Beginning this week for the first time ever the Supreme Court is holding oral argument over the phone and allowing the public to listen in live. Today’s argument in *Little Sisters of the Poor v. Pennsylvania* illustrates the myriad ways live, phone argument is different from the traditional in-person version.

Other than Justice Thomas asking questions, the Chief Justice’s role is the most obvious difference between traditional, in-person argument and live, phone argument observed in this oral argument and the others earlier this week. During in-person arguments the Chief acts as an equal to the other Justices when asking questions. In the phone arguments, presumably to keep them running smoothly, the Chief is acting as a moderator. After the litigant makes a two-minute uninterrupted presentation, the Chief asks a question and then directs his colleagues to ask questions one-at-a-time by seniority.

The argument today, as a result of being moderated in this manner, was less chaotic than usual where the Justices frequently cut off the litigants—and each other—to ask questions. Relatedly, the argument in this case went way over the hour time limit which the Chief Justice normally sticks close to. Two litigants argued for one side in this case. Instead of splitting 30 minutes between them, the Chief Justice allowed all the Justices to question both litigants—which lasted longer than thirty-minutes.

Justice Thomas, who has been totally silent during nearly all the oral arguments of his nearly 30-year career on the Court, has been asking questions of all the litigants in the new, live-audio format. His doing so illustrates how this format has made the Justices harder to read.

Particularly in more controversial cases, if a Justice agrees with one side, he or she may not ask that side’s attorney any questions in oral argument. Or a friendly Justice might ask the attorney for the side he or she supports a “softball” question. But in the argument today numerous Justices, including Justice Thomas, asked attorneys arguing for each side the same question. Unless a listener is familiar with a Justices’ perspective on the question or can tell from how the attorney answers it, it is difficult to know to which side the question is a “softball.”

*Little Sisters of the Poor v. Pennsylvania* is a complicated case involving whether the Trump administration lawfully expanded the Affordable Care Act contraceptive mandate’s conscience exemption. The State and Local Legal Center (SLLC) filed an *amicus brief* in this case supporting lower court authority to issue nationwide injunctions.

In a previous case Justice Thomas expressed skepticism toward nationwide injunctions. In a normal argument, if he ever asked questions which he basically never did, only Justice Thomas would have asked about nationwide injunctions.

In the live argument Justice Thomas asked the attorneys arguing for both sides about the merits of nationwide injunctions. To the attorney defending the lower court’s use of a nationwide injunction in this case he asked (a presumably hostile) question about the history of nationwide injunctions. The
attorney directed Justice Thomas to the amicus briefs covering the subject. Only one amicus brief [5], other than the SLLC amicus brief [3], exclusively defends nationwide injunctions. The SLLC brief covers the history of nationwide injunctions at length.

Finally, the new format creates a disadvantage for the junior Justices who must ask questions after the more senior Justices have asked already asked the most interesting ones. Specifically, in this argument, Justice Gorsuch used one of his questions to allow the litigant to finish answering the last question he was asked.

By:
Wednesday, May 6, 2020 at 02:06 PM
Tags: