

## Litigator of the Week: Gregory Garre of Latham & Watkins

By Jan Wolfe

July 17, 2014

Navigating his way through racial politics, education policy and U.S. Supreme Court precedent, Latham & Watkins partner Gregory Garre won a ruling this week that preserves student affirmative action at the University of Texas at Austin. There could be a counterintuitive lesson in UT Austin's victory: To advance a liberal cause, it may help to have a lawyer with conservative bona fides.

In a 2-1 ruling issued on Tuesday, the U.S. Court of Appeals for the Fifth Circuit ruled that UT didn't violate the Fourteenth Amendment by making race a factor in its admissions process. Siding with Garre, the majority held that UT Austin's approach—accepting all students in the top 10 percent of their high school class and then including race in a quota-free assessment of remaining applicants—was "necessary" for UT Austin to achieve a diverse student body.

The underlying lawsuit, *Fisher v. University of Texas*, has been called the the affirmative action case that will not die. Tuesday's ruling represented the second time the Fifth Circuit has signed off on UT Austin's race-conscious admissions policy. The prior Fifth Circuit ruling, issued in 2011, showed much more deference to UT Austin's claim that it adopted the best approach to boosting minority enrollment. The Supreme Court vacated the Fifth Circuit ruling in June 2013 and remanded the case with instructions to apply strict scrutiny—i.e., to ask whether UT Austin's approach is narrowly tailored to achieving a compelling government interest.

UT Austin retained Latham after the university's first go-round at the Fifth Circuit, once the Supreme Court agreed to hear the case. In addition to Garre, the university is represented by Maureen Mahoney and J. Scott Ballenger of Latham, Lori Alvino McGill of Quinn Emanuel Urquhart & Sullivan and James Ho of Gibson, Dunn & Crutcher. Mahoney had successfully argued in favor of the University of Michigan Law School's affirmative action program in a 2003 Supreme Court case, *Grutter v. Bollinger*.

The remand to the Fifth Circuit culminated in a November 2013 oral argument that was held just blocks from UT Austin's campus. The plaintiff, Abigail Fisher, a white applicant rejected back in 2008, was in attendance. As at the Supreme Court, Garre squared off against Wiley Rein cofounder Bert Rein, whose reduced fees were reportedly covered by a conservative group.

The Supreme Court ruled in the 2003 Michigan case that universities have a compelling interest in diversifying their student body, so the Fifth Circuit oral argument hinged on the second part of the strict scrutiny inquiry: Could UT Austin achieve the same goals with a less race-based approach? To prevail on that issue, Garre urged the Fifth Circuit to delve into the details. The reality, he argued, is that UT



DIEGO RADZINSCHI

Gregory Garre

Austin tried racially neutral alternatives from 1997 to 2004, including targeting low-income high schools with outreach and scholarship opportunities, but minority enrollment was stagnant.

The Fifth Circuit took a similarly fact-based approach to the case in Tuesday's ruling. As if to signal to the Supreme Court that it took its instructions seriously, the majority issued a lengthy 41-page ruling complete with an appendix of graphs and charts. Ultimately, the court found that there was a "want of workable alternatives" to UT Austin's race-conscious policy.

"I don't know how anyone can read this decision and not think the court took the strict scrutiny standard seriously," Garre said in an interview.

Garre is a Republican who clerked for former Chief Justice William Rehnquist after graduating from George Washington University Law School in 1991. He also served as U.S. solicitor general during the tail end of the George W. Bush administration, which had earlier joined the legal challenge to the University of Michigan's affirmative action policy.

Garre declined to discuss his own personal views on affirmative action. "My job is to represent my client," he told us. "But I will say this: Sometimes it can be benefit you as an advocate to see both sides of an issue."