

# Who Me? Couldn't Be: Eleventh Circuit Finds Plaintiffs Lack Standing to Sue Ala. Attorney General in Equal Protection Lawsuit

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Plaintiffs often select a state's attorney general, the official who ordinarily exercises power to enforce state laws, as the defendant to sue in cases involving a constitutional challenge to a state law. But a recent en banc decision from the Eleventh Circuit should cause plaintiffs to rethink that approach. The Eleventh Circuit held in *Lewis v. Governor of Alabama* that the plaintiffs lacked standing to sue Alabama's attorney general because the attorney general's actions could not necessarily be traced to the challengers' injury and the attorney general may not be able to redress their alleged injury.

Two plaintiffs sued the Alabama attorney general in his official capacity asserting, among other things, that a state minimum wage law violated the Equal Protection Clause of the U.S. Constitution. Prior to the enactment of the law, the Birmingham City Council proposed that the Alabama Legislature increase the state's minimum wage. The Legislature rejected the proposal. In response, the city council enacted a local ordinance that would ultimately raise the state's minimum wage from \$7.25 to \$10.10 for those within its city limits. The Legislature promptly responded by enacting a state law that would void local laws like Birmingham's that required employers to provide any benefits or wages not required by state or federal law. The plaintiffs, two African American employees, brought suit against the Alabama attorney general and other parties claiming that the statute violated the Equal Protection Clause of the U.S. Constitution due to its disproportionate impact on African American Alabamians.

After a three-judge panel of the court held that the plaintiffs had standing to sue the Alabama attorney general, the Eleventh Circuit reheard the case en banc and switched paths. In a 7-5 decision, the divided court issued four opinions on the matter: the majority, a concurrence, and two dissenting opinions.

In the majority opinion, authored by Judge Kevin Newsom, the court found that the plaintiffs lacked standing because their alleged injury — failure to be paid in accordance with the Birmingham ordinance — was not caused by or traceable to the attorney general because the attorney general “didn't do (or fail to do) anything that contributed to plaintiffs' harm.” In reaching this conclusion, the court held that the plaintiffs' injury was not traceable to the attorney general's conduct based on his general enforcement power because the statute does not require affirmative enforcement by the attorney general and, in fact, contained no enforcement provision at all.

Nor was the plaintiffs' injury redressable by the attorney general. The plaintiffs' requested declaratory relief, which would require the attorney general to give notice of the statute's unlawfulness to employers, would not increase the likelihood of employers' compliance with the Birmingham ordinance. The court reasoned that even if the requested relief were granted, it is unclear whether the Birmingham City Council would continue to enforce its minimum wage ordinance and whether the plaintiffs' employers would actually begin to pay the plaintiffs more since they would not be legally bound by the court's decision, filed only against the attorney general. The majority repeatedly advocated that the case might have fared better had the plaintiffs sued their employers instead of the attorney general.

The dissenting judges, Judge Charles Wilson and Judge Adalberto Jordan, both of whom heard the case on its initial appeal, doubled down on their original opinion that the plaintiffs satisfied the standing requirement.

In a lengthy and strongly worded dissent, Judge Wilson reasserted that the plaintiffs undeniably cleared the “relatively modest” standing hurdle when the case is properly viewed as a facial, rather than factual, attack on the pleadings. He claimed that the majority “deprive[d] these plaintiffs of their day in federal court by chalking this up as simply a case of ‘wrong defendant’” and unlawfully heightened the plaintiffs' pleading burden by failing to accept the plaintiffs' allegations as true and instead making extra-complaint factual determinations.

Judge Jordan joined Judge Wilson's dissent and wrote separately to note how the majority's material omission of the plaintiffs' additional alleged injury, the denial of equal treatment under the law, also caused it to miss the mark.

But the majority was not moved, and its decision is now the law of the Eleventh Circuit. Read the opinion here: *Lewis v. Governor of Alabama*, No. 17-11009 (11th Cir. Dec. 13, 2019).

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