Washington and Lee Law Review

Volume 47 | Issue 2 Article 7

Spring 3-1-1990

I. Constitutional Law

In *Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered whether the free exercise clause of the first amendment exempted members of the Shiloh True Light Church of Christ (the Church), a separatist religious sect, and their children's employers from the requirements of the Fair Labor Standards Act of 1938, 29 U.S.C. sections 201-219 (1982) (the child labor laws). The child labor laws prohibit the employment of children ages fourteen and under. According to the Secretary of Labor, the defendants, Wendell's Woodwork, Inc. and McGee Brothers Company, employed children as young as nine and ten years old.

The controlling officers of Wendell's Woodwork, Inc. and four of the five owners of McGee Brothers Company were members of the Church. The Church members believed in a home teaching program supplemented with vocational training. As part of this training program, the defendants employed children of Church members to perform a variety of jobs including operating power equipment and laying brick and cinderblock.

Alleging that the defendants' actions violated the child labor laws, the Secretary of Labor brought an action seeking to enjoin the defendants from employing children in the vocational training program. In response, the defendants contended that the free exercise clause of the first amendment exempted the defendants from the requirements of the Fair Labor Standards Act. The United States District Court for the Western District of North Carolina granted the Secretary of Labor's motion *in limine* to prevent the introduction of evidence supporting the defendants' free exercise argument. Consequently, the court held that the religious rights of Church members did not bar the Secretary of Labor's enforcement of the labor laws. On appeal to the United States Court of Appeals for the Fourth Circuit, the defendants conceded that the wage-hour provisions applied, but argued that application of the minimum age requirement was unconstitutional.

To resolve the issue, the Fourth Circuit compared the burden of child labor laws on the defendants' religious interest with the strength of the government's interest in enforcing child labor laws. The court noted that the United States Supreme Court used this balancing test in *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), to resolve a similar conflict between labor laws and free exercise rights. In *Alamo* the defendant, the Alamo Foundation, rehabilitated drug addicts by employing them in commercial enterprises. The Alamo Foundation did not pay the addicts wages, but did provide the addicts with various necessities, including food and lodging. The Supreme Court, finding that the government's interest in enforcing the wage-hour laws outweighed the burden of the wage-hour laws on the defendant's religious interest, held that the wage-hour laws were constitutionally applicable.

The Fourth Circuit analyzed the case at bar using the balancing test that the Supreme Court set forth in *Alamo*. Citing *Prince v. Massachusetts*,

321 U.S. 158, 168 (1944), in which the Supreme Court explained that child employment is an area particularly appropriate for broad state regulation, the Fourth Circuit explained that the government has a substantial interest in regulating child labor. Furthermore, the court noted that commercial enterprises that compete with the defendants have a legitimate interest in the uniform application of child labor laws. Accordingly, the court found that the government's interest in the enforcement of child labor laws outweighed the burden of child labor laws on the defendant's religious interest. The Fourth Circuit, therefore, affirmed the decision of the district court.

In *Martin v. Taylor*, 857 F.2d 958 (4th Cir. 1988), the Fourth Circuit considered whether, by using a single incident as a basis for convicting a defendant of both vandalism and attempted breaking and entering with the intent to commit larceny, a state had violated a criminal defendant's fifth amendment double jeopardy rights. In *Martin* the Commonwealth of Virginia (the Commonwealth) prosecuted petitioner Melvin W. Martin for misdemeanor vandalism. The Commonwealth based the vandalism charge on the allegation that Martin had broken the glass door of a gas station cashier's booth while the gas station was closed for the night. The Commonwealth claimed that Martin's action violated VA. CODE ANN. section 18.2-137 (1988), which provides that a person who unlawfully damages or destroys property not the person's own commits a misdemeanor. Subsequently, based on the Commonwealth's allegation, the General District Court for the City of Buena Vista convicted Martin of misdemeanor vandalism.

In addition to the misdemeanor claim, the Commonwealth in a later trial tried Martin for the felony of attempted breaking and entering with the intent to commit larceny. The Commonwealth based this second charge on the same nighttime incident that led to Martin's vandalism conviction. The Commonwealth argued that evidence showing that Martin had the specific intent to commit larceny and that he carried out some overt act tending towards, but falling short of, the consummation of his intended crime was sufficient to establish that Martin had committed attempted breaking and entering with the intent to commit larceny. Accordingly, the Commonwealth argued that Martin's testimony about his intent to obtain a match from the station proved Martin's specific intent to steal a match from the station, and that Martin's breaking of the glass constituted Martin's commission of an overt act tending towards, but falling short of, the consummation of larceny. The Circuit Court for the City of Buena Vista, the Virginia state court that held Martin's second trial, agreed with this rationale and, therefore, convicted Martin of attempted breaking and entering with the intent to commit larceny.

As a result of his two state-court convictions, Martin filed in the United States District Court for the Western District of Virginia a petition for a writ of habeas corpus. Martin alleged that by twice putting him in jeopardy for the same offense the Commonwealth violated his fifth amendment

rights. The district court held that for purposes of a double jeopardy analysis the offenses of vandalism and attempted breaking and entering with the intent to commit larceny were not the same offense. Therefore, the district court denied Martin's petition for a writ of habeas corpus.

Martin appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, alleging that, because the same evidence that the Commonwealth used to convict Martin of misdemeanor vandalism also was necessary to establish that Martin committed breaking and entering with the intent to commit larceny, the Commonwealth had violated Martin's double jeopardy rights. In considering Martin's appeal, the Fourth Circuit noted *Jordan v. Virginia*, 653 F.2d 870 (4th Cir. 1980). In *Jordan* the Fourth Circuit held that the government violates a person's double jeopardy rights if, in successively trying the person for the same incident, the evidence that the government necessarily uses to obtain a conviction at the first trial also is sufficient evidence to establish an offense charged at the second trial.

Applying the *Jordan* analysis to the facts in *Martin*, the Fourth Circuit first noted the absence of any record of Martin's vandalism trial. Because of this absence, the court assumed both that the Commonwealth's proof at the vandalism trial had followed the charge and that the vandalism offense was the only offense charged or tried. Therefore, the Fourth Circuit reasoned that the only evidence which the Commonwealth necessarily must have presented at the vandalism trial was the evidence that Martin had shattered the glass. Thus, the Fourth Circuit concluded that only the shattered glass evidence was relevant to the *Jordan* double jeopardy analysis.

Having determined that only the shattered glass evidence was relevant to the double jeopardy analysis, the Fourth Circuit considered whether the evidence that Martin shattered the glass was necessary to establish attempted breaking and entering with the intent to commit larceny, the offense charged at the second trial. The Fourth Circuit noted that under VA. CODE ANN. sections 18.2-90 and 18.2-91 (1988) an unlawful entering done during the nighttime, even if not accompanied by a breaking, is sufficient to establish the elements of the underlying felony of breaking and entering. Therefore, the Fourth Circuit reasoned that, to establish the elements of attempted breaking and entering with the intent to commit larceny, the Commonwealth did not have to prove that Martin actually broke the glass. The Fourth Circuit next noted that an attempted crime consists of a specific intent and an overt act. The Fourth Circuit further stated that the Commonwealth could have established Martin's commission of an overt act in any of several ways other than by reference to Martin's shattering of the glass. The Fourth Circuit observed that at the trial the Commonwealth put on evidence showing that, during the incident at the gas station, Martin approached the booth, pushed and pulled the sliding glass window, and placed his hand in the opening that the shattered glass created. The appellate court concluded that any one of these three actions by Martin may have sufficed to satisfy the overt conduct component of the attempt crime. In addition, the Fourth Circuit found that Martin's testimony that he intended to steal from the gas station established the specific intent component.

Consequently, the Fourth Circuit decided that, to obtain Martin's conviction for attempted breaking and entering with the intent to commit larceny, the Commonwealth did not necessarily have to rely on the evidence of Martin's breaking of the glass. Accordingly, the Fourth Circuit held that, because the evidence necessary for Martin's vandalism conviction was not necessary to establish that Martin committed breaking and entering with the intent to commit larceny, the Commonwealth had not successively tried Martin for the same offense so as to violate his double jeopardy rights. Therefore, the Fourth Circuit affirmed the district court's denial of Martin's petition for a writ of habeas corpus.

Circuit Judge Murnaghan dissented on the grounds that the majority had not properly followed *Jordan*. Judge Murnaghan noted that, although the Commonwealth in the felony trial did not need to rely on the evidence that Martin broke the glass, the Commonwealth in fact had relied on that evidence. Judge Murnaghan stated that the majority improperly had based its analysis on the fact that the Commonwealth could have established the same offense without any discussion of Martin's breaking of the glass. Judge Murnaghan reasoned that a proper implementation of *Jordan* requires the court to look at the evidence the Commonwealth actually presented and not at the existence of other evidence that the Commonwealth might have presented to achieve the same result. Judge Murnaghan noted that in *Martin*, to prove that Martin engaged in an overt act tending toward the consummation of the crime of larceny, the Commonwealth admitted that it in fact did rely on the evidence that Martin broke the glass. Thus, Judge Murnaghan concluded that, because the Commonwealth actually used the same evidence at both trials and that evidence was necessary to obtain the second conviction, the Commonwealth had violated Martin's double jeopardy rights.

In *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736 (4th Cir. 1989), the Fourth Circuit considered whether an appellate court independently can modify a jury's award for punitive damages. In *Shamblin's Ready Mix* the plaintiff, Shamblin's Ready Mix, Inc. (Shamblin), brought a wrongful conversion action against Eaton Corporation (Eaton) and Eaton's local distributor, Scott Equipment Company (Scott). According to the court, Shamblin had purchased a pump and motor assembly from Eaton through Scott. Subsequently, the equipment malfunctioned and Shamblin asked Scott to replace the equipment. Scott originally offered to repair the equipment at no charge, but later withdrew its offer because Shamblin continued to insist on total replacement of the equipment. Shamblin then returned the equipment to Scott and threatened to sue Eaton and Scott if they did not replace the equipment.

After evaluating the equipment, Scott determined that the equipment failure resulted from contamination and was not covered under the terms of Eaton's warranty. To confirm this finding, Scott sent the equipment to Eaton without Shamblin's permission or knowledge. After Scott informed Shamblin that the warranty did not cover the equipment repair, Shamblin renewed its threat to sue Scott and Eaton. Additionally, Shamblin demanded

that Scott return the damaged equipment. Because Scott had transferred the equipment to Eaton, Scott informed Shamblin that Scott was unable to return the damaged equipment. Eaton refused to return the equipment because Eaton wanted to maintain control of the equipment in anticipation of litigation. Shamblin filed an action for conversion against Eaton and Scott and then refused Eaton's subsequent offer to return the equipment.

In the United States District Court for the Southern District of West Virginia the jury awarded Shamblin $3,531 in compensatory damages and $600,000 in punitive damages under Shamblin's action for conversion. Eaton appealed the judgment to the United States Court of Appeals for the Fourth Circuit, which held that, although punitive damages were allowable under West Virginia law, the jury's award was excessive because Shamblin used inadmissible evidence to mislead the jury. The court noted that although a low-level Eaton employee had made an ad hoc decision to retain Shamblin's equipment, Shamblin's closing argument misled the jury into believing that Eaton maintained an ongoing policy of failing to return damaged equipment to customers. As a result, the court set aside the punitive damage award and remanded the case to the district court for a new trial. On remand, the jury awarded Shamblin $650,000 in punitive damages, and Eaton appealed the judgment for a second time to the Fourth Circuit.

The Fourth Circuit again found that the punitive damage award was excessive in light of Shamblin's misconduct at the trial level. The Fourth Circuit noted that the punitive damage award exceeded the compensatory damage award by a ratio of more than 184:1. This imbalance, the court explained, appeared grossly excessive because Shamblin did not suffer any personal injuries, business losses, or property damage from Eaton's actions. In addition, the court noted that Eaton had offered to return the equipment after Shamblin filed the complaint. Finally, the court found that the Eaton employee responsible for the decision to retain the equipment did not act with harmful or malicious intent. The Fourth Circuit, therefore, concluded that, although a court should set aside a jury's damage award only under exceptional circumstances, a miscarriage of justice would occur if the court did not overturn the jury's punitive damages award.

After concluding that the jury's punitive damages award was excessive, the court considered whether a jury would have to retry the punitive damage award for a third time. Eaton and Scott petitioned the Fourth Circuit to make an independent determination on the punitive damage award. Shamblin, however, contended that such an action by the appellate court would violate the seventh amendment. While the Fourth Circuit found no specific case law on whether a jury must determine a punitive damage award, the court noted that in *Kinnon v. Gilmer*, 131 U.S. 22 (1889), the United States Supreme Court held that courts could not unilaterally modify compensatory damage awards. The Fourth Circuit, however, distinguished *Kinnon* because the *Kinnon* case involved compensatory damage awards and not punitive damage awards. The Fourth Circuit explained that punitive damage awards promote public welfare whereas compensatory damage awards punish private wrongs.

The Fourth Circuit compared *Kinnon* to *Tull v. United States*, 481 U.S. 412 (1987), in which the United States Supreme Court held that the seventh amendment did not require a jury to determine the amount of the remedy in actions involving civil penalties because such a determination was not a "fundamental element of the trial." The Fourth Circuit explained that punitive damages were analogous to civil penalties because both remedies serve the public interest. The court, therefore, concluded that the *Tull* holding was applicable to the case at bar. Applying the *Tull* rationale, the Fourth Circuit concluded that, once a jury makes the initial determination of liability, an appellate court independently can modify the amount of punitive damages as a matter of law. In support of this conclusion, the court noted that the First, Sixth, Seventh, and Eighth Circuits also had reduced punitive damage awards without discussion of whether the seventh amendment was applicable. Additionally, the court explained that a policy of appellate review of jury awards for punitive damages allows the appellate court to balance fully all relevant circumstances justifying punishment of a defendant.

After determining that the jury's punitive damage award was excessive and that an appellate court independently may modify a jury's punitive damage award, the Fourth Circuit reviewed Eaton's and Scott's conduct to determine the appropriate amount of Shamblin's remedy. Based on Shamblin's lack of personal injury or property damage, Shamblin's use of inadmissible evidence at trial, the Eaton officers' and directors' noninvolvement in the decision to retain the damaged equipment, and Eaton's and Scott's lack of prior history of similar conduct, the Fourth Circuit held that $60,000 in punitive damages was sufficient to punish Eaton for allowing a low-level employee wrongfully to retain Shamblin's damaged equipment. Accordingly, the court set aside the jury's punitive damage award and entered judgment in Shamblin's favor in the amount of $60,000.

In *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989), the Fourth Circuit considered whether a plaintiff could compel an employee of the Environmental Protection Agency (EPA), Jack L. Downie, to testify in a state court civil action with respect to information acquired during the course of his official duties and against the specific instructions of his EPA superiors. The state trial court, at the request of both parties, served Downie with subpoenas to testify in a tort action about his investigation of an alleged gasoline leak. The Regional Counsel for the EPA decided that Downie's testimony was not in the interest of the EPA, prohibited Downie from testifying, and moved to quash the subpoenas. The state trial court denied the EPA's motion to quash the subpoenas and directed Downie to testify. The EPA subsequently removed the subpoena proceedings to the United States District Court for the Northern District of West Virginia pursuant to 28 U.S.C. section 1442(a) (1948).

The district court initially held that removal was proper and then reviewed the EPA's decision to prohibit Downie's testimony. The district court found that Downie's testimony was not subject to privilege, that it

was essential to the administration of justice, that Downie was the most knowledgeable and impartial source of information, and that testifying would result only in minimal inconvenience to Downie and the EPA. To reach its conclusion, the district court relied upon a "housekeeping" statute, 5 U.S.C. section 301 (1966), that permits an executive department head to regulate the conduct of its employees but that does not authorize withholding information from the public. The district court rejected the EPA's reliance upon EPA regulations, which seek to ensure that an employee's official time is used only for official purposes, because a department head cannot claim a privilege to withhold information from the public. The district court also rejected the EPA's defense of sovereign immunity because neither the United States nor the EPA were named parties in the tort action.

The EPA appealed to the Fourth Circuit. The EPA argued that, in the absence of a waiver of sovereign immunity, the EPA is not subject to subpoenas that a state or local court issues in actions in which the EPA is not a party. The EPA also argued that the subpoenas did not comply with the internal EPA regulations concerning state court subpoenas, and therefore, the subpoenas should be quashed.

The Fourth Circuit began its discussion of the case by reviewing case law recognizing the authority of agency heads to restrict testimony of their subordinates. Following the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and the Ninth Circuit's decision in *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986), the Fourth Circuit stated that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's direction given under valid agency regulations. According to the Fourth Circuit, prohibitions on such testimony conserve resources and minimize governmental involvement in controversial matters that are unrelated to official business.

The Fourth Circuit next addressed the EPA's claim that the state circuit court and the federal district court lacked jurisdiction to issue the subpoenas. Finding that the jurisdiction of a federal court upon removal is derivative of that of the state court, the Fourth Circuit decided that the doctrine of sovereign immunity precluded the state court and, thus, the federal court upon removal from exercising jurisdiction to compel Downie to testify. Recognizing that the government was not a party to the underlying action, the Fourth Circuit found that the nature of a subpoena proceeding is inherently that of an action against the United States. Following the Supreme Court's decision in *Dugan v. Rank*, 372 U.S. 609 (1963), the court stated that the doctrine of sovereign immunity would bar the subpoena proceedings even though the subpoena proceedings are against a federal employee and not against the government.

The Fourth Circuit went on to find that the principle of federal supremacy reinforces the protection of sovereign immunity and prevents the state court's attempt to override the EPA regulations. The state court's action violated the Constitution's supremacy clause by asserting its power of judicial review over federal agencies and by contradicting the agency's duly enacted regulations that have the force and effect of federal law. Thus,

the Fourth Circuit held in *Downie* that a state may not compel an EPA employee to testify against the orders of a superior if the superior is acting pursuant to duly promulgated regulations. The Fourth Circuit recognized the current explosion in environmental litigation and stated that federal agencies have valid and compelling interests in keeping their employees free to conduct their official business without being targeted as potential witnesses in private civil actions.

In *Foremost Guaranty Corp. v. Community Savings & Loan, Inc.*, 826 F.2d 1383 (4th Cir. 1987), the Fourth Circuit considered in an interlocutory appeal whether the eleventh amendment of the United States Constitution bars a declaratory judgment action against a savings and loan for which a state agency functions as an appointed receiver. In *Foremost Guaranty* the plaintiffs, Foremost Guaranty Corporation (Foremost) and United Guaranty Residential Insurance Company (UGI), issued mortgage guarantee insurance policies to EPIC Mortgage, Inc. (EMI), a subsidiary of Community Savings and Loan, Inc. (Community). Subsequently, Foremost and UGI sought to rescind the mortgage guaranty insurance policies, claiming that EMI used fraud and misrepresentation to obtain the insurance policies. Thus, the plaintiffs brought in the United States District Court for the Eastern District of Virginia a consolidated action against EMI and Community seeking a declaratory judgment that would allow Foremost and UGI to rescind the defendants' insurance policies. As a result of the plaintiffs' actions against the defendants, the Circuit Court for Montgomery County, Maryland, appointed the Maryland Deposit Insurance Fund (MDIF) as conservator and receiver of Community.

In response to the plaintiffs' allegations MDIF, as Community's receiver, claimed that because MDIF, a state agency, acts both as an insurer of deposits in Maryland-chartered savings and loans and as Community's receiver, the State of Maryland was the real party in interest in the plaintiffs' suit. Consequently, on the grounds that the eleventh amendment sovereign immunity clause bars the plaintiffs from bringing an action in which the State of Maryland is the real party in interest, MDIF filed a motion to dismiss the plaintiffs' claims.

In addressing the defendants' motion to dismiss, the district court distinguished between MDIF's function as insurer and MDIF's function as receiver. The district court noted that, to the extent that MDIF functioned as Community's receiver, MDIF did not operate as an arm of the State in its relationship to Community. The district court further noted that MDIF's capacity as an insurer of Community's deposits gave MDIF a claim against Community's assets. The district court also recognized that an adverse judgment against Community would deplete the assets available for MDIF to use to satisfy insurance claims against Community. However, the district court concluded that the potential depletion of assets available to satisfy insurance claims does not constitute the direct depletion of state treasury funds necessary to implicate the eleventh amendment bar against suing the state. The district court consequently denied the defendants' motion to dismiss.

Subsequently, the defendants filed a motion to amend the court's order for the purpose of certifying an interlocutory appeal pursuant to 28 U.S.C. section 1292(b) (1986). The district court denied the defendants' motion to amend. Nonetheless, even though the district court did not enter final judgment or certify its order for final appeal, the defendants appealed the district court's refusal to grant a motion to dismiss. The defendants argued on appeal that, because the eleventh amendment precludes parties from suing a sovereign state or its operating agencies, the plaintiffs cannot sue a savings and loan such as Community for which a state agency such as MDIF acts as receiver.

In considering the defendants' appeal the Fourth Circuit initially addressed whether the case at bar fell within a narrow exception to the final judgment rule, which exception the United States Supreme Court articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Fourth Circuit noted that even though a district court has not certified its order for an interlocutory appeal, under *Cohen* and its progeny an appellate court may review an issue if the trial court decides the conclusive issue of the case; if the trial court decides an important collateral matter independent of the litigation's primary issue; if the trial court's decision precludes reviewability subsequent to a final judgment; or if the urgency of the matter necessitates a ruling prior to the final judgment and presents a meritorious, disputed question upon appeal. In *Foremost Guaranty* the Fourth Circuit reasoned that the district court's decision on the eleventh amendment issue fit within the collateral order exception to the final judgment rule. Consequently, the Fourth Circuit allowed the defendants' interlocutory appeal.

Having determined that the defendants were entitled to an interlocutory appeal, the Fourth Circuit addressed whether the district court erred in refusing to grant the defendants' motion to dismiss. In considering the defendants' eleventh amendment claim, the Fourth Circuit narrowed the issue to a question of whether, by suing a savings and loan for which a state agency acts as receiver, the plaintiffs in fact were suing the state. To determine whether the state was a party in interest, the Fourth Circuit used a test that the United States Supreme Court outlined in *Dugan v. Rank*, 372 U.S. 609 (1963). The Fourth Circuit noted that under the *Dugan* rationale a state qualifies as a real party in interest only if an adverse judgment against the state requires the state to satisfy any potential judgment with public funds, or if the adverse judgment affects, disrupts, or restrains the daily functioning of the state government.

Applying the *Dugan* test to the circumstances in *Foremost Guaranty*, the Fourth Circuit examined the relationship between MDIF and the State. The Fourth Circuit noted that, because the plaintiffs had not alleged wrongdoing by, or requested relief from, MDIF, the state agency was involved in the suit solely as Community's receiver. Consequently, the appellate court recognized that any adverse judgment against Community, while reducing the assets available for MDIF to distribute upon liquidation, would not interfere with the State's administration of public funds. Further, the Fourth Circuit noted that rescission of the mortgage guaranty insurance

policies subsequently might increase MDIF's exposure as an insurer of deposits. However, the Fourth Circuit reasoned that, because rescission of the insurance policies would not necessarily result in distribution of state-appropriated funds, liability to the State would remain too indirect and speculative to implicate the eleventh amendment. Because the plaintiffs' suit against Community did not interfere with MDIF's administration of public funds and posed only indirect and collateral liability on the State, under the *Dugan* test the defendants failed to establish that the State of Maryland was a party to the suit. Accordingly, the Fourth Circuit concluded that MDIF failed to prove that the protections of the eleventh amendment apply when an agency acts merely as a conservator. Consequently, the Fourth Circuit affirmed the district court's denial of the defendants' motion to dismiss.

In *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989), the Fourth Circuit considered whether Maryland's requirement that nonindigent write-in candidates for certain public offices file a certificate of candidacy and pay a filing fee to become "official" candidates violates the first and fourteenth amendments to the United States Constitution. Reba Williams Dixon and Dana Burroughs campaigned in the 1987 Baltimore City elections for the offices, respectively, of Mayor of Baltimore and President of the Baltimore City Council. The Maryland Election Code, MD. ELECTION CODE ANN. sections 1-1(a)(20), 4A-6, 4D-1, 17-5 (1986), requires that to gain official status write-in candidates must file certificates of candidacy with the state and pay the same filing fees as required of candidates whose names appear on the ballot. The state may waive the $150 filing fee if the candidate demonstrates an inability to pay. Should a prospective write-in candidate fail to pay the filing fee or to petition for indigent status, the state will exclude the candidate's name from the official list of candidates that Maryland disseminates to the public, and the state will not report publicly after the election the number of votes that the write-in candidates received. Dixon and Burroughs sought to run as write-in candidates, but refused to pay the required filing fees or to petition the Board for permission to file as indigent candidates as required by law. The Board consequently rejected Dixon's and Burroughs's certificates of candidacy.

Dixon and Burroughs immediately instituted a challenge to the constitutionality of the Maryland law in the United States District Court for the District of Maryland. Dixon and Burroughs claimed that Maryland's imposition of a filing fee and refusal to report the votes that nonofficial write-in candidates received violate the first and fourteenth amendments. Two residents of Baltimore who cast votes for Dixon and Burroughs, Edwin B. Fruit and Margaret Mary Kreiner, joined Dixon and Burroughs as plaintiffs in the challenge.

In addressing the plaintiffs' claims, the district court only considered whether the Maryland law violates the equal protection clause of the fourteenth amendment. The district court upheld the Maryland law under

the equal protection clause because the court found that the $150 write-in filing fee does not impose a significant burden on candidates or voters and that Maryland's interests in defraying the cost of write-in candidacies and discouraging frivolous candidacies provide a rational basis for the Maryland law. The plaintiffs appealed the district court's ruling to the United States Court of Appeals for the Fourth Circuit.

In evaluating the plaintiffs' challenge, the Fourth Circuit first noted that, while legislative restrictions on candidates for public office may infringe upon the constitutional rights of the candidates themselves, such restrictions also may violate voters' first amendment right of association and the fundamental right to vote. In addition, the Fourth Circuit expressed dissatisfaction with the equal protection analysis the district court used that emphasized the effect of the restrictions upon the candidate rather than upon the voter. Consequently, the Fourth Circuit abandoned the equal protection analysis the district court used when examining the constitutionality of legislative restrictions on candidacy.

The Fourth Circuit adopted a two-part test under the first and fourteenth amendments that does not require a separate analysis under the equal protection clause of the fourteenth amendment. The Fourth Circuit's analysis focused on the impact of the challenged laws upon the voters' constitutional rights rather than upon the candidates' rights. Under this test, when evaluating a constitutional challenge to a state's elections laws, the reviewing court first must examine the character and magnitude of the asserted injury to the rights protected by the first and fourteenth amendments that the plaintiff voter seeks to vindicate. Second, the court must identify and evaluate the legitimacy and strength of the interests the state has put forward as justifications for the burden imposed by its rule. In examining the state's interests, the court must consider the extent to which the state's interests make it necessary to burden the plaintiff's rights and determine whether the challenged law is narrowly tailored to serve a compelling state interest.

The Fourth Circuit thus began its analysis of the plaintiffs' challenge by considering the character and magnitude of the injury to the plaintiffs' first amendment right of association that Maryland's write-in filing fee requirement imposed. The Fourth Circuit found that Maryland's denial of official status to uncertified write-in candidates deprives the candidates and their supporters of the intangible benefits that a political campaign derives from the "official" designation. The court found, however, that the magnitude of this injury was not substantial, as Dixon and Burroughs were able to campaign vigorously regardless of their unofficial status.

The Fourth Circuit next evaluated the character and magnitude of the injury that Maryland's refusal to report publicly the number of votes cast for uncertified write-in candidates caused to the plaintiff voters' fundamental right to cast an effective vote. According to the court, the ability to cast a write-in ballot for a candidate, particularly a candidate who represents an unpopular or minority view, is an important avenue of dissident expression. Because most write-in candidates represent unpopular or minority views and, therefore, stand little chance of winning, the expressive quality of

write-in votes depends in large part upon the public reporting of the number of write-in ballots cast. Refusing to make public the number of votes a candidate has garnered because of a failure to pay a filing fee, according to the court, is tantamount to preventing voters from casting their votes for a particular candidate altogether. Consequently, the court found that the Maryland law imposed an injury of great magnitude to the voters' right to cast an effective vote.

After concluding that the Maryland filing fee requirement infringed upon the voters' first amendment right of association and right to cast an effective vote, the Fourth Circuit examined the interests that the State of Maryland asserted in justification of the challenged requirements. First, Maryland argued that the filing fee required of nonindigent write-in candidates was intended to help defray the cost of write-in candidacies. The Fourth Circuit acknowledged that states may require election candidates to pay fees only in certain limited circumstances. According to the court, the state may require the candidate to bear only those expenses that arise as a result of that candidate's decision to enter the race. The state, however, must bear expenses attributable to the legislature's decision to hold the election. The court found that the State of Maryland failed to prove that it calculated the $150 fee to cover only those election expenses chargeable to the candidates. Accordingly, the court held Maryland's interest in defraying election expenses insufficient to justify the filing fee's burden upon the voters' first amendment associational rights and right to cast an effective vote.

The Fourth Circuit next examined Maryland's claim that its interest in preventing fraudulent and frivolous candidacies and the resulting potential for voter confusion justifies the imposition of a filing fee with respect to write-in candidates. While the court acknowledged that ensuring the legitimacy and seriousness of candidates for public office may in some circumstances constitute a legitimate state objective, the court held that the imposition of a filing fee is a wholly ineffective and impermissible means of accomplishing that potentially legitimate goal. According to the court, Maryland's filing fee is both over- and under-inclusive in discouraging frivolous candidates in that it fails to bar both wealthy frivolous candidates, who can afford the fee, and indigent frivolous candidates, who need not pay the fee. Accordingly, the Fourth Circuit held Maryland's write-in candidate filing fee requirement insufficiently narrowly tailored to Maryland's regulatory interest in light of the burden the requirement places on the plaintiffs' constitutional rights.

After holding the filing fee requirement unconstitutional, the Fourth Circuit turned to the question of the constitutionality of Maryland's refusal to report publicly the number of votes cast for anyone other than official, state-certified candidates. The court first held that Maryland's economic interests could not justify its refusal to report votes cast for uncertified candidates. According to the court, under the current system Maryland election authorities count all write-in votes as a matter of course. The counting and reporting of votes of uncertified candidates thus is an expense

resulting from the legislature's decision to hold an election rather than from the candidates' decision to enter the race. Consequently, the court found that Maryland must bear the expense of counting the write-in votes.

The court next held that the State's interest in preventing frivolous candidacies or the reporting of write-in votes cast for fictitious personages was likewise insufficient to justify Maryland's refusal to report such votes. As the court stressed throughout its opinion, write-in candidacies have great value as avenues for dissident expression, and votes cast even for noncandidates or fictitious persons may have value as the voter's statement of dissatisfaction with all of the candidates on the ballot. To refuse to report these votes as a penalty for failure to pay a filing fee or failure to obtain state certification unacceptably burdens the rights of voters. Consequently, the court emphasized that, while drafting a constitutionally valid pre-election certification requirement or filing fee may be possible, under no circumstances will such requirements be valid as conditions to the post-election reporting of votes cast for a candidate.

In *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989), the Fourth Circuit considered whether the at-large system of voting for the city council in Norfolk, Virginia, violates the Voting Rights Act of 1965, 42 U.S.C.A. sections 1973-1973bb-1 (1965), by interfering with the plaintiffs' right to elect a pro rata share of councilmembers. In *Collins* the plaintiffs, seven black citizens of Norfolk and the Norfolk Branch of the National Association for the Advancement of Colored People, alleged that the at-large system of voting, aggravated by staggered terms, diluted the voting strength of black citizens. Plaintiffs supported their allegation with reference to a historical lack of a minority presence on the city council. Plaintiffs stated that until 1968 the seven-member council consisted of all white members. From 1968 to 1977, one black member served on the council. Upon resignation of the only black councilmember in 1977, the mayor appointed another black candidate whom the city subsequently re-elected to serve three consecutive four year terms. Not until after the plaintiffs commenced this action did an additional black member serve on the city council, marking the first time that two black members simultaneously have served on the city council. Plaintiffs alleged that, because the city's population is thirty-five percent black and the black population has a high rate of participation in the electoral process, the inability of the black population to elect more than one councilmember at a time is a result of Norfolk's at-large voting system.

According to plaintiffs, the inability to elect "representatives of their choice" violates the Voting Rights Act of 1965 by using race or color to deny black citizens of Norfolk the right to vote. Plaintiffs further alleged that, although two black members simultaneously have sat on the council since 1984, their simultaneous election can be attributed only to special circumstances rather than to a voting scheme which complies with the Voting Rights Act of 1965. Consequently, plaintiffs sought to eliminate the at-large system of voting to allow plaintiffs to elect representatives of their choice.

In response to plaintiffs' claim, the United States District Court for the Eastern District of Virginia entered judgment for the city, *Collins v. City of Norfolk*, 605 F. Supp. 377 (E.D. Va. 1984) (*Collins I*), and the Fourth Circuit affirmed in *Collins II*, 768 F.2d 572 (4th Cir. 1985). However, the United States Supreme Court vacated the Fourth Circuit's judgment in *Collins III*, 478 U.S. 1016 (1986), and remanded to the Fourth Circuit for consideration in light of *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Collins IV*, 816 F.2d 932 (4th Cir. 1987), the Fourth Circuit reversed the district court's judgment and remanded for further proceedings. After remand the district court entered judgment for the city in *Collins V*, 679 F. Supp. 557 (E.D. Va. 1988).

In *Collins V* the district court applied the *Gingles* three-pronged test utilized if at-large voting is alleged to dilute votes in violation of the Voting Rights Act of 1965. According to the *Gingles* test plaintiffs must prove three facts. First, the plaintiffs must show that the black minority is adequately large and geographically condensed so as to comprise a majority in a single member district. Second, the plaintiffs must show that the black minority politically is cohesive. Third, the plaintiffs must show that the white majority consistently votes as a bloc, enabling the majority to prevail over the minority's preferred candidate.

In applying the *Gingles* test the district court determined that the plaintiffs sufficiently proved the first two elements of their cause of action by proving that Norfolk's black population is sufficiently large and geographically compact to constitute a majority in two districts, and that Norfolk's black population politically is cohesive enough to satisfy the second prong of *Gingles*. However, the district court reasoned that the statutory term "representatives of their choice" included all candidates who received greater than fifty percent of the black vote, regardless of whether an unsuccessful candidate received a higher percentage of the black vote. By reference to the election of candidates who received a majority of the black vote, yet not the highest percentage of black votes, and the election of a second simultaneous black councilmember in 1984, the district court concluded that no indications of racial-bloc voting existed in Norfolk city council elections. Thus, the district court found that, because the plaintiffs failed to prove that the white majority engages in racial-bloc voting, the plaintiffs failed the third prong of the *Gingles* test. Accordingly, the district court held that the plaintiffs failed to prove that the at-large voting scheme dilutes the voting strength of the black minority enough to constitute a violation of the Voting Rights Act of 1965.

Plaintiffs appealed, arguing that the district court both erroneously identified the minority's preferred representatives and erroneously attributed inordinate importance to the election of a second black councilmember in 1984. As a result, the plaintiffs claimed that the district court erroneously failed to find legally significant white bloc voting necessary to meet the third prong of the *Gingles* test. In considering plaintiffs' appeal the Fourth Circuit analyzed the district court's application of the *Gingles* test to Norfolk's at-large voting system. The Fourth Circuit agreed with the district

court's finding that the plaintiffs satisfied the first two prongs of the test by showing the ability of the minority group to comprise a majority in a single member district and the ability of the minority group to be politically cohesive.

However, contrary to the district court's findings, the Fourth Circuit found that the plaintiffs had satisfied the third prong of the *Gingles* test. In finding white bloc voting sufficient to satisfy the third prong, the Fourth Circuit reasoned that the district court misconstrued the statutory definition of the minority's "representatives of choice." The Fourth Circuit noted that the district court defined the minority's preferred candidates as any successful candidate who received greater than fifty percent of the minority vote. However, the Fourth Circuit reasoned that, with at-large voting in multimember district races, a successful candidate who received a majority of the minority vote cannot be deemed the minority's preferred representative if another candidate received an even higher percentage of the minority vote, yet lost the election because not enough of the white majority voted for him or her.

Therefore, the Fourth Circuit reasoned that a successful candidate who does not receive the highest percentage of minority votes cast is presumed not to be the minority's representative of choice. In reversing the district court's definition as an erroneous construction of "preferred candidates," the Fourth Circuit relied on testimony of candidates who fit within the district court's definition yet did not consider themselves to be representative of the minority position. Therefore, because the city did not effectively rebut the presumption that these candidates are not representative of the minority group, the Fourth Circuit concluded that the plaintiffs had proved that racially polarized voting existed in city council elections.

After determining that racially polarized voting existed, the Fourth Circuit considered whether the election of a second minority councilmember in 1984 and 1988, after the plaintiffs commenced this action, negated the existence of racially polarized voting. Contrary to the district court's findings, the Fourth Circuit attributed the success of the second councilmember to unusual voting patterns by the white majority. More specifically, the Fourth Circuit reasoned that the white majority group intended to moot plaintiffs' action by endorsing a second minority candidate in lieu of their own candidate—an action that the majority group never before had taken. Consequently, the Fourth Circuit concluded that, because special circumstances existed, the simultaneous election of two black candidates after plaintiffs had commenced this action did not negate the existence of racially polarized voting.

Accordingly, because the Fourth Circuit determined that the plaintiffs had satisfied the *Gingles* three-pronged test, the Fourth Circuit held that Norfolk's at-large voting system violated the plaintiffs' rights under the Voting Rights Act of 1965 to elect representatives of their choice. Therefore, the Fourth Circuit reversed the district court's decision and remanded for further proceedings. Upon remand, the Fourth Circuit directed that the district court should enjoin at-large elections for the Norfolk city council,