pointing out that this is not a situation where the government is monopolizing a previously private function.

Now Fisher up for intervenors. Points out that CSS is doing valuable work but there are two serious problems with CSS claims: (1) CSS acting as contractor; (2) Free Exercise claim cannot turn on whether claims are honorable or offensive.

This is a reasonable rule governing selection of those who will care for children in government custody.

Roberts asking about what if contract terminated because of hypothetical City belief in opposition to Catholic limitation of priesthood to men.

Fisher clarifying that the stigma is about those allowed to participate in program not in the general views of the Church.

Thomas asking about assessment of the pool and placement. Asking about best interests of the child analysis at the pool stage.

Thomas is asking what the policy is about assessing families at the pool stage. Fisher is saying that you are looking for people who can provide care and loving home to children. Thomas pushing about whether the best interests standard is really governing.

Breyer asks about what is the right rule. Difficulty in administering rule on either side.

Scalia again looms large in the argument.

Breyer pointing out that a Constitutional holding can't be fixed by Congress. Fisher explaining that when we are dealing with internal government affairs that you don't even need to apply Smith. Is the rule reasonable?

Fisher explains that the program that CSS is administering is completely different than what Catholic agencies had historically done because the City has care and control over the children.

Alito asking about what would happen if that government took over homeless shelters and then the only way an entity could participate is through government contract - Alito arguing this is a license.

CSS can operate without contracting with the City which is an important distinction from the hypotheticals that Alito and Barrett are raising.

Fisher noting that even if the government occupies the field of certification of families, then there is no reason that the contractor line of cases doesn't apply. The test is one of reasonableness.

Sotomayor asks Fisher is whether there is a compromise. Fisher noting that CSS can disclaim any endorsement of same-sex marriage. All they are doing is carrying out a government function and following government law.

Kagan asks about whether government interests undermined by other exemptions. Fisher explains as to the law, SG put aside government contracting aspect of the case. As to general applicability, the government contracting context is relevant.

Fisher notes that purported exemptions as to certification process do not exist. It is not disability that is taken into account, it is only ability to care for a child. And then in child placement it is a different set of rules that apply.