ALM | LAW.COM

THE AM LAW LITIGATION DAILY

# Discussing The Uptick in Women Arguing at SCOTUS With Akin's Aileen McGrath

**By Ross Todd**
April 25, 2024

**Aileen McGrath** has known she wanted to be an appellate lawyer since she was about seven-years old. That's when McGrath, now a partner in the Supreme Court and appellate practice at **Akin Gump Strauss Hauer & Feld**, saw her father make his sole argument at the U.S. Supreme Court. He spent much of his career handling appeals for the New York City Law Department.

"For the rest of his career, he had a drawing on the wall of his office where I had drawn a picture of myself standing at the lectern," said McGrath when we spoke with her earlier this week. "I had captioned it: 'I want to be a lawyer because I'm good at arguing.'"

McGrath joined Akin in February 2021 after working for nearly a decade in the San Francisco City Attorney's Office, eventually as the co-chief of appellate litigation. Earlier this year, she matched her dad's tally of SCOTUS arguments, handling a case for the local government of El Dorado County, which lies just east of Sacramento in the Sierra Nevada Mountains. The Litigation Daily caught up with McGrath, who clerked for former Justice Stephen Breyer, to discuss her first SCOTUS argument and the uptick in women advocates arguing at the court this term.

The following has been edited for length and clarity.

**When you were at the City Attorney's Office here in San Francisco, you overlapped with another Breyer clerk briefly if my math is correct: Vince Chhabria, now a federal judge in the Northern District of California, was on the appellate side of the shop when you got there, right?**

Aileen McGrath: Yes, he was. He, in particular, inspired me to join the office, actually.

**Oh, really? Tell me that story.**

So, when I was a law clerk, I had no idea what I wanted to do. I knew generally that I wanted to do appellate work. I didn't really know where I would do it—whether it would be in a firm or whether it would be in government. And I also didn't know where I wanted to live. And Vince Chhabria, who at the time was deputy city attorney in the San Francisco City Attorney's Office, came by chambers one afternoon, which is something that would happen in the Breyer chambers: Former clerks would come by to see the justice and talk about what they were doing. And he came by to talk about his docket—basically, the cases that he was working on and his job at the City Attorney's Office. I remember meeting him and thinking that seemed like the coolest job imaginable: to represent a city with really innovative and creative legislators who were exploring new ways to do a variety of different things and to have the chance to represent them in federal and state court, but most especially the Ninth Circuit and the U.S. Supreme Court. Vince talked about all the work that he was doing in those places.

Courtesy photo

**Aileen M. McGrath of Akin Gump Strauss Hauer & Feld.**

A number of years later, when I started thinking more specifically about the next steps, I wound up reaching out to Vince, who then put me in touch with the City Attorney who told me about openings and opportunities in the office. Then it all kind of took off very quickly from there. Vince and I overlapped for maybe two or three years at the City Attorney's Office and I eventually took on the role that he had at the time, which was chief of appeals.

**What experience did you gain there at the City Attorney's Office?**

Basically, everything that you can imagine doing as a lawyer, I gained that kind of experience at the City Attorney's Office. I argued the most high-profile cases at the Ninth Circuit and the Northern District of California. I appeared at the California Court of Appeal—all the things you think of as the bread and butter of the appellate practice.

But I also had the opportunity to do things like work very closely with members of the board of supervisors to craft legislation. I helped talk through litigation strategy and ways to position ordinances for Constitutional and other kinds of challenges.

But I also had the chance to do what's effectively plaintiffs' side work. When I started out at the City Attorney's Office, I worked in the affirmative litigation and consumer protection

division. So I kind of veered from my appellate career trajectory a bit, but in a way that's been really beneficial to me. I worked on big document-heavy cases. I took depositions. I produced discovery and sought discovery. I filed complaints—all the things that you don't really do as an appellate litigator, but I spent a number of years doing that kind of work as well.

So, I really got the chance to see from start to finish everything that goes into a case like legislation or policy decisions that are percolating at the legislature or in local government agencies. I got to see how those ideas move from just ideas to eventually action items and then at the end of the day, often litigation.

**Well, what has your transition to private practice been like?**

I've been able to draw on all of my favorite parts of my prior experiences in coming to private practice. If you're asking about what motivated me to leave the City Attorney's Office and come to private practice, it was really that I was reaching a certain point in my career: Many people go to the City Attorney's Office and they spend their entire career there. I'd been there about 10 years. And I started to feel like I was reaching a decision point in terms of whether I would be someone who would spend my entire career there—which is a really amazing and interesting way to spend your legal career and many people do that—or if I would try something different, and take what I knew I was good at and what I knew that I liked and leave behind some of the other things that, as I started to refine my practice, were things that I wanted to leave behind.

Joining Akin's Supreme Court and appellate practice seemed like a natural fit for me in the sense that appellate work—ending up in court, writing briefs, thinking through strategy—those are all the things that I enjoy the most and where I feel like my skills really come to the fore. But I also still benefit from all the more on-the-ground litigation experience that I've had. I still frequently tap into trial teams and the district court strategy again at the very beginning stages of the case. I still play that role in a number of cases. And all of it draws on the kind of soup-to-nuts experience that I had as a government lawyer, where your fingers touch everything in the case from start to finish.

**Well, how did this opportunity to argue at the Supreme Court come about? The firm did not handle the case at the Court of Appeal below, right?**

So, like virtually everyone else in the SCOTUS bar, I read the long conference grant list with interest to see what kinds of cases the court decides to take. I saw that the court had taken a local government case. Obviously, based on my background, local government issues will always be really interesting to me, especially issues involving California local governments. So I saw there was a case that had kind of flown under the radar until that point.

In talking through it with my team, we thought we would reach out to them to see if they could use any further assistance now that the case had gotten to the Supreme Court. And I wound up also reaching out to my contacts in state and local government. Even in private practice, I continue to write amicus briefs for IMLA, the International Municipal Lawyers Association, and other local government entities like CSAC, the California State Association of Counties. I reached out to my contacts there to ask whether El Dorado could use any help with the brief or maybe even with an argument now that the case was at the court. Through those channels, they put me in touch with the county council. The answer was "Yes." Now that the case had gone to the court, they were eager to bring in some additional resources to help with briefing and even argument.

In the course of talking through the case with them, it became clear that I was able to draw on my prior experience with local government work. I already knew what *Nollan/Dolan* was. (Editor's note: *Nollan/Dolan* is the two-part test the Supreme Court has laid out for evaluating the constitutionality of a development exaction.) I had some familiarity with development impact fees. And through that it became clear that I was the person who would be best positioned to take the case on the merits. So they hired me to continue to do the rest of the merits work, which meant the brief and the argument.

**Well, Justice Barrett's majority opinion notes that you were in "radical agreement" with the petitioner on the question presented by the time this thing got to oral argument. So while technically the decision from below where your client won got overturned, you had pretty much conceded that would be the case. So how do you put this down in your record books? How do you explain it to a prospective client when you're pitching for your next SCOTUS argument?**

The case is a win in my book because what was really big for my client and also for counties generally, was the concern that each and every development impact fee—meaning every time that the county or another local government imposes a fee on a particular property—would be subject to an individualized constitutional test. That would mean when the government charges you $5,000 to build a new house on a particular parcel of land they would have to show that that $5,000 was exactly calibrated to the impact of your particular property. And that's not usually the kind of determinations that governments make. Usually, governments make categorical, class-wide determinations about how certain kinds of properties are going to impact the community. They don't usually have the resources to make individualized determinations. That possibility was really what was at stake for my client in this case, because that was the result that Pacific Legal Foundation was asking for.

We didn't take issue with the way that they framed the question presented, which to me obscured the heart of the issue in the sense that it focused on this "legislative" versus "administrative" label. But really what it was about was whether routine fees that are imposed by county legislators are subject to this kind of individualized scrutiny. By getting the court to focus exclusively on this categorical legislative/administrative difference that no one disputes, it leaves entirely open for the county on remand and for counties generally, to continue to support and defend imposing these fees on that categorical basis that I described: They don't have to justify it on an individual parcel-specific basis. They can say things like, "Building new houses in the western part of our town is going to cause $8 million worth of necessary road improvements and we can decide how to apportion that $8 million based on a logical and reasonable determination that affects similarly situated property equally." And so because counties can continue to do that under the Supreme Court's decision, I count this as a complete victory because that's exactly what my client and other counties were trying to achieve.

**What did your oral argument prep look like?**

It looked like taking every Ninth Circuit argument I've done and putting it on the biggest dose of steroids you can imagine.

Someone gave me the advice of it being no different than a regular argument and I found that to be true, but also not true. It was true in the sense that I approached it the same way.

I tried to step back from the weeds of the case. There's this temptation to really delve deeply into the thousands of pages of the record and understand every single thing that happened over the course of the case. And it's not to say that I didn't—I did do that. But where I tried to focus my preparation was on the bigger picture questions about the constitutional issues at stake, the practical implications of the rule that we were advocating for, how the rule would be applied by counties across the country. Those are the kinds of questions that the court is going to ask. The court is going to ask bigger-picture questions about how the position that we're taking would operate in future cases and across the board. So I tried to be very mindful of taking the time to think about those bigger picture questions.

**How did you feel about your performance after the fact?**

I felt relieved first and foremost. [Laughs.] But I felt great afterwards. It was so nerve-wracking to prepare for that experience. But then, once I got up there and started talking, it felt like what most arguments feel like to me, which is a conversation with the justices. There were just more of them. They were certainly more active than many panels I've argued in front of, but I felt like the argument unfolded like a conversation and I was able to guide the court towards the points that I wanted to make about the burden that would be placed on local governments by the role that the petitioners were advocating for. Taking that approach helped the court understand what was at stake and I like to think that was a part of why we ended up with the narrow result that we did. It enabled the court to avoid opening a Pandora's box of issues for local governments. I think particularly if you read Justice Kavanaugh's concurrence, I think that's an example of how those points made headway.

**The AP reported earlier this month that since October, just over one-third of the arguments made at the court this year were made by women compared with under one-quarter of arguments the year before and as low as 12% in some recent years. I know that Theane Evangelis of Gibson Dunn made her debut argument at the Court this week. Is there some momentum there for women advocates getting opportunities at the court?**

I do think this year has been a great example of strides being made. I also think that one year is not enough to say that there has been a complete sea change. I think we're looking back at decades where, as you've pointed out, women are really underrepresented and other diverse attorneys are really underrepresented at the court. It's been great to see so many women argue this term. It's been great to be one of them. So yes, I do think there's momentum. I don't think that the work on this front is done. And so hopefully that momentum continues to build and carry forward

**Goodwin Procter partner Jaime Santos, another woman who recently had her first SCOTUS argument, tweeted this week about Lisa Blatt at Williams & Connolly becoming the first woman to argue 50 cases at the court in the big Starbucks case against the NLRB. Santos was lamenting the fact that the slow pace of cert grants could mean that Lisa Blatt is the only woman that hits that 50 argument threshold. Do you think the court's pace has something to do with the dearth of opportunities for folks like yourself to get that first argument?**

I'm not sure. I do think that on the one hand, the fewer cases that the court grants the fewer opportunities there are for anyone to be arguing. I think that's one of the concerns that the SCOTUS bar generally has been discussing: There are fewer and fewer cases and so many lawyers who want to do them at the same time.

On the other hand, the fact that there are so few cases as well as the fact that there is this dialogue around the importance of having women and diverse advocates has really crystallized the extent to which it is important to be mindful about who is getting up there for each and every case. It becomes even more important to think about representation and sponsorship in each case.

The fact that the court is taking fewer cases means there are fewer cases for everybody. I think this year is perhaps a good example of why there may not be that correlation: We have fewer cases than before and more women advocates.

**The first half of Blatt's SCOTUS arguments came while she was in the government. At your argument earlier this year, Erica Ross, from the Solicitor General's Office, argued on behalf of the federal government. The current Solicitor General, Elizabeth Prelogar, despite her win percentage in front of this particular court, is widely regarded as one of the best Supreme Court advocates there is and maybe ever was.**

Absolutely.

**What's it going to take to get the same sort of representation from corporate clients at SCOTUS that you see among women advocates in the government?**

I think that sponsorship is really where you see the strides being made. I mean, it is one thing to say, as people do, that we need to have more women up there. We need to have more clients willing to place their confidence in advocates who have had fewer cases before the court, which is necessarily going to include women given the statistics. It's one thing to say that those are things that we should be trying to do and it's another to actually follow through. That's where true sponsorship, I think, comes in. I'm lucky to be part of a group where the head of my group, **Pratik Shah**, who has many more arguments than I do, from day one in the El Dorado case completely supported me standing at the podium. He made it clear that he would do whatever it took to help me get to that place and to draw on his experience. That kind of sponsorship and collaboration is what's going to get more women at the podium. If you have that kind of sponsorship at the firm, the client is going to see that and the client is going to have complete confidence in whoever the more experienced advocate has said is the right person to argue that case. And that's I think what is going to have to happen over and over again, for us to make any real strides.

*Correction: A prior version of this story misspelled the first name of Goodwin Procter partner Jaime Santos.*