



## **INSTRUCTIONS FOR TEACHER**

This moot court is based on the Supreme Court case of Chiafalo v. Washington. As this case explains, the winner of the Presidential Election is not necessarily the candidate who wins the most votes. On a practical level, Chiafalo describes the constitutional mechanics of electing the President and introduces the institution tasked with deciding the winner of the Presidential Election: the Electoral College. In looking at the unusual subject of “faithless Electors,” the case asks whether the voters retain control over the Electors and the Presidential Election, or whether the Electors are meant to exercise their own discretion when deciding the President. Chiafalo also implicates a core question of constitutional law: When, if ever, should there be safeguards *against* the popular vote?

The lesson should begin with an overview of the federal and state court system and a brief explanation of appellate advocacy and the difference between a trial and an appellate argument. This background information is provided below.

Read the Summary of the Facts together as a class. Then, divide students into three groups: Appellant/Petitioner (Chiafalo), Appellee/Respondent (Washington), and Supreme Court Justices. The groups can then on their own discuss the fact pattern, brainstorm ideas on the BRAINSTORMING SHEET, review and evaluate significant arguments on the ARGUMENT SHEET, and prepare their arguments to the Supreme Court for the mini moot court. The student Justices should work together to evaluate potential arguments using the BRAINSTORMING SHEET and ARGUMENT SHEET and to draft questions for oral argument using the JUSTICE SHEET.

During the discussion period, students from each side will need to select representatives (2-4) who will act as the Advocates during the moot court, and students from the Supreme Court will need to select a Chief Justice. Advocates from each side will have 15 minutes to present their side’s strongest arguments to the Supreme Court and answer questions from the Justices. The Advocates should decide how they want to divide their oral argument time. Afterwards, the

mock Supreme Court will decide the outcome of the case, and the Chief Justice will announce the Court's decision. The oral argument should proceed as follows:

- The Chief Justice will open the argument by announcing, “We will hear argument today in Chiafalo v. Washington. Petitioner, you have 15 minutes.”
- Advocates will only have 15 minutes to present their strongest arguments to the Supreme Court and to answer any questions posed by the Justices. Advocates representing Chiafalo will go first, followed by Advocates representing Washington.
  - After the Advocates representing Washington have made their arguments, the Advocates representing Chiafalo have five (5) minutes for “rebuttal.” The rebuttal should focus on responding to issues that Washington raised during the oral argument.
  - NOTE: The Advocates for Chiafalo must reserve time for rebuttal at the start of their oral argument. (Kindly remind Chiafalo to reserve time if he or she forgets as a rebuttal is a powerful tool during oral arguments).
- Each side should begin its argument by saying, “Thank you, Chief Justice, and may it please the Court.” Then, the Advocates may proceed with their arguments.
- During each side's oral argument, the Justices will interject with 3 questions. All students on each side can raise their hands to answer questions posed by the Justices of the Supreme Court if their Advocates need assistance.
- Once the oral arguments have been completed, the Chief Justice will close the arguments by saying, “The case is submitted.”
- Then, the Justices will confer and write a brief opinion (no more than three (3) paragraphs) with their decision. The Justices should decide how they want to divide the work of writing the opinion themselves. The Chief Justice will then summarize the Court's decision for the class.

### **Court System and Appellate Advocacy**

Technically, there are 51 court systems in the United States. Each State has its own state court system, and the Federal government has a Federal court system. For our purposes, the general rule is that issues of state law are resolved in state court, while issues of Federal law are resolved in Federal court. In both the state and Federal systems, there are three levels of courts—the trial courts, the appeals courts, and the Supreme Court. Most of the action happens in the trial courts, and this is where the facts of the case are first decided. Ultimately, a trial court judge (with or without a jury) decides which side is the winner and which side is the loser.

The loser will likely be unhappy with this outcome, so she might ask that another court review the trial court's decision. This is called an appeal, and appeals are heard by, you guessed it, the appeals courts. The side who asks for the appeal is called the Appellant or Petitioner (because she has to file a *petition* to have her case reviewed), and the other side is called the Appellee or Respondent (because she has to *respond* to the petition).

During the appeal, the Appellant and Appellee submit written documents called briefs to the court making their best arguments. After the appeals court has reviewed the briefs, it might ask the Appellant and Appellee to come into court for an oral argument. During an oral argument, the Appellant and Appellee make their arguments in person before the judges, and the judges can ask the Appellant and Appellee questions to test their arguments. After oral argument, the appeals court judges confer about what the outcome should be and ultimately write an opinion explaining their decision.

But, just like with trial court, the side unhappy with the court's decision can decide to appeal. This time the appeal goes to the Supreme Court, and the whole appeals process repeats itself. However, unlike with the appeals courts, the Supreme Court's decision cannot be appealed; it is the final word on the matter. What the Supreme Court says the law means, is what the law means. That's why the "judges" on the Supreme Court are not called judges, they're called Justices. Only in exceptional circumstances can the Supreme Court of the United States decide to review the decision of a State Supreme Court, but the students will be working on one of those exceptional cases today in Chiafalo v. Washington.



## **INSTRUCTIONS FOR STUDENTS**

This moot court is based on the Supreme Court case of Chiafalo v. Washington. As this case explains, the winner of the Presidential Election is not necessarily the candidate who wins the most votes. On a practical level, Chiafalo describes the constitutional mechanics of electing the President and introduces the institution tasked with deciding the winner of the Presidential Election: the Electoral College. In looking at the unusual subject of “faithless Electors,” the case asks whether the voters retain control over the Electors and the Presidential Election, or whether the Electors are meant to exercise their own discretion when deciding the President. Chiafalo also implicates a core question of constitutional law: When, if ever, should there be safeguards *against* the popular vote?

Here’s how the moot court will go:

- You will be divided into one of three groups: Appellant/Petitioner (Chiafalo), Appellee/Respondent (Washington), and Justices of the Supreme Court.
- In your groups, you should discuss the fact pattern, brainstorm ideas on the BRAINSTORMING SHEET, review and evaluate significant arguments on the ARGUMENT SHEET, and prepare your arguments to the Supreme Court for the mini moot court.
- The student Justices should also work together to evaluate potential arguments using the BRAINSTORMING SHEET and ARGUMENT SHEET and to prepare questions for oral argument using the JUSTICE SHEET.
- During the discussion period, students from each side will need to select representatives (2-4) who will act as the Advocates during the moot court, and students from the Supreme Court will need to select a Chief Justice. Advocates from each side will have 15 minutes to present their side’s strongest arguments to the Supreme Court and answer questions from the Justices. The Advocates should decide how they want to divide their oral argument time. Afterwards, the mock Supreme Court will decide the outcome of the case, and the Chief Justice will announce the Court’s decision.
- The oral argument should proceed as follows:

- The Chief Justice will open the argument by announcing, “We will hear argument today in Chiafalo v. Washington. Petitioner, you have 15 minutes.”
- Advocates will only have 15 minutes to present their strongest arguments to the Supreme Court and to answer any questions posed by the Justices. Advocates representing Chiafalo will go first, followed by Advocates representing Washington.
  - After the Advocates representing Washington have made their arguments, the Advocates representing Chiafalo have five (5) minutes for “rebuttal.” The rebuttal should focus on responding to issues that Washington raised during the oral argument.
  - NOTE: The Advocates for Chiafalo must reserve time for rebuttal at the start of their oral argument. (Kindly remind Chiafalo to reserve time if he or she forgets as a rebuttal is a powerful tool during oral arguments).
- Each side should begin its argument by saying, “Thank you, Chief Justice, and may it please the Court.” Then, the Advocates may proceed with their arguments.
- During each side’s oral argument, the Justices will interject with three (3) questions. All students on each side can raise their hands to answer questions posed by the Justices of the Supreme Court if their Advocates need assistance.
- Once the oral arguments have been completed, the Chief Justice will close the arguments by saying, “The case is submitted.”
- Then, the Justices will confer and write a brief opinion (no more than three (3) paragraphs) documenting their decision. The Justices should decide how they want to divide the work of writing the opinion themselves. The Chief Justice will then summarize the Court’s decision for the class.

## SUMMARY OF FACTS: CHIAFALO V. WASHINGTON

### BACKGROUND:

You might think that the winner of the United States Presidential Election is the candidate who receives the most votes. As a practical matter, often this is true. But it isn't *necessarily* true. In fact, since 2000, the United States has had five (5) Presidential elections. In two (2) of those elections, the winner received fewer votes nationwide than the loser. How does this happen?

Article II of the United States Constitution says that an institution called the **Electoral College** decides the winner of the Presidential election. The Electoral College is just a body of members called "Electors" sent by the 50 States (and Washington, D.C.) whose only purpose is to decide the next President. Each State (and Washington, D.C.) sends a number of Electors to the Electoral College equal to the number of U.S. Senators it has plus the number of Members it has in the House of Representatives. For example, Pennsylvania has two (2) Senators and 18 Representatives in the House, so it has 20 Electors (or votes) in the Electoral College. After Election Day, the Electors meet and cast their votes. In total, there are 538 Electors of the Electoral College, and the winner of the Presidential Election is the candidate who receives a majority of Electoral College votes.

Article II of the Constitution also says that, "Each State shall appoint, in such Manner as the Legislature thereof may direct," Electors to the Electoral College. Keep this language in mind. The Twelfth Amendment, adopted in response to "hiccups" in the Presidential Elections of 1796 and 1800,<sup>1</sup> further provides: "The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . ; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President."

In the early days of the nation, State legislatures would just pick the Electors themselves. Now, however, every State (for our purposes) provides for a popular vote that looks like this:

---

<sup>1</sup> The Presidential Elections of 1796 and 1800, held before the passage of the Twelfth Amendment, exposed the shortcomings of the Presidential Election process described in Article II of the Constitution. Under Article II, each Elector receives two (2) votes. In theory, the Electors would use one (1) vote to elect the President and one (1) vote to elect the Vice President. The candidate who received the most votes was declared the President, and the candidate who received the second-most votes was declared the Vice President. But, under the pre-amendment Constitution, Electors did not vote for the President and Vice President separately. Thus, two problems might occur (and did occur, in back-to-back elections). First, as in 1796, the candidate with the most votes and the second-most votes might be from *different* parties—this doesn't make for cohesive governing. Second, the two candidates who run as President and Vice President from the same party might receive the same number of votes. Although they ran as "President" and "Vice President," a "Vice Presidential" candidate who receives the same number of votes as the "Presidential" candidate might refuse to concede. This happened in the Election of 1800, and it wasn't clear who won the Presidency for several months.

1. The State’s citizens vote for Presidential candidates nominated by the political parties, for example, the Republicans and the Democrats;
2. Each party submits a list (a “slate”) of potential Electors to the State; and
3. The political party whose candidate wins the popular vote in that State for President has its slate of Electors sent by the State to the Electoral College.

This means that all the Electors from a State will cast their votes in the Electoral College for the Presidential candidate who won the most votes in that State. For example, in the 2016 Election, more voters in Pennsylvania voted for Donald Trump (the Republican candidate) than Hillary Clinton (the Democratic candidate), so Pennsylvania sent the 20 Electors nominated by the Republican Party to the Electoral College, and they cast their 20 votes for Donald Trump.

But what if the Electors from Pennsylvania in 2016 decided to “go rogue” and vote, instead, for Hillary Clinton? Electors who vote against their party’s nominee, and, therefore, against the popular vote in their States, are referred to as “faithless Electors.” Is this necessarily a bad thing? What, if anything, do we do about faithless Electors?

Most States (38) have adopted laws that require anyone seeking to become an Elector to pledge that she will vote for the candidate nominated by her political party. These laws are called “pledge laws.” The Supreme Court upheld the constitutionality of pledge laws in Ray v. Blair, rejecting the argument that the Constitution “demands absolute freedom for the Elector to vote his own choice.” However, the Court in Ray did not address the question of whether it would be unconstitutional to penalize an Elector who voted against her pledge.

\* \* \*

And that brings us to this case. Washington State is one of the many States that has a pledge law. But Washington State’s pledge law goes further. Under the law, if an Elector votes for a candidate other than the candidate for whom she pledged to vote, she may be fined up to \$1,000. Fourteen (14) other States have similar pledge laws.

In the 2016 Election, Hillary Clinton won more votes than Donald Trump in Washington. Therefore, the Democratic slate of Electors was sent by Washington State to the Electoral College. Peter Chiafalo was one of those Democratic Electors. Under Washington law, Chiafalo had pledged to cast his vote in the Electoral College for the Democratic candidate. However, Chiafalo and two of his fellow Electors devised a plan—they decided that they would vote for someone other than Clinton. They thought that if they broke with their party, other Electors from other States would do the same; specifically, they hoped that Electors from States won by Donald Trump would also cast their votes for someone else, costing Trump the Presidency.

Chiafalo’s plan did not work, but it did cost him—Washington State fined him \$1,000 for voting against his pledge.

\* \* \*

Chiafalo challenged his fine in Washington State Court, arguing that Washington’s pledge law was an unconstitutional violation of Article II. The Washington Supreme Court disagreed with Chiafalo. Chiafalo asked the United States Supreme Court to review the decision and answer the

question left open by Ray: Does the fine imposed by Washington's pledge law violate an Elector's ability to vote for the candidate of her choosing under Article II of the Constitution? That's what you'll be deciding today.

**BRAINSTORMING SHEET**

Which side do you represent?

Your Group's Arguments (Rank from best to worst):



Opposition's Arguments (Rank from best to worst):

Counterarguments to Opposition's Arguments:

Possible Supreme Court Questions:

Responses to Supreme Court Questions:

--	--

### ARGUMENT SHEET

Look over these arguments below. Note whether they help Chiafalo (Appellant/Petitioner) or Washington (Appellee/Respondent). You can also decide an argument helps both sides (Both) or neither side (Neither). If you decide that an argument helps your side, how will you draw a comparison between that argument and your side's argument? If you decide that an argument helps your opponent's side, what are potential counterarguments, and/or how might you distinguish your side's argument?

1. \_\_\_\_\_ In Ray v. Blair, the Supreme Court upheld an Alabama pledge law against a challenge under Article II of the Constitution. Article II provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors...." In Ray, the Court held that the Alabama pledge law was a valid "exercise of the state's right to appoint electors in such manner" as it chooses. If the right to appoint means anything, a State must be able to enforce that right, including by imposing penalties on Electors who vote for a candidate against their pledge.
  
2. \_\_\_\_\_ A lot can happen after Election Day. The President-elect could become seriously ill, or even die. In fact, this happened in the Election of 1872, when one of the major party nominees died after Election Day but before the Electoral College convened. Because of their discretion, the Electors were able to vote for other candidates. And this isn't the only situation where Elector discretion would be essential. The President-elect could commit a serious crime, or it might become known that the President-elect had been paid-off by a foreign power trying to steal the election. Electors must retain discretion over their votes in the Electoral College to be able to respond to emergency situations like these.

3. \_\_\_\_\_ At the time of drafting, the framers of the Constitution debated various direct measures of electing the President, including election by Congress, by State legislatures, and by popular vote. All of these proposals were rejected in favor of the Electoral College. That is, the framers made an informed decision to adopt an *indirect* method of choosing the winner of the Presidential Election. But that decision is only meaningful to the extent that the Electors actually vote independently. A system in which States can control the votes of the Electors by punishing them for their “faithless” votes is no different from a system of direct election by popular vote, which the framers rejected.
  
4. \_\_\_\_\_ Going back to the first contested Presidential Election—the Election of 1796—no one, including many of the drafters of the Constitution, expected these Electors to exercise their independent judgment. At the time, depending on the State, either the State legislature or the voters themselves would choose the Electors; however, before the election, these potential Electors made known their intention to vote for a particular candidate. That is, Electors have always pledged their votes to candidates and parties, and Electors were not selected for their wisdom, but for their loyalty.
  
5. \_\_\_\_\_ It is exceedingly rare for Electors to vote against the winner of their States’ popular votes. In fact, there have only been about 180 “faithless Electors” in the nation’s history, during which time over 23,000 Electoral votes have been cast.
  
6. \_\_\_\_\_ The Maryland State Constitution, adopted before the United States Constitution, included a provision (no longer in effect) that created an Electoral College for State Senate elections. Maryland’s Constitution required Electors to pledge to “elect without favor, affection, partiality, or prejudice, such persons for Senators, as they, in their judgment and conscience, believe best qualified for the office.” Prominent drafters of the United States Constitution knew about Maryland’s Constitution and referred to it at the Constitutional Convention. But the U.S. Constitution does not include language like Maryland’s, indicating that the drafters did not intend for Electors to exercise their discretion.

7. \_\_\_\_\_ Under Article II and the Twelfth Amendment, “Electors” are called upon to “vote by ballot.” These terms carry their everyday meanings. When someone “elects” or “votes” to do something, she makes a choice. The Washington pledge law prevents Electors from exercising any choice, rendering the terms meaningless and stopping Electors from exercising their constitutional duties.
8. \_\_\_\_\_ The Twelfth Amendment allows political parties to run “tickets”—a Presidential nominee and a Vice-Presidential nominee—without risking repeats of the Elections of 1796 and 1800 (refer back to the footnote above). In doing so, the Twelfth Amendment acknowledged, facilitated, and constitutionalized what was true at the time and remains true now: an Elector merely votes for the party ticket that wins the popular vote in her State. Notably, if the Electors were empowered to exercise their discretion, why didn’t they resolve the crises in 1796 or 1800 themselves? That a constitutional amendment was required to alter the procedure for electing the President, suggests that the Electors understood that they were not called on to exercise discretion.
9. \_\_\_\_\_ Article II reads: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors....” The key word here is *appoint*. In Ray, the Supreme Court addressed a question within the scope of a State’ appointment power—whether, as a condition of *appointment*, a State can impose a pledge requirement. But the Washington law does not *condition* an Elector’s *appointment*, it imposes a penalty *after* an Elector has been appointed and, in fact, *after* she has already cast her vote. The Washington law, therefore, does not regulate the “manner of appointment,” but polices the substantive votes of its Electors. This is outside the bounds of the State’s Article II authority.
10. \_\_\_\_\_ While the result might be different if there was a genuine crisis, for example, the death of a candidate, this case does not present that question. Agreeing with the rule that Electors must always be allowed to exercise their discretion goes too far. Electors could vote against their pledges for any reason they, “in their discretion,” find justified,

including just because they think their party's candidate is bad. This would allow Electors to override the will of the people whenever they disagree with the people's choice. This is troublingly anti-democratic.

### JUSTICE SHEET

You are a Supreme Court Justice hearing Chiafalo v. Washington. Answer the following questions by referencing the SUMMARY OF FACTS and BRAINSTORMING and ARGUMENT SHEETS.

1. Pretend that you are listening to the oral arguments of the attorneys representing Chiafalo. What three (3) questions would you ask? Select three (3) Justices to ask one question each during Chiafalo's oral argument. You may interject with your questions at any time.

A.

B.

C.

2. Pretend that you are listening to the oral arguments of the attorneys representing Washington. What three (3) questions would you ask? Select three (3) different Justices to ask one question each during Washington's oral argument. You may interject with your questions at any time.

A.

B.

C.

3. After hearing the oral arguments, you have to decide who wins the case. Write a brief court opinion (no more than three (3) paragraphs) ruling either in favor of Chiafalo or Washington. You should decide how you want to divide the work of writing the opinion yourselves. Remember, if you are ruling in favor of Chiafalo, then you are arguing that Washington's pledge law unconstitutionally infringes on an Elector's right to exercise her discretion in casting her votes in the Electoral College under Article II. If you are ruling in favor of Washington, then you are arguing that the Washington pledge law is constitutional because it merely allows the State to enforce its power to appoint Electors, and reign in the discretion of Electors, under Article II.

No pressure!

\_\_\_\_\_ Chiafalo

\_\_\_\_\_ Washington