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Looking Back at a Battle for Affirmative Action: Latham's Gregory Garre

Latham & Watkins's Greg Garre offers memories and advice on his Supreme Court appearance defending affirmative action policies in Texas.

By Marcia Coyle

Good morning and welcome to Supreme Court Brief. Advocates and amici in next week's affirmative action challenges involving Harvard and the University of North Carolina have been holding press briefings and offering experts in anticipation of the Oct. 31 arguments. We offer something different: An interview with Latham's Greg Garre who, representing the University of Texas, faced the heat of that battle not once but twice. He offers memories and advice.

Photo: Diego M. Radzinschi/ALM

Gregory Garre, partner with Latham & Watkins.

Fighting an Uphill Battle

When the lawyers defending affirmative action in the Harvard and University of North Carolina cases go before the justices on Oct. 31, they will have with them in spirit an advocate who has defended affirmative action twice and who offers some simple advice: Stick to your position and try to lower the temperature.

"The lawyers who are arguing are all exceptionally talented," Gregory Garre, head of Latham & Watkins' Supreme Court and appellate practice said. "The one thing I learned through the first case and tried to bring in the second case is not to get caught up in the heated moment. The passions get very heated."

Garre, a former U.S. solicitor general, argued Fisher v. University of Texas in October 2012 and again when the case returned to the high court in 2015. Fisher II, decided by a 4-3 court in 2016, was the first time that Justice Anthony Kennedy, who wrote the majority opinion, had ever upheld an affirmative action plan. (Justice Elena Kagan recused. Justice Antonin Scalia died in February 2016).

"I think these are extraordinarily difficult cases to argue because the justices feel very strongly about the issues, approach them many times from different perspectives and also are exceptionally active during argument," Garre said. "That confluence of factors makes it especially challenging and heated in the moment."

And although the broader issue of affirmative action in higher education is obviously important, these cases,

he added, are also very fact dependent and the application of those facts makes them a little different from the typical high court case.

Garre said his firm was contacted by the University of Texas after the justices agreed in February 2012 to hear the challenge to its admissions program. That challenge was orchestrated by the same person who is behind the suits against Harvard and North Carolina: Edward Blum, head of the Project on Fair Representation, which has brought dozens of lawsuits challenging racial preferences.

Latham was a logical choice. It had experience representing higher education institutions and, importantly, retired partner Maureen Mahoney argued and won the landmark affirmative action case, Grutter v. Bollinger, involving the University of Michigan Law School, in 2003. Blum and his organization, Students for Fair Admissions, are asking the justices in the Harvard and North Carolina cases to overrule that 2003 precedent.

Garre recalled that an important part of his preparation for the arguments was meeting with people actually engaged in the university's admissions process and, equally if not more important, meeting with students to get their perspectives on diversity on campus.

"Often when preparing for oral argument you'll speak with people involved in the case, but this was more intensive," he said. "We wanted to be familiar with how this operated in the real world."

The two arguments were "certainly among the more intense arguments I've done," Garre, who has argued 47 high court cases, recalled. "There really was no opportunity to catch your breath."

One exchange with Justice Antonin Scalia in Fisher II triggered an audible gasp in the courtroom, and headlines and commentary afterward. Scalia, obviously referring to the so-called mismatch theory propounded in an amicus brief in the case, said: "There are those who contend that it does not benefit African Americans to—to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a less—a slower-track school where they do well."

Garre quickly dismissed that theory, saying: "This court heard and rejected that argument, with respect, Justice Scalia, in the Grutter case, a case that our opponents haven't asked this court to overrule…. And, frankly, I don't think the solution to the problems with student body diversity can be to set up a system in which not only are minorities going to separate schools, they're going to inferior schools."

Garre's main reaction after the argument, he said, was "I survived. Looking at the justices going in, we knew it was an uphill battle and very few people gave us a shot at winning."

The lawyers defending Harvard and North Carolina next week likely face an uphill battle as well, he said. "But this is a completely different court. The question of overruling [Grutter] makes the dynamic different for both advocates and the justices."

The justices will be trying to see where their colleagues are, not only on the resolution of the particular cases before them, but on how far the court is willing to go to resolve them, according to Garre.

"I also think, in terms of what to expect, the argument is not going to be as one-sided as some may expect," he added. "It will be very interesting to see how the justices react. Five of them (Kagan, Gorsuch, Kavanaugh, Barrett and Jackson) have never heard an affirmative action case before this court."