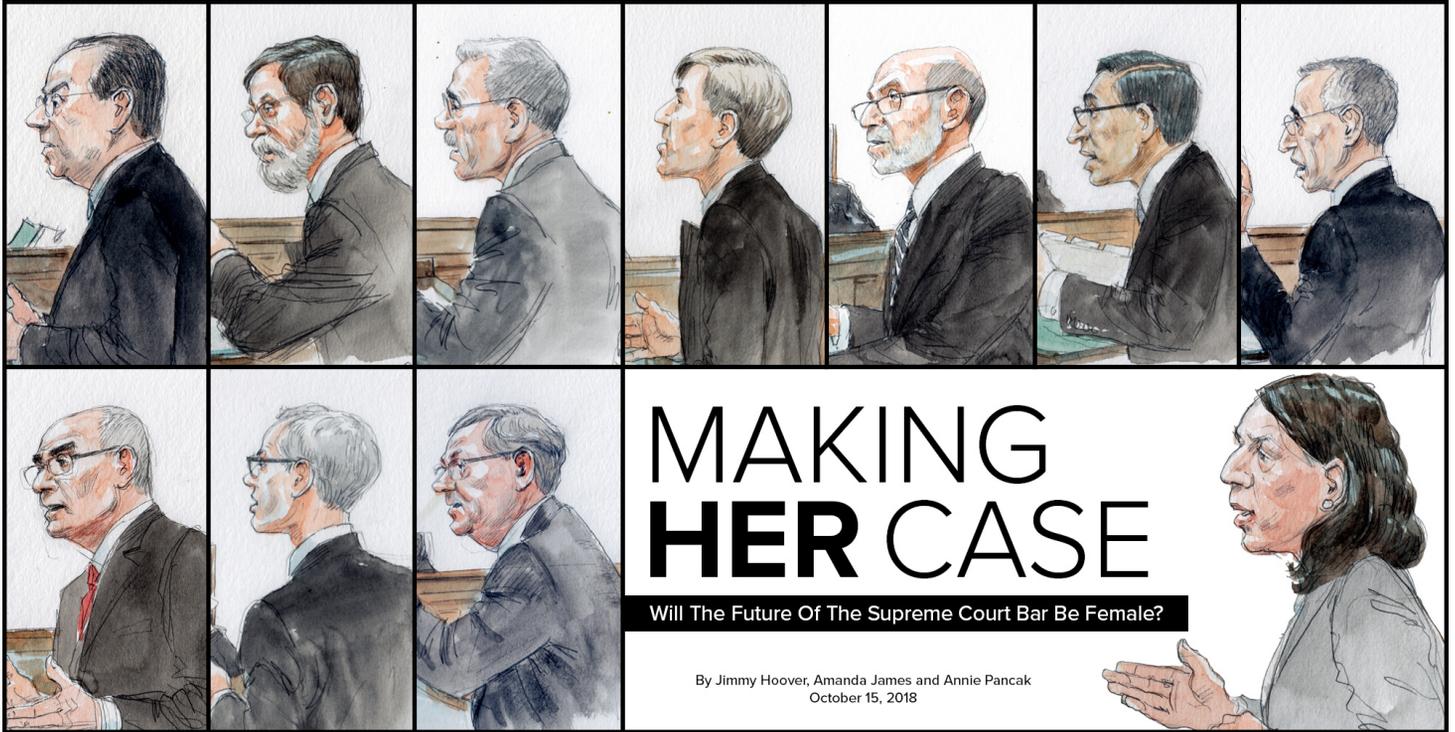


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Making Her Case: Will The Future Of The Supreme Court Bar Be Female?

By Jimmy Hoover, Amanda James and Annie Pancak
October 2, 2018

Kelsi Corkran noticed something unusual only a few months into the last U.S. Supreme Court term.

LAW360 IN-DEPTH

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The court had just released its hearing list for the January argument session and the Orrick Herrington & Sutcliffe LLP appellate partner was looking through it for familiar names when she saw that out of 23 arguing attorneys, only two were women.

“Every year women are pretty significantly underrepresented in the court. I remember seeing that back when I clerked ... But I was expecting to see more than two,” she said in an interview.

Corkran kept an eye on the trend. By the time the last argument session ended in late April, she was one of only 16 different female attorneys who had taken the lectern in the preceding seven months, the lowest number in at least the past decade.

What was responsible for the sharp drop? A recent exodus of longtime female attorneys from the U.S. solicitor general's office is a likely culprit. But the fact that the shakeup had such an effect is no comfort to some who've been eyeing the issue for years.

“It reflects that we've made pretty much no progress at all in the context of the free market and private practice,” Corkran said in an interview over the Supreme Court's summer recess. Of the 45 advocates from law firms last term, only four were women, including Corkran. The other 12 women who argued before the justices hailed from the government or nonprofits.

There is only one woman among the advocates that can count themselves among the Top 10 most frequent arguers over the last decade. Before leaving the solicitor general's office for Gibson Dunn, Nicole Saharsky argued 27 times before the court over the past 10 completed terms, tied with Kellogg Hansen Todd Figel & Frederick PLLC partner David C. Frederick.



Orrick's Kelsi Corkran, who was one of four women from a private law firm to argue before the court last term, said she was surprised to see only two women on the hearing list for this past January's argument session.

Recent spotlight on the gender breakdown of arguers has frustrated some female practitioners who feel that the groundbreaking work of women in the Supreme Court bar can be overlooked.

“In our minds, the statistics only scratch the surface of the story on this,” said Erin Murphy of Kirkland & Ellis LLP, who [argued last term’s blockbuster gerrymandering case](#), *Gill v. Whitford*.

The October 2018 term is looking more encouraging, with six female advocates making appearances in the first argument session of the term, including one from private practice. The full picture won't be visible until the last session wraps up in April.

But many firms still lag behind when it comes to gender balance. Four of the top 10 firms who argue most frequently before the court have not had a female advocate present a case in the last 10 years, Law360 found. The firms — Mayer Brown LLP, Sidley Austin LLP, Jones Day and Kellogg Hansen Todd Figel & Frederick PLLC — either did not respond to multiple requests for comment or declined to address the matter.

In a series of interviews with Law360, practitioners and experts described how everything from the pipeline of Supreme Court clerks to the preferences of corporate clients — perhaps the most important factor — contributes to the sharp gender disparity at the high court.

“It’s true at any level of appellate law and I think it’s drawn into sharper relief at the Supreme Court that to get a Supreme Court argument, you need a Supreme Court argument,” said Cate Stetson, a partner at Hogan Lovells. The process “overvalues statistics and tends to cement in the people who are perceived as the veteran Supreme Court litigators, the overwhelming majority of whom are male.”

Not only does the status quo pass over capable female talent, but it also poses a broader problem for the country at large, experts say.

“The Supreme Court is one of the fora in which the critical legal questions of the day get debated, and if we limit participation of that debate to a small subset of attorneys, it’s not going to be as full and rich as it otherwise would be,” said Danielle Spinelli, a partner at WilmerHale.

Shakeup at the SG’s Office

As the Trump administration prepared for its first full term at the court in the fall of 2017, six experienced female assistants to the solicitor general left the office for positions in private practice or other government jobs, creating a shortfall in the ranks of government attorneys who typically represent the bulk of female Supreme Court advocates in a given term.

Turnover at the office is a regular part of any administration, but the quick succession of high-profile departures led to speculation in legal blogs about whether the election of President Donald Trump and the legal controversies associated with his administration — from the travel ban to a teen abortion case — were factors. Still, several of those who left denied their decision was related to politics.



Munger Tolles partner Elaine Goldenberg was one of five female assistants to the solicitor general who departed the government office for private practice in 2017.

Elaine Goldenberg, a former assistant to the SG who left for Munger Tolles & Olson LLP in November 2017, said she had always planned to leave after five years, which she described as a typical tenure for the position, “regardless of what the administration was.”

“There were a lot of people who had been there for about five years or maybe even a little longer,” Goldenberg said. “It just all happened at the same time.”

In addition to Goldenberg, four other female assistants to the solicitor general were picked up by private firms throughout 2017: Ginger Anders joined Munger Tolles in March 2017 after a stint in the DOJ’s Office of Legal Counsel, Sarah Harrington left for Goldstein & Russell PC, Ilana Eisenstein for DLA Piper LLP and Saharsky for Gibson Dunn & Crutcher LLP. Another former assistant, Elizabeth Prelogar, left the SG’s office to work with Special Counsel Robert Mueller on his investigation into the 2016 presidential election.

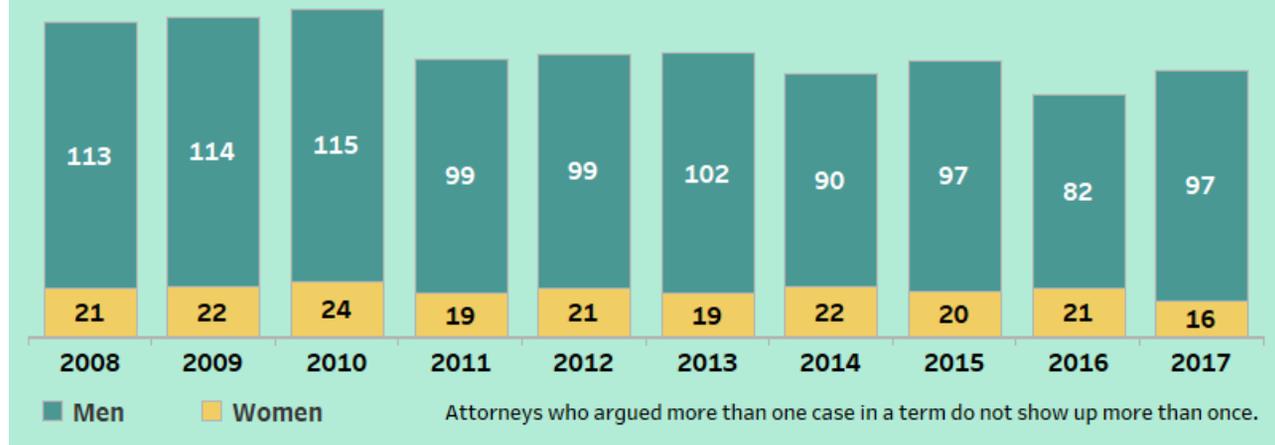
The exiting attorneys included some of the office’s most experienced. Saharsky argued 29 cases over her tenure there, including 27 in the last 10 completed terms. In eight years there, Harrington logged 20 arguments. Anders left with 18.

Unlike private firms, the SG’s office distributes arguments by seniority and allows only one argument for first-year assistants, meaning that an exodus of longtime female staff attorneys would affect advocate numbers even if they were all replaced by women. The office did not return a request for information about its staff makeup, or who replaced the outgoing attorneys.

That impact is borne out by the data. During [the most recent completed term](#), five out of 16 women who argued before the court hailed from the solicitor general’s office, compared to seven out of 21 in 2016 and eight out of 20 in 2015.

Women Underrepresented

In the 2017 term, the number of individual female advocates the justices saw over the course of the term sank to its lowest point in a decade.



BigLaw's Lack of Progress

The vacuum of female advocates created by turnover at the solicitor general's office has caused some to revisit why private practice has struggled to achieve more gender parity at the Supreme Court.

Some say the problem begins with the disproportionately low number of women who win Supreme Court clerkships, coveted spots that can propel lawyers to the upper echelons of the legal profession.

Over the past 10 completed terms, about 35 percent of all clerks hired by the justices have been female. Term to term, that number didn't move much, sometimes dipping closer to 30 percent or jumping to over 40 percent as it did in the 2016 term. In the last completed term, the number of female clerks sank back to nearly 37 percent.

Jennifer Mika, a lawyer for the D.C. Department of Disability Services, found that over half of advocates who argued more than once in a given term between 2010 and 2015 had clerked for a justice. The fact that women are less likely than men to clerk at the Supreme Court, she concluded, "places potential women Supreme Court advocates at a disadvantage."

Justice Brett Kavanaugh's decision to hire all female law clerks this year has improved those numbers, with a record 51 percent of the October 2018 Supreme Court clerk class being women. The gender diversity of Justice Kavanaugh's D.C. Circuit clerks was [a frequent talking point](#) during his confirmation process, as the White House noted that more than half of the 48 clerks he worked with on the appeals court were women.

His clerk hiring practices came under scrutiny after he was accused of sexual misconduct in the 1980s while he was in high school and college. The Guardian reported a Yale law professor told students to appear "model-like" and feminine if they wanted to work for him, a claim the professor denied.

Justice Kavanaugh continued to tout his diversity record at his White House swearing-in ceremony.

"A clerkship at the Supreme Court is one of the most coveted achievements and credentials in American law.

I'm proud that all four of my newly hired law clerks at the Supreme Court are women, a first in the history of the Supreme Court," he said.

Notwithstanding the pipeline problem, the number of women at top appellate practices is "not so small as to explain" why, out of the 45 attorneys from private law firms who argued at the court last term, only four were women, Corkran said.

"I think there has to be something else going on to exacerbate the disparity," she said.



Female advocates are in a tough spot when it comes to making a name for themselves, since the "overwhelming majority" of those perceived to be "veteran Supreme Court litigators" are male, said Hogan Lovells partner Cate Stetson.

Nor would expanding the pipeline of women in the SG's office be "an effective near-term or a long-term solution" to leveling the playing field of top Supreme Court advocates in the appellate industry, said Hogan Lovells' Stetson.

"That office is only so large, and there are only so many women who are going to be able to go through it," she said. "I don't think that's a panacea."

The office consists of a solicitor general at the top of the hierarchy, four deputies below that position, 16 attorney assistants to the solicitor general, and various staff, interns and fellows, according to a page on the office's website last updated in April.

Structural bias against women within law firms is another possible explanation. Another theory is that women are generally less inclined to self-promote or aggressively compete with a growing field of appellate specialists for the increasingly small number of merits cases that the Supreme Court takes up each term. But practitioners say there's more to the story.

Reached by email about how firms can help close the gender gap, veteran Supreme Court litigator Lisa Blatt of Arnold & Porter Kaye Scholer LLP had a short reply: "I think you mean clients."

On bet-the-company cases, the major corporate clients that sustain Washington's Supreme Court bar prioritize an advocate's experience at the high court above nearly all else, a cycle that leaves many otherwise credentialed female appellate attorneys with few opportunities.

By emphasizing experience, even if the case goes south, a general counsel can return to the company executives and say, "Well, I chose a veteran Supreme Court litigator so we did the best we could," Stetson explained.

PD Villarreal, who directs litigation at the pharmaceutical giant GlaxoSmithKline plc, said that corporations are often culturally conservative, where "there is a tendency to go back to the same old, and oftentimes that ends up being a white male."

Some companies are "stuck in a serious stereotypical attitude of what [a Supreme Court advocate] should look like. I think they're just hurting their [employers]," he said.

To that end, Stetson said, in addition to filling out the so-called legal pipeline, there needs to be "a more holistic recognition by these general counsels who say, 'we're taking these diversity-in-team issues seriously' and 'we want this woman in the lead, and we want her in the lead because she's talented and is going to do an excellent job for us.'"

Some corporations have made more progress than others. Since Villarreal joined GSK roughly nine years ago, the company has had a program specifically focused on increasing the diversity of their outside litigation counsel. As firms compete for legal work, the number of women and minorities on their proposed teams forms a substantial part of the overall "score" of their bid.

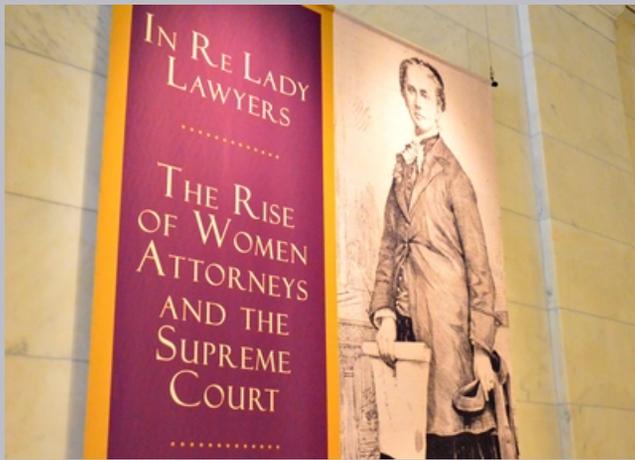
GSK uses a different process for its Supreme Court litigation, relying on its relationships with several Supreme Court specialists, rather than a formal bidding process, to coordinate its representation. But there, too, the company values diversity; for years, one of its closest "relationship partners" has been Arnold & Porter's Blatt.

"We like the fact that she's a woman, that she adds diversity, like I said, because we're committed to promoting diversity throughout the company," Villarreal said. "The fact that she's a great advocate is certainly another piece of the equation."

While companies are becoming increasingly aware of the importance of hiring diverse legal teams, Villarreal described the change as "glacial."

Solving the Problem

But law firms aren't simply at the whims of their clients. There are various steps they can take to break the mold of Supreme Court regulars and give female partners a shot to argue. Indeed, a few already have.



From Lockwood To O'Connor, Exhibit Traces Women At High Court

"[T]he Court which has said to woman 'You cannot enter here,' must now open its doors at her approach," wrote the legal publisher Myra Bradwell in 1879 after Congress passed a law allowing women to argue at the U.S. Supreme Court.

Belva Lockwood's achievement getting the law passed and becoming the first woman admitted to the Supreme Court bar heralded a long history of female advocates that is the subject of an exhibit called *In Re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*.

The exhibit's piquant artifacts and memorabilia capture the fight for gender equality in broad strokes and fine details. But its most insightful pieces are the wealth of documents from the early era of female Supreme Court advocacy.

In one newsprint on display, a writer for a Chicago paper recommended two female attorneys for a vacant high court seat almost 80 years before Justice Sandra Day O'Connor became the first female justice.

Panels throughout the exhibit also highlight the hurdles women faced. Years before she argued her first Supreme Court case over a married woman's debt, Lockwood was rejected from the court's bar by the chief justice, who said that "none but men are eligible to practice as attorneys."

But unlike the court in those years, the exhibit allows Lockwood a rebuttal: "Defeats are always advantageous, if they only bend the spirit and do not break it."

The exhibit occupies the southern wing of the Supreme Court's ground floor, where it will be open to the public free of charge during regular hours for the next two years.

Under long-standing industry norms, the partner in charge of the client relationship who brings in the business gets to argue the case. This often advantages older male practice heads with decades of court experience, many of whom are former solicitors general with dozens of arguments under their belt.

That's beginning to change. Josh Rosenkranz, the leader of the Supreme Court practice at Orrick, has restricted himself to no more than two Supreme Court arguments per term, which he said helps gives his colleagues a chance to develop their craft while allowing him to concentrate his efforts on the cases that he does argue.

"Clients will almost always prefer the more experienced advocate," Rosenkranz said in an email. "But if we accede to the preference every time, we will not move the needle. In most cases, I no longer commit right up front that I will be the one to argue. I say no even when there is stiff competition — as there was in every case that I managed to transition to a colleague last term."

Rosenkranz described how he builds a client's confidence in other partners, particularly women, at the firm.

"Explicitly, I say early, and often, how impressive she is," he said. "I send clips about recent arguments or accolades. More subtly, I don't hog the limelight. I make sure that she takes the lead in client communications and discussions. I give her credit for her work and insights. In conversations about the case, I visibly defer to her judgment."

Clients don't always bite, and the firm has missed out on Supreme Court cases because Rosenkranz wouldn't argue them, he said.

According to Corkran, Rosenkranz's approach was "directly correlated" to Corkran's own appearance before the court in the 2017 term representing a former Kansas police officer in his civil rights lawsuit against the city of Hays.

Corkran won her case after the court [dismissed the city's appeal as "improvidently granted,"](#) meaning that the court realized it should never have agreed to review it in the first place. Corkran had suggested that the court do so in response to a question from Justice Sonia Sotomayor, and was later applauded when the case was dismissed.

Orrick is not the only firm looking to spread appellate opportunities around. Neal Katyal, a former acting solicitor general who's now at Hogan Lovells, said he's felt a responsibility to make room for other minority attorneys. Upon arriving at the firm in 2011, he'd already argued 15 Supreme Court arguments and said it doesn't matter to him if he gets more.

He keeps a list of every associate in the appellate practice at Hogan Lovells, made up of five women and seven men, including himself, and he has links to all of their oral arguments from the U.S. Court of Appeals website. He'll send them to a client and say, "Listen to these. This is how good this person is."

He also entrusted responsibility to two young associates, one male and one female, to argue the travel ban case in the Ninth Circuit in December: Colleen Roh Sinzduk and Mitchell Reich. Katyal then argued the case, *Trump v. Hawaii*, in the U.S. Supreme Court.

'Cautiously Optimistic'

Despite the recent dip in female advocates, some still see women making inroads in the Supreme Court bar.

"I think for me," said Gibson Dunn partner Allyson Ho, "what can get lost in the shuffle is what women like Nicole [Saharsky] and Caitlin [Halligan] and Helgi Walker, who is also at my firm, are accomplishing, and the number of cases they have argued, the high-profile cases they have argued."

Kirkland's Murphy — who [also argued](#) *Texas v. U.S.*, the challenge to Obama-era immigration actions, and [the 2014 campaign finance case *McCutcheon v. FEC*](#) — said focusing exclusively on advocate statistics can be "frustrating" because it glosses over positive developments for female Supreme Court lawyers.



Kirkland & Ellis partner Erin Murphy, seen here in 2013 following a Supreme Court hearing in the campaign finance case *McCutcheon v. FEC*, told Law360 the success of female high court advocates can't be measured in numbers alone. (AP)

She pointed to the recent trend of female Supreme Court advocates bypassing government experience and developing their practice in the private sector. In addition to Murphy and Corkran, the two other women to argue before the court last term, Jenner & Block LLP's Jessica Amunson and Ho, never worked for the U.S. solicitor general's office or a state equivalent.

"If you look only at people who have gotten arguments exclusively while practicing at law firms, there really aren't many people, male or female, who have argued three, four, five cases over the past five years," she said. "So this is a highly competitive area, and it's one where women are proving themselves absolutely able to compete. And that strikes me as a great sign of things to come."

Meanwhile, some women who otherwise would surely count among the ranks of Supreme Court regulars have been tapped for a higher purpose.

"I think it's a function of the fact that a lot of the best women appellate advocates have been so successful they've become federal judges," said Kathleen Sullivan, head of the appellate practice at Quinn Emanuel Urquhart & Sullivan LLP and former dean of Stanford Law School. Sullivan [secured a historic victory](#) at the court for client Samsung Electronics Co. over Apple Inc. in December 2016.



Kathleen Sullivan, the head of Quinn Emanuel's appellate practice who secured a major victory for Samsung over Apple in 2016, noted that some of the best female appellate attorneys have tapped out of the advocacy game early — they've "been so successful they've become federal judges." (AP)

The first female solicitor general, Elena Kagan, would likely have had her pick of the nation's top appellate chairs had President Barack Obama not nominated her to replace the retiring Justice John Paul Stevens. Others who held the post — including Kirkland & Ellis' Paul Clement and Gibson Dunn's Ted Olson — became giants of the Supreme Court bar after their service.

Another longtime attorney for the SG's office, Patricia Millett, became the co-chair of Akin Gump Strauss Hauer & Feld LLP's powerhouse appellate practice before being selected to sit on the D.C. Circuit, generally regarded as the second most powerful court in the country.

This year's decline has not shaken the belief among many prominent gender equality advocates in the legal profession that progress is afoot, however slow. Spinelli pointed to the class of women attorneys who recently left the SG's office, whom she said "will presumably make themselves felt in private practice" in the years to come as their nongovernment careers develop.

Whether the start of the new term is a sign of things to come remains to be seen. The first oral argument session featured appearances from six women out of 24 total appearances. The group included one attorney from the SG's office, four lawyers from nonprofits or public defender's offices, and one private practitioner.

While the vast majority of arguing attorneys during the two-week sitting were men, only three female attorneys took the podium during the first session of the October 2017 term.

"I am cautiously optimistic that things will improve, but I don't think we can simply rely on the passage of time to solve the problem," Spinelli said.

Methodology: Law360 counted all advocates who appeared in the transcript of each oral argument before the

U.S. Supreme Court from the 2008 term through the 2017 term. The law firm or organization the attorney is affiliated with was verified in documents filed with the Supreme Court if it is unclear from the transcript. A few cases have more than one oral argument. This data counts each of those arguments separately.

The data for law firms represents a combination of the arguments made by a law firm in its current form, as well as any identifiable predecessor law firms. For example, Hogan Lovells' numbers include arguments made by Hogan & Hartson. Goldstein & Russell PC's numbers include arguments made by Goldstein Howe & Russell and Howe & Russell. Kirkland & Ellis LLP's arguments include arguments made by Bancroft. Arnold & Porter Kaye Scholer LLP's arguments include those made by Arnold & Porter and Kaye Scholer. Kellogg Hansen Todd Figel & Frederick PLLC's numbers include arguments made by Kellogg Huber Hansen Todd Evans & Figel.

Our analysis of advocates affiliated with law firms does not include solo practitioners.

Jimmy Hoover is the Supreme Court reporter for Law360. He last wrote about [Justice Kavanaugh's confirmation process](#). Amanda James and Annie Pancak are data reporters. They last wrote about the 2008 recession's [toll on the legal industry](#). Additional reporting and data analysis by senior data reporter Jacqueline Bell. Graphics by Jonathan Hayter and Chris Yates. Editing by Jocelyn Allison and Rebecca Flanagan.

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