

## 11th Circ. Says Ala. Can't Escape Voting Rights Act Suit

By **Kevin Penton**

*Law360 (February 4, 2020, 4:00 PM EST)* -- States cannot hide behind their purported immunity to lawsuits to duck allegations that they violate the Voting Rights Act, the Eleventh Circuit has ruled in a case alleging Alabama's practice of electing appellate judges at large unfairly discriminates against black voters.

Congress repealed the so-called sovereign immunity of states to lawsuits by private parties when it approved the Voting Rights Act, a three-judge panel held 2-1 Monday, in a win for the Alabama conference of the National Association for the Advancement of Colored People.

While the U.S. Supreme Court has interpreted the 11th Amendment as prohibiting the filing of lawsuits by private citizens against their states in federal court, the high court also clarified in 1976 in *Fitzpatrick v. Bitzer* that Congress can remove that immunity through its powers under the 14th Amendment to ensure that states do not engage in discriminatory activity, the court said.

When the Fifth and Sixth circuits previously reviewed the issue, they also concluded that Congress had validly repealed the sovereignty of states under the Voting Rights Act, it said.

"We agree with both of our sister circuits and the district court in this case, which concluded that it was 'difficult to conceive of any reasonable interpretation ... that does not involve abrogation of the state's immunity,'" the majority opinion said. "The Voting Rights Act, as amended, clearly expresses an intent to allow private parties to sue the states."

The NAACP filed the suit in September 2016, saying African American voters are rarely elected to any of the state's appellate court seats, even though they make up about 26% of the population, and all 19 of Alabama's current appellate judges are white.

The case was filed on behalf of four black voters claiming Alabama's at-large elections for all of its appeals courts violate the racial discrimination protection of Section 2 of the Voting Rights Act. The voters say the system has produced wins for only two black candidates, both of whom had been first appointed by the governor.

In August 2017 U.S. District Judge W. Keith Watkins denied Alabama's motion to dismiss the case, determining that states could not "hide behind the 11th Amendment to defend themselves in suits by private plaintiffs for alleged violations of the VRA."

U.S. Circuit Judge Elizabeth L. Branch dissented Monday, holding that the Supreme Court clarified in 1985 in *Atascadero State Hospital v. Scanlon* that for a law to repeal a state's immunity to lawsuits by private citizens in federal court, legislators must make their intention "unmistakably clear in the language of the statute."

"Section 2 does not include any language that demonstrates unmistakably clear congressional intent to abrogate state sovereign immunity," Judge Branch wrote. "It clearly contains no express reference to either the 11th Amendment or state sovereign immunity."

Keith J. Harrison, an attorney representing the NAACP, told Law360 on Tuesday that given Alabama's history of state-sponsored acts of voting discrimination, it is important that the court recognized that private individuals can sue the state over Voting Rights Act issues.

"This is an important victory in the continuing civil rights struggle against racial discrimination in voting," Harrison said.

"This decision affirms the critical role that individual citizens and organizations play in the fight for equal rights at the ballot box," said Kristen Clarke, president and executive director of the Lawyers' Committee for Civil Rights Under Law, which also represented the NAACP.

Counsel for Alabama could not be reached for comment Tuesday.

U.S. Circuit Judges Charles R. Wilson and Elizabeth L. Branch and U.S. District Judge C. Roger Vinson sat on the panel for the Eleventh Circuit.

Alabama is represented by Steve Marshall, Edmund G. LaCour Jr., James W. Davis and Misty S. Fairbanks Messick of the state's Office of the Attorney General.

The NAACP is represented by Keith J. Harrison and Jay DeSanto of Crowell & Moring LLP, Jon Greenbaum, Ezra D. Rosenberg and Brendan B. Downes of the Lawyers' Committee for Civil Rights Under Law, Bradford M. Berry of the NAACP and James U. Blacksher and J. Mitch McGuire.

The case is *Alabama et al. v. Alabama State Conference of the National Association for the Advancement of Colored People et al.*, case number 17-14443, in the U.S. Court of Appeals for the 11th Circuit.

--Additional reporting by Michele Gorman. Editing by Abbie Sarfo.

*Update: This article has been updated with comments from counsel for the NAACP.*