**Judicial Review & the Oregon Supreme Court**

**How do we Prepare for Supreme Court Oral Arguments?**

**Part 3**

**In this section:**

* 1. How a Supreme Court Hearing / Oral Argument works
  2. Persuasive Speaking / Rhetoric
  3. Student-friendly summaries of both cases the Court will hear
  4. Preparation materials to complete about the cases (students should bring these with them to the hearings)

***Note to Teachers:***

This section will give students a prepared and positive experience when they see Oregon Supreme Court in live oral arguments. They will be seeing two separate hearings, but an appellate hearing is much different than the traditional trial format students may be used to seeing on television. This section will explain how a hearing works and will provide background on both of the cases, as well as materials students can use to prepare for watching the arguments and forming opinions themselves.

The below url links to a video of the most recent Pace University Moot Court competition where you can view multiple examples of law students in oral argument. Any one or several of these examples will give your students an idea of what to expect at the May 15 hearings:

**http://tinyurl.com/y4d7wkqb**

**Oregon Supreme Court Oral Arguments**

**3.1 - How Oral Arguments Work**

**How Oral Arguments Work**

How the courtroom looks:

**Justices’ Bench**

**Attorney Podium**

Attorney Table

Attorney Table

In a Supreme Court hearing (also called “oral argument”), there are:

* no juries
* no witnesses
* no exhibits

The Justices have already read briefs of the case prior to the hearing. Each side (and even third parties) submit briefs - or stories of the case. The hearing is simply a final chance to make their most important points.

Petitioner’s attorney and the Respondent’s attorney each have a set amount of time (usually 30 minutes) to make their case before the bench of Justices. The attorneys must use all of their public speaking skills to make their case concisely and persuasively.

Then, they must be able to think quickly and flexibly because the Justices can ask any questions they want of either attorney. The attorneys must be ready to respond to any question put to them by the Court.

Oregon Supreme Court Oral Arguments Name:

**Persuasive Speaking / Rhetoric**

Because there are no witnesses or exhibits in an appellate hearing, attorneys must use their best persuasive skills to present their case and answer questions from the Court. Below are the 3 main parts of rhetoric you might use to persuade someone to your way of thinking on a topic. Consider each one, and then try them out in brief persuasive sentences.

*Scenario:* You must convince your principal that attending a live hearing of the Oregon Supreme Court would be a good idea for your class. How might you convince the principal?

**Logos**: appealing to the *logic* of your listener. You might cite facts or statistics, or authorities (in a hearing, this would include former cases or the law) to appeal to the *reason* of your listener to convince them of your view.

1. Write a ***Logos*** argument for the above scenario:

**Ethos:** making an *ethical* appeal to your listener based on your *good character* or reliability. You must convince the listener that you are fair, reliable, and understand what you are talking about.

1. Write an ***Ethos*** argument for the above scenario:

**Pathos:** appealing *emotionally* to your listener. You persuade by appealing to the emotions of your audience, calling on personal experiences, sympathetic stories, drawing compassion and empathy from your listener.

1. Write a ***Pathos*** argument for the above scenario:

Oregon Supreme Court Oral Arguments

3.3 - The Cases

**Background of Case #1:**

*OLIVIA CHERNAIK*

*Plaintiff-Appellant-Petitioner*

*v.*

*KATE BROWN & STATE OF OREGON*

*Defendants-Respondents-Respondents*

**Supreme Court Case S066564**

1. **Original Trial / Facts of the Case\*:**

Plaintiffs sued defendants for relief related to the state’s alleged failure to take sufficient steps to protect the state’s public-trust resources from the effects of climate change. This is the second time this case has been before the Court of Appeals: the first time they reversed the trial court’s dismissal of the case, and remanded for the trial court to determine whether plaintiffs were entitled to declare that the atmosphere and other natural resources are trust resources that the state has an obligation to protect.

The trial court ruled that

1. Only state submerged and submersible lands are resources encompassed by the public trust doctrine; and
2. The state does not have an obligation to protect public-trust resources from the effects of climate change.

The Appeals Court decided the first time around that the trial court made the correct conclusions but because the case had been dismissed, the Appeals Court once again remanded (sent back) the case to the trial court to make the declaratory judgement on the case (the trial court must state the above two rulings in its judgment).

The plaintiffs had amended their complaint and then asked the trial court to make a summary judgement on the following 4 declarations:

1. A declaration of law that the State of Oregon, as a trustee and sovereign entity, has a fiduciary obligation to manage the atmosphere, water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife and fish as public trust assets, and to protect them from substantial impairment caused by the emissions of greenhouse gases in, or within the control of, the State of Oregon and the resulting adverse effects of climate change and ocean acidification;

2. A declaration that atmospheric concentrations of carbon dioxide (CO2) exceeding 350 parts per million (ppm) constitutes substantial impairment to the atmosphere and thereby the other public trust assets;

3. A declaration that to protect these public trust assets from substantial impairment, Oregon must contribute to global reduction in emissions of CO2 necessary to return atmospheric concentrations of carbon dioxide to 350 ppm by the year 2100; and

4. A declaration that Defendants have failed, and are failing, to uphold their fiduciary obligations to protect these trust assets from substantial impairment by not adequately reducing and limiting emissions of carbon dioxide and other greenhouse gases in, or within the control of, the State of Oregon.”3 Plaintiffs specifically did not seek a rul

The defendants then asked the trial to dismiss the plaintiff’s amended complaint and rule that:

1) The common law public trust doctrine does not extend to the atmosphere.

2) The common law public trust doctrine does not impose the particular affirmative actions associated with traditional legal trusts (i.e., fiduciary obligations or duties). Instead, Oregon courts have applied it only as a restraint on alienation.

3) Because there are no fiduciary duties associated with the common law public trust doctrine, any declaratory or injunctive relief based on an alleged violation of such duties must be denied.

4) Even if this Court recognizes new fiduciary duties under the public trust doctrine, injunctive relief is not warranted, because the Court must presume that the State will comply with the new law as announced, and therefore, that no future violation of law is likely.

5) This Court is without authority to grant injunctive or further relief, because doing so would violate the principle of separation of powers.

6) Finally, this Court lacks authority to grant injunctive relief, because such relief would cause the Court to decide a political question that our constitutional system entrusts to the other branches of government.” The trial court granted the state’s motion

The trial court granted the state’s motion and dismissed the case.

On appeal, plaintiffs argue that the court erred by concluding the public-trust doctrine applies only to submerged and submersible lands, and that the court was wrong to conclude that the state doesn’t have an obligation to protect trust resources from climate changed. They also argue that the trial court erred in not reaching the question of whether the state has upheld its duty to protect public trust resources from “substantial impairment due to climate change.”

*\*summarized from the Court of Appeals Opinion*

1. **Oregon Court of Appeals: Decided January 9, 2019**

The Appeals Court began its opinion by discussing the history of Oregon’s public-trust doctrine. Briefly, upon admittance to the union, Oregon obtained title to the submerged and submersible land underlying “title-navigable” water because it now had “state sovereignty.” Later it was decided by Oregon courts that no matter if title of submerged and submersible lands is in private hands, the state still has the power to intervene on behalf of the public interest. When they decide cases about public-trust doctrine, Oregon courts usually focus on the extent to which the state has the power to intervene in navigable waterways to protect the public uses of those waterways.

The Appeals Court then concludes that the plaintiffs argument that the public-trust doctrine applies to more than just submerged and submersible land (waterways) is not essential for their decision, the court says that their opinion will refer to “public-trust resources” in the abstract, but won’t specific what that includes.

Next, the Court determined that Oregon’s common law public-trust doctrine is not a legally binding obligation for the state. “Rather, the public-trust doctrine uses the word “trust” as an imperfect metaphor to capture the idea that the state is restrained from substantially impairing the common-law public right to use public trust resources for certain purposes.”

The Appeals court concluded that the trial correctly granted the state’s motion for summary judgement. Because that conclusion resolves the controversy between the parties, the Appeals Court did not address the other declarations sought by the plaintiffs. The Court vacated the trial court’s actions, however, saying that the trial court needed to enter a judgement that declared the parties’ rights, and thus the Appeals Court remanded the case back to the trial court to re-issue the judgment.

1. **Oregon Supreme Court - Oral Arguments, November 13, 2019**

Briefs available (and soon to be available) on the Supreme Court’s website:

Petitioner Brief on the Merits (rec’d 7/31/19)

Amicus Curiae Brief (Multnomah County)

Amicus Curiae Brief (Organizations, businesses and individuals)

Amicus Curiae Brief (Law Professors)

Amicus Curiae Brief (Fourteen Oregon Elected Officials)

Amicus Curiae Brief (Kenneth Kaufman's clients)

Amicus Curiae Brief (Elisabeth Holmes' clients)

Amicus Curiae Brief (Multnomah and Lane Counties)

Amicus Curiae Brief (Oregon Trial Lawyers Association)

Respondents Brief on the Merits

Petitioners Reply Brief

Oregon Supreme Court Oral Arguments

3.3 - The Cases

**Background of Case #2:**

*State of Oregon,*

*Plaintiff-Respondent-Petitioner*

*v.*

*Tamara Louise Fulmer,*

*Defendant-Appellant-Respondent*

**Supreme Court Case SO66654**

1. **The Original Trial Court / Facts of the Case\***

On patrol one night, Officer Delepine of the Hillsboro Police Department pulled a car over for having an expired license plate registration. When Officer Delepine asked Tamara Fulmer, the defendant, for her driver’s license and registration, she admitted her registration was expired and her license was suspended, and that she did not have insurance.

Following protocol, because the officer intended to impound the car from there, as he wrote a citation for the defendant, he called for a second officer to assist. They asked the defendant to step out of the car so that they could take an inventory of the car before it was impounded. When defendant exited the car, she took her cell phone and a pack of cigarettes with her but left her purse on the passenger seat.

The Hillsboro Police Department’s policy on inventory states that upon taking custody of the vehicle, officers must inventory “all personal property and contents of open containers found” in the vehicle’s passenger compartment. It does not allow the opening of closed containers, but specifically excludes “item[s] designed for carrying money and/or small valuables” (such as closed wallets, coin purses, purses, and waist packs) from the definition of “closed container.” So the policy does allow for items like purses and wallets to be inventoried including their contents.

When Officer Weed (the second officer on the scene) examined the defendant’s purse to take inventory, he found needles and a small bag of methamphetamine. Upon that discovery, he directed Officer Delepine to arrest the defendant. The state charged the defendant with one count of unlawful possession of methamphetamine. But at trial, defendant moved to suppress the evidence from her purse.

She claimed that the officers had unlawfully seized her purse because they did not give her a chance to remove her belongings from the car before they took inventory. The court determined that the stop had been lawful, the decision to impound the car had been lawful, and that the inventory had been lawfully conducted in accordance with the department’s policy.

Defendant was tried and convicted. She appealed the conviction by challenging the denial of her motion to suppress the evidence from her purse.

*\*summarized from the Appellate Court’s opinion*

1. **The Court of Appeals, decided February 6, 2019**

The Oregon Court of Appeals reviewed the law relating to police inventory of impounded vehicles.

Article I, Section 9 of the Oregon Constitution states: that people have the right “to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure.” The question is whether the search of Ms. Fulmer’s purse was unreasonable under the state constitution.

The Court clarified that an inventory search is non-investigatory. That means that an officer can’t order someone to leave items in a vehicle that is being impounded, nor may they inventory items the passenger has taken with them. They also stated in their opinion that if defendant had taken her purse with her or asked to take it with her when she got out of the car, the police would not have been able to search it and thus would not have found the items in it.

Defendant made two arguments to the Appeals Court:

1. **An “Affirmative Duty” Argument:** Ms. Fulmer argued that a rule should be adopted that requires the police to ask the passenger if there are any items they want to remove from the car before they take the inventory. In other words, they should have the *duty* to inform before they take an inventory. The Court recognized that there is no legally valid reason not to want people to know that they are free to remove items before a vehicle is impounded. Requiring officers to ask first, could also ease the public’s mind that inventories are just investigative searches “in disguise.” **But the question isn’t whether it’s a good idea for officers to give this warning, the question is whether the Oregon Constitution *requires* them to do so.**

The Appeals Court decided that though Fulmer made a thoughtful argument for a new policy, she did not persuade the Court that an inventory search of an administratively seized vehicle is unreasonable - and thus it is not a violation of Article I, Section 9 of the Oregon Constitution.

1. **A “Reasonable Person” Argument:** Ms. Fulmer also argued that the seizure of her purse was unlawful because a reasonable person in her position would believe “that she was to exit the car immediately and that she was not free to reach around the car to retrieve her personal items.” She argues that by having her leave the car the way they did, she felt intimidated and assumed, as a reasonable person, that she had no choice to take her personal items with her.

The Appeals Court concluded that “the mere act of an officer asking a person who is not under arrest to step out of a car because it is being impounded, without more, is not enough to cause an objectively reasonable person to believe that they cannot remove any personal items from the car.”

The Appeals Court majority opinion\* concluded the officers did not violate Ms. Fulmer’s rights under Article I, Section 9 of the Oregon Constitution. Ms. Fulmer appealed to the Oregon Supreme Court.

\*The Hon. C.J. Egan dissented from the majority opinion.

1. **Oregon Supreme Court - Oral Argument: November 13, 2019**

Briefs for the Supreme Court have yet to be posted on the Court’s site. Expected briefs:

* Petitioner Brief on the Merits
* Respondents Brief on the Merits
* Petitioners Reply Brief

Oregon Supreme Court Oral Arguments Name:

Preparation Materials for Oral Arguments

Case #1

**Preparing to Observe Oral Arguments**

*Olivia Chernaik*

*v.*

*Kate Brown & State of Oregon*

**Supreme Court Case S066564**

What are the **FACTS** of the case (what’s the story behind the lawsuit?)?

1. 6.

2. 7.

3. 8.

4. 9.

5. 10.

What is the Petitioner asking the Court to decide?

What is the Respondent asking the Court to decide?

What is the key part of the law that must be decided by the Court?

What questions do you have about the case, or what facts do you want clarified?

*(you will not be able to ask the Court questions specifically about the cases - this is to prepare you to observe whether your questions get answered in the course of the Oral Arguments)*

Oregon Supreme Court Oral Arguments Name:

Preparation Materials for Oral Arguments

Case #2

**Preparing to Observe Oral Arguments**

*State of Oregon*

*v.*

*Tamara Louise Fulmer*

**Supreme Court Case SO66654**

What are the **FACTS** of the case (what’s the story behind the lawsuit?)?

1. 5.

2. 6.

3. 7.

4. 8.

What is the Petitioner asking the Court to decide?

What is the Respondent asking the Court to decide?

What is the key part of the law that must be decided by the Court?

What questions do you have about the case, or what facts do you want clarified?

*(you will not be able to ask the Court questions specifically about the cases - this is to prepare you to observe whether your questions get answered in the course of the Oral Arguments)*