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Too Plain to be Misunderstood: Sovereign Immunity Under the Arkansas Constitution¹

*The framers of the constitution certainly knew that instances of hardship would result from the prohibition of suits against the State, but they nevertheless elected to write that immunity into the constitution. The language is too plain to be misunderstood, and it is our duty to give effect to it.*²

Given the fluid nature of the law, time is often the greatest enemy of clarity in court precedent. From law students to experienced judges, anyone who has tried to research the doctrine of sovereign immunity under the Arkansas Constitution has surely struggled with that enemy as they sift through the years of convoluted and inconsistent cases interpreting the scope of the State's protection from suit. This comment attempts to abate the Arkansas lawyer's burden in understanding the language that is ostensibly impossible to misunderstand.

I. FOUNDATIONS OF THE STATE'S IMMUNITY

An historically powerful staple of the common law, the doctrine of sovereign immunity once provided state and federal governments and their employees nearly universal protection from judicial proceedings.³ However, following the passage of the Federal Tort Claims Act⁴ in 1946, states began to gravitate

1. University of Arkansas School of Law J.D. Candidate '19. The author would like to thank Howard W. Brill, Vincent Foster Professor of Legal Ethics & Professional Responsibility and former Chief Justice of the Arkansas Supreme Court, without whose experience, wisdom, and guidance this comment would not have been possible.

2. *Bryant v. Ark. State Highway Comm'n*, 233 Ark. 41, 44, 342 S.W.2d 415, 417 (1961).

3. *State Sovereign Immunity and Tort Liability*, NAT'L CONFERENCE OF STATE LEGISLATURES [hereinafter NCSL], <http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx> [https://perma.cc/3HNZ-6BMX] (last updated Sept. 8, 2010).

4. 28 U.S.C. § 2674 (2012).

toward more governmental accountability and away from immunization.⁵ This nationwide trend toward more government liability can largely be seen as an effort to alleviate the historical harshness of the doctrine of sovereign immunity,⁶ which slams the doors of the courthouse shut on many plaintiffs with legitimate claims.

Today, most states deal with governmental liability by statute or state constitutional provision granting authority over sovereign immunity to the legislature.⁷ Arkansas, on the other hand, remains one of only three states to have an express reservation of sovereign immunity in its state constitution.⁸

This was not always the case. The old Arkansas Constitution of 1868 originally granted the legislature the power to determine the State's immunity, declaring, "[t]he General Assembly shall direct by law in what manner and in what courts suits may be brought by and against the state."⁹ That language was altered with the adoption of the current version of the state constitution in 1874, the first to include an outright prohibition of suits against the State.¹⁰ Article V, Section 20 of the Arkansas Constitution now provides that "[t]he State of Arkansas shall never be made defendant in any of her courts."¹¹ Despite the seemingly broad and unambiguous language of that provision, Arkansas's courts have struggled to furnish a comprehensive and coherent recitation of the scope of sovereign immunity under Section 20 since its inception, and the question of when the State may be hauled into its own courts still lacks a truly clear answer.¹²

5. NCSL, *supra* note 2.

6. NCSL, *supra* note 2.

7. NCSL, *supra* note 2.

8. ARK. CONST. art. V, § 20. Alabama and West Virginia are the other two. *See* ALA. CONST. art. I, § 14; W. VA. art. VI, § 35.

9. ARK. CONST. of 1868, art. 5, § 45.

10. HOWARD W. BRILL & CHRISTIAN H. BRILL, *ARKANSAS LAW OF DAMAGES* § 22:1 n.1 (6th ed. 2014) [hereinafter BRILL].

11. ARK. CONST. art. V, § 20 [hereinafter Section 20]. Unless otherwise noted, all constitutional provisions mentioned in this article refer to provisions of the current Arkansas Constitution.

12. Megan Hargraves & Devin R. Bates, *Sovereign Immunity in Arkansas: Absolute or Only a Bar to Monetary Recovery?*, MITCHELL WILLIAMS (Mar. 1, 2018), <http://www.mitchellwilliamslaw.com/sovereign-immunity-in-arkansas-absolute-or-only-a-bar-to-monetary-recovery> [https://perma.cc/6ACA-TX7G].

The sovereign immunity provision must be read together with article XVI, section 2, which requires the General Assembly to arrange payment of all “just and legal debts” incurred by the State.¹³ The legislature created the Arkansas State Claims Commission in 1949 for the sole purpose of resolving claims against the State that could not be heard by the courts.¹⁴ The Commission is a non-judicial forum where governor-appointed and senate-confirmed commissioners hold sole discretion over the merits and value of a claim.¹⁵ In *Fireman’s Insurance Co. v. Arkansas State Claims Commission*,¹⁶ the Arkansas Supreme Court declared that the Commission is considered an “arm of the General Assembly” with “total control over the determination of and subsequent funding for payment of the ‘just debts and obligations of the state’—all other avenues for redress through legal proceedings being barred by the sovereign immunity provision of the Arkansas Constitution”¹⁷ As such, litigants may pursue their claims against the State only when an exception to the doctrine of sovereign immunity applies. Troublingly though, there is no independent judicial tribunal to which claimants may appeal the Commission’s decisions, and instead, they are left to simply hope for the rightful outcome.¹⁸

Although the Arkansas Supreme Court has acknowledged the harshness of the doctrine in the past,¹⁸ it has rarely acknowledged the difficulty and complexity of interpreting the sovereign immunity clause. Despite the Court’s²⁰ declaration in *Bryant v. Arkansas State Highway Commission* that the language of Section 20 is “too plain to be misunderstood,”²¹ the Court is asked to interpret that very same language during almost every term. Out of the mass of litigation has come only a patchwork of inconsistent opinions that leaves practitioners at a loss for any real

13. ARK. CONST. art. XVI, § 2.

14. *Hanley v. Ark. State Claims Comm’n*, 333 Ark. 159, 166, 970 S.W.2d 198, 201 (1998).

15. *Ark. Cmty. Correction v. Barnes*, 2018 Ark. 122, at 18, 542 S.W.3d 841, 850 (Hart, J., dissenting).

16. 301 Ark. 451, 784 S.W.2d 771 (1990).

17. *Id.* at 458, 784 S.W.2d at 775.

18. *Barnes*, 2018 Ark. 122, at 20, 542 S.W.3d at 851 (Hart, J., dissenting).

¹⁸ See, e.g., *Bryant*, 233 Ark. 41, at 44, 342 S.W.2d at 417.

20. Unless otherwise noted, all references to “the Court” herein refer to the Arkansas Supreme Court.

21. *Bryant*, 233 Ark. 41, at 44, 342 S.W.2d at 417.

certainty. Over time, the Court's interpretations have slowly chipped away at the provision's use of "never" to the point that the plain meaning of the word often has virtually no effect.²²

A. WHO IS PROTECTED BY THE STATE'S SOVEREIGN IMMUNITY?

At its core, sovereign immunity is a jurisdictional immunity from suit.²³ However, it operates as an affirmative defense that must be specifically asserted in responsive pleadings in order to preserve the defense.²⁴ In the recent case of *Walther v. FLIS Enterprises*, the Court explicitly held that, despite its jurisdictional qualities, sovereign immunity is not an issue of subject-matter jurisdiction, reasoning that "it is not a limit on the court's authority to hear a particular type of case."²⁵ In light of the Court's subsequent holding in *Arkansas Department of Veterans Affairs v. Mallett*,²⁶ it is not yet clear how strict the Court will apply the rules of pleading and preserving sovereign immunity as an affirmative defense.²⁷ This issue, however, is just one of many that has come about as a result of the recent case of *Board of Trustees v. Andrews*²⁸ and its progeny, as will be discussed below.²⁹

The Court has long held that the prohibition of suits against the State applies in both law and equity to bar any suit that has the purpose and effect of coercing the State either directly or indirectly.³⁰ In addition to protecting the State and its agencies,³¹ the doctrine extends to independent commissions of the State³²

22. See discussion *infra* Section II.

23. *E.g.*, *Duit Constr. Co. v. Ark. State Claims Comm'n*, 2015 Ark. 462, at 5, 476 S.W.3d 791, 795.

24. *Walther v. FLIS Enters.*, 2018 Ark. 64, at 4-5, 540 S.W.3d 264, 267. (citing *Ark. Lottery Comm'n v. Alpha Mktg.*, 2012 Ark. 23, at 6, 386 S.W.3d 400, 404); *Ark. Lottery Comm'n v. Alpha Mktg.*, 2013 Ark. 232, at 8, 428 S.W.3d 415, 421 n.1.

25. *FLIS*, 2018 Ark. 65, at 4-5, 540 S.W.3d at 267 (internal quotation marks omitted).

26. 2018 Ark. 217, at 2-3, 549 S.W.3d 351, 352.

27. See *infra* Section III(A).

28. 2018 Ark. 12, 535 S.W.3d 616.

29. See *infra* Sections II(D) & III.

30. *E.g.*, *Watson v. Dodge*, 187 Ark. 1055, 63 S.W.2d 993, 994 (1933).

31. *E.g.*, *Ark. Game & Fish Comm'n v. Eddings*, 2011 Ark. 47, at 4, 378 S.W.3d 694, 697.

32. *Ark. Lottery Comm'n v. Alpha Mktg.*, 2013 Ark. 232, at 6, 428 S.W.3d at 419; *Tri-B Advert., Inc. v. Ark. State Highway Comm'n*, 260 Ark. 227, 229, 539 S.W.2d 430, 431 (1976).

and state colleges and universities.³³ Creative lawyers have tried and failed to circumvent the State's express constitutional grant of immunity by suing a state employee or officer in their official capacity.³⁴ The Court considers such actions tantamount to suits against the State.³⁵

Ultimately, whether an entity is protected by the State's sovereign immunity turns on whether the pleadings show that the State is the real party in interest and if a judgement for the plaintiff would operate to control the actions of the State or subject it to financial liability.³⁶ If so, it is said that the action is one against the State and the trial court acquires no jurisdiction unless an exception to the doctrine applies.³⁷ Furthermore, although an order denying a motion to dismiss is normally not appealable, an interlocutory appeal is allowed if the denied motion was based on sovereign immunity,³⁸ as the right to immunity from suit is lost if the case is allowed to proceed to trial.³⁹

B. OVERVIEW OF EXCEPTIONS

There are a number of exceptions to the doctrine of sovereign immunity under Arkansas law,⁴⁰ but due to the Court's inconsistent and contradictory language, understanding the scope and number of those exceptions is never as straightforward as the Court would like to suggest. The aforementioned *Fireman's Insurance* case is a prime example of a problematic sovereign immunity opinion from the Arkansas Supreme Court. The Court categorically stated that "[t]he *only* exception to total and complete sovereign immunity from claims which has been recognized by this court occurs when the state is the moving party

33. *Wash. Cty. v. Bd. of Trs. of the Univ. of Ark.*, 2016 Ark. 34, at 13, 480 S.W.3d 173, 181 (University of Arkansas entitled to sovereign immunity and therefore exempt from ad valorem taxation); *Short v. Westark Cmty. Coll.*, 347 Ark. 497, 504-08, 65 S.W.3d 440, 445-48 (2002) (community college entitled to sovereign immunity protection).

34. See BRILL, *supra* note 9, at § 22:2.

35. *Simons v. Marshall*, 369 Ark. 447, 451, 255 S.W.3d 838, 841-42 (2007).

36. *Ark. Dep't of Cmty. Corr. v. City of Pine Bluff*, 2013 Ark. 36, at 3-4, 425 S.W.3d 731, 733-34; *Brown v. Ark. State HVACR Licensing Bd.*, 336 Ark. 34, 37-38, 984 S.W.2d 402, 403 (1999).

37. *City of Pine Bluff*, 2013 Ark. 36, at 4, 425 S.W.3d at 734.

38. ARK. R. APP. P. 2(a)(10).

39. *Simons*, 369 Ark. at 450, 255 S.W.3d at 841.

40. *Infra* Part II. See also BRILL, *supra* note 9.

seeking specific relief.”⁴¹ This could not be further from the truth. *Fireman’s Insurance* completely ignores numerous other exceptions that had been well-recognized by the time that case was decided in 1990.⁴² These exceptions will be examined in detail in Part II. For clarity, I will discuss these exceptions in terms of four broad categories: waiver by conduct, bad faith, miscellaneous, and statutory waiver.

The first category of exceptions arises when immunity is waived by the State’s conduct. The first of the exceptions in this category is the one mentioned in *Fireman’s Insurance*: the “specific relief” exception. When the State decides to sue in its own courts and seek specific relief, it is treated like any other claimant.⁴³ The second exception is when the State consents to suit and acquiesces to the court’s jurisdiction.⁴⁴

The second category includes the “bad faith” exception. This exception allows injunctions against the State when State agency officers act illegally (“*ultra vires*”) or in bad faith.⁴⁵ This category also includes the “ministerial act exception” whereby a plaintiff may seek a writ of mandamus if a State agency officer refuses to perform a purely ministerial action required by statute.⁴⁶

The third category of exceptions primarily entails the exception allowing declaratory judgments and federal law considerations.⁴⁷

Finally, the fourth category, waiver by statute, concern circumstances where an act of the legislature authorizes a suit against the State. For over twenty years, the Court recognized that the General Assembly had the power to provide the State’s consent to suit through legislation, but this changed completely in

41. *Fireman’s Ins. Co. v. Ark. State Claims Comm’n*, 301 Ark. 451, 455, 784 S.W.2d 771, 774 (1990) (emphasis added) (citing *Parker v. Moore*, 222 Ark. 811, 262 S.W.2d 891 (1953)).

42. See Jack Druff, *State Court Sovereign Immunity: Just When is the Emperor Armor-Clad?*, 24 U. ARK. LITTLE ROCK L. REV. 255, 257-58 (2002). See also *infra* Part II.

43. *Foster v. Ark. State Highway Comm’n*, 258 Ark. 176, 184, 527 S.W.2d 601, 606 (1975); see also BRILL, *supra* note 9.

44. See *infra* Part II(A)(2).

45. BRILL, *supra* note 9.

46. BRILL, *supra* note 9.

47. See *infra* Part II(C); see also BRILL, *supra* note 9.

Board of Trustees v. Andrews.⁴⁸ The Court has now renewed its former commitment to the position that Section 20 immunity cannot be waived by a statute.⁴⁹

II. EXCEPTIONS TO THE STATE'S IMMUNITY

The Court's irregular holdings make it continually difficult for practitioners to decipher just when the State may be subject to suit. The lack of any one source to provide a thorough exposition of sovereign immunity in Arkansas only compounds this problem, as busy lawyers are left to unscramble the dense and complex thicket of case law on their own. The following discussion is an attempt to piece together the Arkansas Supreme Court's variable opinions and provide a guide as to when the State is and is not protected by sovereign immunity under Section 20.

This overview is divided into four subparts. Subpart A outlines when the State may waive its immunity by conduct. Subpart B examines the "bad faith" category of exceptions. Subpart C explores two miscellaneous exceptions. Finally, Subpart D discusses the ever-changing status of statutory waiver and the impact of the Court's recent decision that the legislature does not have the power to waive the State's immunity by statute.

A. WAIVER BY CONDUCT EXCEPTIONS

The waiver by conduct category encompasses the best-established exception to the doctrine of sovereign immunity as well as those severely lacking in definition. This subsection will discuss the specific relief exception, consent to suit, and waiver by other conduct.

1. *Specific Relief Exception*⁵⁰

The specific relief exception is the most consistently recognized exception to Section 20 immunity and typically the least controversial, as it rests on the sound logic that the State, "by

48. *Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, at 10-12, 535 S.W.3d 616, 622-23.

49. *Id.*

50. Sometimes referred to as the "affirmative-relief exception." *Landsn Pulaski, LLC v. Ark. Dep't of Corr.*, 372 Ark. 40, 43, 269 S.W.3d 793, 796 (2007).

virtue of its sovereignty,” has the right to sue in her own courts.⁵¹ The Court has said repeatedly that, “[t]he only exception to total and complete sovereign immunity occurs when the state is the moving party seeking specific relief.”⁵² This means that when the State decides to sue in her own courts, she is treated like any other litigant, subject to the same restrictions as private suitors, and “must submit to and abide by the results.”⁵³ Therefore, if the State initiates the action, it waives its constitutional protection and cannot then raise the defense of sovereign immunity as a defense to a counterclaim.⁵⁴ The defense is waived even in the case that the State’s only avenue for redress is to file suit.⁵⁵

This exception to the doctrine does not only apply when the State initiates a lawsuit, however, since the Court’s language dictates that the State must only be a moving party seeking specific relief. As such, the State may waive its immunity and subject itself to judgment if it files a counterclaim seeking affirmative relief in a responsive pleading, even though the answer also raises the defense of sovereign immunity.⁵⁶ The Arkansas Lottery Commission narrowly avoided this result in *Alpha Marketing*.⁵⁷ In its answer to Alpha’s original complaint, the Commission requested a declaratory judgment canceling certain trademarks held by Alpha.⁵⁸ It subsequently dropped this request in its answers to Alpha’s first and second amended complaints, but on appeal, Alpha argued that the Commission had nonetheless incorporated the request in its later answers.⁵⁹ Ultimately, the Court found that the pleadings then in front of them (the answer to the second amended complaint) properly

51. See Ark. State Highway Comm’n v. Partain, 193 Ark. 803, 805, 103 S.W.2d 53, 54 (1937) (citing *Wilson v. Parkinson* 157 Ark. 69, 247 S.W. 774 (1923)).

52. *Landsn Pulaski*, 372 Ark. at 43, 269 S.W.3d at 796; *Fireman’s Ins. Co. v. Ark. State Claims Comm’n*, 301 Ark. 451, 455, 784 S.W.2d 771, 774 (1990).

53. *Foster v. Ark. State Highway Comm’n*, 258 Ark. 176, 184, 527 S.W.2d 601, 606 (1975).

54. *Fireman’s Ins.*, 301 Ark. at 455, 784 S.W.2d at 774 (citing *Parker v. Moore*, 222 Ark. 801, 262 S.W.2d 891 (1953)).

55. Bd. of Trs. of Univ. of Ark. v. Pulaski Cty., 2013 Ark. 230, at 3-4, No. CV-12-829, 2013 WL 2382600, at *2 (May 30, 2013) (plaintiff was a university and therefore the moving party seeking relief and could not claim sovereign immunity later in the suit).

56. See Ark. Lottery Comm’n v. Alpha Mktg., 2013 Ark. 232, at 8-9, 428 S.W.3d 415, 420-21; see also BRILL, *supra* note 9.

57. See *Alpha Mktg.*, 2013 Ark. 232, at 8-9, 426 S.W.3d at 420-21.

58. *Id.*

59. *Id.*

raised the defense of sovereign immunity and did not seek affirmative relief.⁶⁰ If nothing else, this case should serve as a keen reminder of the importance of careful pleading and the general impact of word choice, for without the alterations to its answers, the Commission very well may have waived its immunity.

This should not be taken to mean that anytime the State requests relief in a pleading that it is necessarily waiving its immunity. To waive the defense of sovereign immunity, “the request for relief must be *specific*.”⁶¹ Though it has not expanded much on what it considers a “specific” request, the Court in *LandsnPulaski* made clear that an answer raising sovereign immunity and asking for “all other appropriate relief” is not a sufficiently specific request for affirmative relief constituting a waiver of the State’s immunity defense.⁶² Similarly, the State does not waive its immunity defense and is not considered subject to suit when it acts pursuant to a statute in order to collect child support for the benefit of parents, seek custody of neglected juveniles, or commence paternity actions.⁶³

2. *Consent to Suit*

Whereas the waiver of immunity under the specific relief exception may be inadvertent or involuntary, consent to suit is the voluntary waiver of immunity by the State. The idea is that the State, in her sovereign wisdom, may elect to appear in court and acquiesce to the court’s jurisdiction.⁶⁴ Like any other situation in which the State is not protected by Section 20 immunity, if the State voluntarily waives its immunity, it is treated like any other litigant and is bound by the outcome of the litigation.⁶⁵

While the concept of voluntary waiver is fairly straightforward, the State’s ability to consent has never been as

60. *Id.*

61. *LandsnPulaski, LLC v. Ark. Dep’t of Corr.*, 372 Ark. 40, 44, 269 S.W.3d 793, 796 (2007) (emphasis in original).

62. *Id.*

63. *State Office of Child Support Enf’t v. Mitchell*, 330 Ark. 338, 346-48, 954 S.W.2d 907, 911-12 (1997); *Ark. Dep’t of Human Servs. v. State*, 312 Ark. 481, 488-89, 850 S.W.2d 847, 851 (1993). *See also* BRILL, *supra* note 9.

64. *See* BRILL, *supra* note 9.

65. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 496, 10 S.W.3d 892, 901 (2000); *see also* BRILL, *supra* note 9.

clear due to the Court's inconsistent and confusing opinions on the subject. The Court has frequently and flatly declared that Section 20 prohibits consent to suit,⁶⁶ while also holding that sovereign immunity is a defense that may be waived.⁶⁷ In *Grine v. Board of Trustees*,⁶⁸ the Court echoed this sentiment, proclaiming that consent to suit is "expressly withheld by the Constitution of this State."⁶⁹ The Court then went on to hold that "sovereign immunity is jurisdictional immunity from suit, and where the pleadings show the action is one against the State, the trial court acquires no jurisdiction. However, *unlike subject-matter jurisdiction, sovereign immunity can be waived.*"⁷⁰ So, it would appear that the State *is* in fact allowed to consent to suit/voluntarily waive sovereign immunity. The Court did not offer a distinction between waiving the defense and "consenting" to suit, and there does not appear to be one.

A number of older cases took the hardline position that *all* suits against the State are forbidden by the state constitution, and as such, the State does not have the ability to consent to suit.⁷¹ Those cases seemed more concerned with the General Assembly providing the State's consent to suit through a statutory waiver of immunity,⁷² which was recently held to be an unconstitutional practice.⁷³ In more recent cases, however, the Court has frequently held that the State may in fact voluntarily waive the

66. See, e.g., *Fairbanks v. Sheffield*, 226 Ark. 703, 706, 292 S.W.2d 82, 84 (1956) (holding that sovereign immunity is a constitutional mandate that "cannot be waived by the General Assembly").

67. Druff, *supra* note 41, at 260.

68. 338 Ark. 791, 2 S.W.3d 54 (1999).

69. *Id.* at 796, 2 S.W.3d at 58 (quoting *Pitcock v. State*, 91 Ark. 527, 535, 121 S.W. 742, 745 (1909)).

70. *Id.* at 796-97, 2 S.W.3d at 58 (emphasis added) (citing *Brown v. Ark. State HVACR Licensing Bd.*, 336 Ark. 34, 984 S.W.2d 402 (1999)).

71. E.g., *Ark. State Highway Comm'n v. McNeil*, 222 Ark. 643, 644-45, 262 S.W.2d 129, 130 (1953); *Ark. State Highway Comm'n v. Nelson Bros.*, 191 Ark. 629, 636, 87 S.W.2d 394, 397 (1935) (discussing consent to suit through statute). *But see* *Page v. McKinley*, 196 Ark. 331, 336-37, 118 S.W.2d 235, 237-38 (1938) (considering that suits against the state "cannot be maintained without its consent.").

72. *Fairbanks v. Sheffield*, 226 Ark. 703, 706, 292 S.W.2d 82, 84 (1956) (holding that a statute permitting suits against the state park system was "an unconstitutional attempt on the part of the legislature to consent to a suit against the State"). The United States Supreme Court also considers statutory waiver as a consent to suit. *Alden v. Maine*, 527 U.S. 706, 755 (1999) ("Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits.").

73. See *infra* Part II(D).

defense.⁷⁴ One problem arises in that, although the newer cases contradict the older ones, those cases have not been specifically overturned.⁷⁵ Another issue, mentioned above, is the Court's tendency to echo the old cases while simultaneously remaining in-step with modern precedent that recognizes consent to suit as an exception to Section 20 immunity, such as in *Grine*.⁷⁶ These problems can also be easily rectified with more uniform articulations of the law that distinguish between when the Court is referring to consent through statute or consent through some other means, such as a voluntary appearance.

In her dissent in *Andrews*, Justice Baker advanced a credible argument that the plain language of Section 20 itself may imply the State's ability to consent to suit.⁷⁷ Turning to the dictionary, Justice Baker asserted that the framers of the constitution intended the word "made" as used in Section 20 to mean "compel."⁷⁸ Accepting this as true, Section 20 can sensibly be interpreted to mean that the State cannot be *compelled* to become a defendant in her courts but may freely *allow* herself to be sued.⁷⁹ However, a majority of the Court has yet to embrace this view and indeed has not specifically ruled on this definitional question.⁸⁰

In the face of its oscillating precedent, the Court in *Lake View* confidently declared that, "[i]t is axiomatic that the State of Arkansas can voluntarily waive a sovereign-immunity defense. In addition, the State can consent to being sued."⁸¹ Given this syntax, it appears that the Court has again drawn some undefined distinction between a voluntary waiver of the defense and consent

74. *E.g.*, *Short v. Westark Cmty. Coll.*, 347 Ark. 497, 504, 65 S.W.3d 440, 445 (2002); *Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 496, 10 S.W.3d 892, 901 (2000); *Grine v. Bd. of Trs. of the Univ. of Ark.*, 338 Ark. 791, 797, 2 S.W.3d 54, 58 (1999); *Ozarks Unlimited Res. Coop. v. Daniels*, 333 Ark. 214, 221, 969 S.W.2d 169, 172 (1998).

75. BRILL, *supra* note 9.

76. *Grine*, 338 Ark. at 796-97, 2 S.W.3d at 58.

77. *Bd. of Trs. of the Univ. of Ark. v. Andrews*, 2018 Ark. 12, at 13-14, 535 S.W.3d 616, 624 (Baker, J., dissenting). Although *Andrews* focused the state's ability to consent through a statutory waiver, Justice Baker's argument is nonetheless applicable to the broader issue of consent to suit.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 496, 10 S.W.3d 892, 901 (2000) (citations omitted).

to suit, as it did in *Grine*.⁸² As mentioned above, there is no apparent difference in the two terms unless the Court is contemplating that voluntary waiver to include a situation where the State is the moving party seeking relief, with the waiver being “voluntary” in the sense that the State’s attorneys know or should know that seeking specific relief will waive the defense. In any event, the legal profession can take a modicum of comfort and confidence in the *Lake View* Court’s explicit declaration of the State’s ability to consent to suit, because most opinions only contemplate the State’s capacity to consent in a cursory fashion.⁸³ Still, precedent reveals that capacity to be far from “axiomatic,” and, considering the recent *Andrews* opinion,⁸⁴ it remains open to dramatic shifts in judicial attitudes.

3. Waiver by Other Conduct

It is a well-established principle that a state cannot act except through its officers.⁸⁵ But at what point does an officer’s conduct waive the State’s constitutional guarantee of immunity? The two exceptions above seem to dictate that the State must either seek specific, affirmative relief, or it must give its knowing consent to be sued. The cases, however, suggest that state officers can *unintentionally* consent by their actions, thereby waiving immunity and subjecting the State to liability.

The Court first opened up this possibility in the *Lake View* case. That decision stands out in the Court’s sovereign immunity jurisprudence not only because it explicitly proclaims the State’s power to consent to suit⁸⁶ but also because of the *manner* in which the Court found the State had given its consent.⁸⁷ In *Lake View*, attorneys for the school district sought fees from the State,

82. See *supra* Part I(B).

83. See, e.g., *Newton v. Etoch*, 332 Ark. 325, 332, 965 S.W.2d 96, 99 (1998) (quoting *Page v. McKinley*, 169 Ark. 331, 336-37, 118 S.W.2d 235, 238 (1938)); *Ozarks Unlimited Res. Coop. v. Daniels*, 333 Ark. 214, 221, 969 S.W.2d 169, 172 (1998); *State Office of Child Support Enf’t v. Mitchell*, 330 Ark. 338, 346-47, 954 S.W.2d 907, 911 (1997).

84. See *infra* Part II(C).

85. *Grine v. Bd. of Trs. of the Univ. of Ark.*, 338 Ark. 791, 797, 2 S.W.3d 54, 58 (1999) (citing *Pitcock v. State*, 91 Ark. 527, 121 S.W. 742 (1909)).

86. See *supra* Part II(A)(2).

87. See *Druff, supra* note 41, at 268.

arguing that their work had benefitted the State as a whole.⁸⁸ The majority, therefore, concluded that the doctrine of sovereign immunity applied to the case because the State's treasury would have to be tapped to pay the attorneys for work benefitting the State.⁸⁹ In an effort to settle this claim and resolve the dispute, the Attorney General's office approved two published notices to class members supporting the payment of fees and continued to advocate in chancery court for their payment.⁹⁰ The Court found that these actions amounted to a waiver of the State's sovereign immunity defense with respect to payment of the fees.⁹¹ Taken to the extreme, this unprecedented finding could mean that the Court might find a waiver of immunity where the State's conduct simply suggests that the State bears some liability in a certain lawsuit, even when it has not sought affirmative relief and has not expressly consented to suit.⁹²

This method of waiving the State's immunity was argued again only months after *Lake View* in the *Milberg*⁹³ case. In *Milberg*, the State settled claims against tobacco companies by consent decree and the Attorney General requested that the appellant attorneys be included on a list of outside counsel set to receive attorney fees from the tobacco companies as part of the settlement.⁹⁴ The appellants argued that their work had benefitted the State as a whole and that the Attorney General's actions were similar to the Attorney General's actions in *Lake View*, and thus, '*Lake View* supported a finding of waiver in their case.'⁹⁵ The Court, however, distinguished *Lake View* on the grounds that the fees in that case were to be paid out of state funds and the State's

88. *Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 495-96, 10 S.W.3d 892, 900-01 (2000). While the majority agreed with the attorneys, calling the benefit they provided to the state "beyond dispute," *id.* at 496, 10 S.W.3d at 901, at least one justice disagreed: "As noble as this statement is and in reality how true it may be, the record is devoid of any evidence as to the 'substantial economic benefit' the State has received and no evidence has been offered upon which a percentage fee could be calculated." *Id.* at 340 Ark. at 499, 10 S.W.3d at 903 (Dalby, J., concurring). This economic benefit argument was unsuccessful in a subsequent suit. *See infra* notes 92-97 and accompanying text.

89. *Lake View*, 340 Ark. at 496, 10 S.W.3d at 901.

90. *Id.*

91. *Id.*, 340 Ark. at 496, 10 S.W.3d at 901.

92. *See* Druff, *supra* note 41, at 265.

93. *Milberg, Weiss, Bershad, Hynes, & Lerach, LLP v. State*, 342 Ark. 303, 28 S.W.3d 842 (2000).

94. *Id.* at 322, 28 S.W.3d at 855.

95. *Id.* at 321-22, 28 S.W.3d at 854-55.

attorneys had continued to advocate for the payment of the fees; whereas in *Milberg*, the fees would come out of the tobacco companies' pockets and the State stopped advocating for the payment of the fees on appellants' behalf.⁹⁶ Despite not finding a waiver in *Milberg* as it did in *Lake View*, the Court nonetheless acknowledged that the State might waive its immunity through executive branch conduct in settlement negotiations.⁹⁷ As such, these holdings appear to condone a finding that the State has waived its immunity even when its conduct is far removed from the notion of a request for specific relief or a conscious acquiescence to a court's jurisdiction.⁹⁸

Given the Court's recent dedication to considering sovereign immunity as an affirmative defense,⁹⁹ it is now entirely possible that in every lawsuit against the State, the attorneys representing the State entity can singlehandedly waive the State's Section 20 immunity – "either as a result of poor lawyering skills, negligent omission, or even as a matter of trial strategy."¹⁰⁰ This result seems quite distant from the purportedly strict interpretation of Section 20 that the current Court has embraced in recent cases.¹⁰¹ The United States Supreme Court has sharply criticized allowing this "constructive consent" to waive a state's sovereign immunity,¹⁰² and in the interest of coherence, the Arkansas Supreme Court would do well to follow suit and make clear that consent to suit should only be found when the State has intentionally relinquished or abandoned its right to protection from suit.

B. THE "BAD FAITH" EXCEPTIONS

While the State must act through its officers,¹⁰³ the State does not have the authority to authorize its agencies or officers to

96. *Id.* at 323, 28 S.W.3d at 855.

97. *See id.*

98. *See Milberg*, 342 Ark. at 321-23, 28 S.W.3d at 854-55.

99. *See supra* Section I(A).

100. *Walther v. FLIS Enterprises*, 2018 Ark. 64, at 23-24, 540 S.W.3d 264, 276 (Baker, J., dissenting).

101. *See infra* Section II(D).

102. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 (1999); *Druff, supra* note 41, at 266 n.66.

103. *Grine v. Bd. of Trs. of the Univ. of Ark.*, 338 Ark. 791, 797, 2 S.W.3d 54, 58 (1999) (citing *Pitcock v. State*, 91 Ark. 527, 121 S.W. 742 (1909)).

violate the law.¹⁰⁴ The two exceptions to Section 20 immunity in this category – the “*ultra vires*” and ministerial act exceptions – deal with situations in which the State or its employees/officers are acting outside their authority or not acting when required.

1. The “*Ultra Vires*” Exception

The Court has routinely held that Section 20 does not protect the State, its agencies, or its officers if they are acting “*ultra vires*” (beyond their authority) or in a way that is otherwise illegal, wanton, injurious, in bad faith, arbitrary, or capricious.¹⁰⁵ If an officer or arm of the State acts in such a way, the courts have equity jurisdiction to issue injunctions and restrain those actions.¹⁰⁶ Courts may also enjoin state action that will cause irreparable injury¹⁰⁷ or result in the taking of private property without compensation.¹⁰⁸ Such suits are allowed to proceed against the State under the logic that an injunction preventing the State or its officers from acting illegally or *ultra vires* does not control the (lawful) actions of the State or subject it to financial liability.¹⁰⁹ Indeed, the Court has specifically stated that, “it is the effect of tapping the state treasury that makes the State a defendant.”¹¹⁰ Accordingly, the trial court is charged with determining whether an action actually seeks an injunction against the State on legitimate grounds or impermissibly petitions to coerce the State.¹¹¹ Finally, it is important to consider that the injunction must be brought in a timely fashion, as the Court has said that landowners cannot sit idly by and watch the State take,

104. *Ralls v. Mittlesteadt*, 268 Ark. App. 741, 744, 596 S.W.2d 349, 351 (1980).

105. *E.g.*, *Key v. Curry*, 2015 Ark. 392, at 4, 473 S.W.3d 1, 4-5 (actions of the State Board of Education in taking control of the Little Rock School District allowed by statute and not *ultra vires*); *Grine*, 338 Ark. at 798-99, 2 S.W.3d at 59.

106. *Grine*, 338 Ark. at 798-99, 2 S.W.3d at 59.

107. *Ark. Game & Fish Comm’n v. Lindsey*, 292 Ark. 314, 320, 730 S.W.2d 474, 478 (1987).

108. *Austin v. Ark. State Highway Comm’n*, 320 Ark. 292, 294, 895 S.W.2d 941, 942 (1995).

109. *See State Office of Child Support Enf’t v. Mitchell*, 330 Ark. 338, 346-47, 954 S.W.2d 907, 911 (1997); BRILL, *supra* note 9. *Cf.* *Comm’n on Jud. Discipline & Disability v. Digby*, 303 Ark. 24, 26, 792 S.W.2d 594, 595 (1990) (talking about declaratory judgments, *see infra* Part II(D), but echoing the view that a suit is not one against the State if it would not place the State under a financial obligation).

110. *Mitchell*, 330 Ark. at 347, 954 S.W.2d at 911.

111. BRILL, *supra* note 9.

occupy, or damage their land because the ensuing action would be one for damages and therefore a prohibited coercive suit.¹¹² It follows that similar delays in the case of a threatened irreparable injury would also bar a later suit for damages.

As discussed further below, the Court recently held in the *Andrews* case that the legislature cannot waive sovereign immunity by statute.¹¹³ On the same day the Court issued that opinion, it also issued an opinion in *Williams v. McCoy*, wherein the Court again recognized the illegal acts exception.¹¹⁴ However, the Court included the following in a footnote:

We recently held in *Andrews* that a legislative statute that waives sovereign immunity is unconstitutional. While we are mindful that there may in the future be a constitutional challenge to the illegal acts exception, that issue was not argued in this case; therefore, we do not address it here.¹¹⁵

As such, in the wake of *Andrews*, *Williams*, and the cases following them, it appears that the validity of the illegal acts exception remains an open question,¹¹⁶ and indeed it might not be considered constitutional by the time this comment reaches publication.

2. The Ministerial Act Exception

Courts of this state also have the power to issue writs of mandamus – a type of mandatory injunction against state agencies or officers who refuse to do a purely ministerial (not discretionary) act required by statute.¹¹⁷ Mandamus actions have been consistently recognized and allowed in Arkansas,¹¹⁸ but not

112. *Bryant v. Ark. State Highway Comm'n*, 233 Ark. 41, 43, 342 S.W.2d 415, 416-17 (1961).

113. *Bd. of Trs. of the Univ. of Ark. v. Andrews*, 2018 Ark. 12, at 11, 535 S.W.3d 616, 622; *infra* Section II(D).

114. *Williams v. McCoy*, 2018 Ark. 17, at 3, 535 S.W.3d 266, 268.

115. *Id.* at 3, 535 S.W.3d at 268 n.1 (internal citation omitted).

116. *See Ark. Dep't of Veterans Affairs v. Mallett*, 2018 Ark. 217, at 6, 549 S.W.3d 351, 354 (Goodson, J., dissenting).

117. *LandsnPulaski, LLC v. Ark. Dep't of Corr.*, 372 Ark. 40, 43, 269 S.W.3d 793, 795-96 (2007) (no ministerial act); *Clowers v. Lassiter*, 363 Ark. 241, 244-45, 213 S.W.3d 6, 9-10 (2005) (petition sought to force a state agency to do something more than a purely ministerial duty, so mandamus inappropriate).

118. *LandsnPulaski*, 372 Ark. at 43, 269 S.W.3d at 795-96; *Hickenbottom v. McCain*, 207 Ark. 485, 490, 181 S.W.2d 226, 228 (1944); *Golden v. McCarroll*, 196 Ark. 443, 446, 118 S.W.2d 252, 254 (1938).

without restriction. Just as with the ultra vires exception, a mandamus proceeding cannot be maintained against state agencies or officers if its true purpose is to recover damages or otherwise improperly coerce the State to act.¹¹⁹

C. OTHER EXCEPTIONS

There are two other instances when the State is not protected from suit by Section 20: declaratory judgments and certain times under federal law.

1. *Declaratory Judgments*

Declaratory judgments, much like injunctions to bar the State from acting beyond its authority or force it to carry out a statutory duty, are allowed so long as they would not operate to coerce the State to act.¹²⁰ An action for declaratory relief cannot be maintained if the effect of the judgment would cause the State to bear a financial obligation,¹²¹ force it to file a counterclaim on a contractual dispute,¹²² or compel discretionary agency action.¹²³ Perhaps the best example of an allowable action for declaratory relief would be a plaintiff seeking a declaration of whether a State agency or officer violated a rule or law.¹²⁴

2. *Federal Reasons*

Suits against the State in state court might not be barred if they are based on a federal statutory cause of action because the Supremacy Clause of the United States Constitution trumps the state constitution.¹²⁵ However, the United States Supreme Court in *Alden v. Maine* held that “[s]tates retain [their] immunity from private suits in their own courts.”¹²⁶ Finally, when it comes to

119. *Bryant v. Ark. State Highway Comm’n*, 233 Ark. 41, 43-44, 342 S.W.2d 415, 416-17 (1961).

120. *Comm’n on Jud. Discipline & Disability v. Digby*, 303 Ark. 24, 26, 792 S.W.2d 594, 595 (1990).

121. *Id.*

122. *Travelers Cas. & Sur. Co. of America v. Ark. State Highway Comm’n*, 353 Ark. 721, 728-29, 120 S.W.3d 50, 53-55 (2003) (claim based on surety bond).

123. *See Grine v. Bd. of Trs. of the Univ. of Ark.*, 338 Ark. 791, 798-99, 2 S.W.3d 54, 59 (1999).

124. *Digby*, 303 Ark. at 26, 792 S.W.2d at 595.

125. *See BRILL*, *supra* note 9.

126. 527 U.S. 706, 754 (1999) (emphasis added).

federal court, Section 20 offers no protection.¹²⁷ Congress often attaches conditions to the receipt of federal grants or other federal dollars, and the states will periodically acquiesce to suit in federal court as a condition to receiving those funds.¹²⁸

D. ANDREWS AND THE QUESTION OF WAIVER BY STATUTE

For more than twenty years, the Arkansas Supreme Court consistently recognized that the General Assembly had the power to waive the State's Section 20 immunity by statute, thereby providing the State's consent to suit and creating another exception to the doctrine of sovereign immunity.¹²⁹ This came to an abrupt halt on January 18, 2018, when the Court issued its opinion in *Andrews*, wherein it returned to its former precedent and held that the legislature does *not*, in fact, have the power to waive Section 20 immunity by statute.¹³⁰ With one stroke of the pen, the Court overturned more than two decades of cases¹³¹ and opened the door to an untold number of yet-to-be-realized consequences.¹³² While this drastic change in the law was unanticipated, it should not have come as a shock. To understand why, one must look at the history of the Court's on-again/off-again relationship with statutory waiver.

As noted above, the predecessor to the Arkansas Constitution of 1874 granted the General Assembly the power to determine how and when the State could be sued, like the majority of states do today.¹³³ In reaching their decision, the *Andrews* court emphasized that the framers of the current constitution removed the language permitting the legislature to waive the

127. This is apparent from the very language of Section 20: “[t]he State of Arkansas shall never be made a defendant in any of *her courts*.” (emphasis added). See ARK. CONST. art. V, § 20.

128. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 697 (1999) (Breyer, J., dissenting) (pointing out the coercive effects of tying education and highway grants to a waiver of immunity).

129. See, e.g., *Bd. of Trs. of the Univ. of Ark. v. Andrews*, 2018 Ark. 12, at 16-17, 535 S.W.3d 616, 625-26 (Baker, J., dissenting).

130. *Id.* at 9-12, 535 S.W.3d at 622-23.

131. For a list of most of the cases in which the Court recognized statutory waiver as a valid exception to Section 20 immunity, see *id.* at 17, 535 S.W.3d at 626 n.2 (Baker, J., dissenting).

132. See *id.* at 13-19, 535 S.W.3d at 624-27 (Baker, J., dissenting); *infra* Part III.

133. See *supra* Part I.

State's immunity by statute – the only way a legislature can act – and instead chose to use the word “never” in Section 20.¹³⁴ The majority opinion in *Andrews* appears to imply that the first case to look at the issue of statutory waiver came in 1935.¹³⁵ However, there were at least three cases prior to 1935 that considered the legislature's ability to waive the State's immunity through statute.¹³⁶

The first of these, *Dodge I*, came in 1930.¹³⁷ In its opinion, the Court contemplated an Alabama case interpreting that state's immunity provision – one nearly identical to Section 20 – which held that the legislature did *not* have the capacity to waive immunity.¹³⁸ The *Dodge I* court stated that it felt “constrained to give the same construction to the same provision in our own Constitution”¹³⁹ but allowed a suit to be maintained on a contract, finding it not to be a suit against the State.¹⁴⁰ Two years later, the Court in *Baer v. Arkansas State Highway Commission* followed its ruling in *Dodge I*, finding that the Highway Commission could be sued on claims authorized by statute, but held that the statute creating the Highway Commission did not allow for tort claims.¹⁴¹ Later that same year, the Court issued its ruling in *Dodge II* (unrelated to *Dodge I*), wherein it held that the plaintiffs could maintain all suits authorized by statute against the Highway Commission.¹⁴² Despite the fractured and confusing nature of these cases, it appears that the Court, at least for a few years,

134. *Andrews*, 2018 Ark. 12, at 10-11, 535 S.W.3d at 622.

135. *See id.* at 6, 535 S.W.3d at 620; *id.* at 16, 535 S.W.3d at 625 (Baker, J., dissenting).

136. *Ark. State Highway Comm'n v. Dodge*, 186 Ark. 640, 55 S.W.2d 71, 73 (1932) [hereinafter *Dodge II*], *overruled in part by* *Ark. State Highway Comm'n v. Nelson Bros.*, 191 Ark. 629, 87 S.W.2d 394 (1935); *Baer v. Ark. State Highway Comm'n*, 185 Ark. 590, 48 S.W.2d 842 (1932), *overruled in part by* *Ark. State Highway Comm'n v. Nelson Bros.*, 191 Ark. 629, 87 S.W.2d 394 (1935); *Ark. State Highway Comm'n v. Dodge*, 181 Ark. 539, 26 S.W.2d 879 (1930) [hereinafter *Dodge I*], *overruled in part by* *Ark. State Highway Comm'n v. Nelson Bros.*, 191 Ark. 629, 87 S.W.2d 394 (1935).

137. *Dodge I*, 181 Ark. 539, 26 S.W.2d 879 (1930).

138. *Id.* at 542, 26 S.W.2d at 880.

139. *Id.*

140. *Id.* at 551, 26 S.W.2d at 884.

141. *Baer*, 185 Ark. at 591, 48 S.W.2d at 843.

142. *Dodge II*, 186 Ark. 640, 646, 55 S.W.2d 71, 73 (“[W]e now hold that, in all cases where the statute authorizes a suit, it may be maintained against the highway commission whether it be thought to be a juristic person or whether section 20, art. 5, be merely declaratory of the general doctrine that the state may not be sued in her courts unless she has consented thereto.”).

recognized an ability in the legislature to consent to suits through its lawmaking process.

This view was short-lived, however. In 1935, the Court explicitly overruled the three above cases in *Arkansas State Highway Commission v. Nelson Brothers*,¹⁴³ the first statutory waiver case mentioned by the majority in *Andrews*.¹⁴⁴ In that case the Court took a strict approach in its reversal, expressing concerns about the impulsivity borne from the “human element” of the legislature, and referring to the decision in *Dodge II* as “indefensible.”¹⁴⁵ It went on to flatly state: “[i]t is our settled conviction that the state cannot give its consent to the maintenance of an action against it”¹⁴⁶ The Court followed this precedent some years later in *Fairbanks v. Sheffield*,¹⁴⁷ where the Court held that a statute authorizing suits against the state park system amounted to “an unconstitutional attempt on the part of the legislature to consent to a suit against the State.”¹⁴⁸ Citing *Nelson Brothers*, the Court expressly declared that Section 20 is “mandatory and cannot be waived by the General Assembly.”¹⁴⁹ Decades later, in 1993, the Court held that courts cannot order the state Department of Human Services to pay certain costs and restitution even though it was authorized by statute.¹⁵⁰

After more than sixty years of holding that the legislature was powerless to waive the state’s immunity by statute, the Court’s attitude flipped again in 1996 with two cases – *Staton*¹⁵¹ and *Tedder*.¹⁵² Both cases concerned a statute¹⁵³ that allowed taxpayers to sue the State if their refund claim had been filed and

143. 191 Ark. 629, 637, 87 S.W.2d 394, 397 (1935).

144. Bd. of Trs. of the Univ. of Ark. v. Andrews, 2018 Ark. 12, at 6, 535 S.W.3d 616, 620.

145. *Nelson Bros.*, 191 Ark. 629, 636, 87 S.W.2d 394, 397 (1935).

146. *Id.*

147. 226 Ark. 703, 292 S.W.2d 82 (1956).

148. *Id.* at 706, 292 S.W.2d at 84.

149. *Id.* (citing *Nelson Bros.*, 191 Ark. at 634, 87 S.W.2d at 396).

150. Ark. Dep’t of Hum. Servs. v. State, 312 Ark. 481, 486-89, 850 S.W.2d 847, 850-51 (1993).

151. Ark. Dep’t of Fin. & Admin. v. Staton, 325 Ark. 341, 344, 942 S.W.2d 804, 805 (1996).

152. Ark. Dep’t of Fin. & Admin. v. Tedder, 326 Ark. 495, 496-97, 932 S.W.2d 755, 756 (1996).

153. ARK. CODE ANN. § 26-18-507(e)(2)(A) (Repl. 1992).

refused or was not acted upon.¹⁵⁴ The Court came to the conclusion in both *Staton* and *Tedder* that, in light of fiscal policy concerns, the State's sovereign immunity was waived once taxpayers had fully complied with the statute.¹⁵⁵ From the time of those decisions until the recent *Andrews* case, the Court consistently held that the legislature could waive Section 20 immunity by statute.¹⁵⁶

In *Andrews*, a former employee of a state college sought relief under the Arkansas Minimum Wage Act ("AMWA").¹⁵⁷ The General Assembly enacted a 2006 provision¹⁵⁸ that allowed suits against the State under the AMWA.¹⁵⁹ In light of pre-1996 case law, the Court said that this provision was "repugnant"¹⁶⁰ to Section 20 and chose to repudiate the cases following *Staton* and *Tedder*, finding instead that the precedent of *Nelson Brothers* and *Fairbanks* was the correct path to follow.¹⁶¹ Thus, as of the writing of this article, the law in Arkansas does not allow the legislature to provide the State's consent to suit through statutory waiver.¹⁶² "In reaching this conclusion," the Court said, "we interpret the constitutional provision, 'The State of Arkansas shall never be made a defendant in any of her courts,' precisely as it reads."¹⁶³ This hardline approach has now created a new layer of uncertainty in Arkansas's sovereign immunity precedent because no one yet knows how far the current Court is willing to extend its strict interpretation from *Andrews*, nor what the full impacts of that decision will be once *Andrews* is put into practice. Justice Baker outlined many of the problems that may arise in her strong dissent, yet she was unable to sway the majority.¹⁶⁴

154. *Bd. of Trs. of the Univ. of Ark. v. Andrews*, 2018 Ark. 12, at 7, 535 S.W.3d 616, 620.

155. *Tedder*, 326 Ark. at 496-97, 932 S.W.2d at 756; *Staton*, 325 Ark. at 344, 942 S.W.2d at 805.

156. *See supra* note 130 and accompanying text.

157. ARK. CODE ANN. §§ 11-4-201 to -222 (Repl. 2012 & Supp. 2017); *Andrews*, 2018 Ark. at 1, 535 S.W.3d at 617.

158. ARK. CODE ANN. § 11-4-218(e) (Repl. 2012 & Supp. 2017).

159. *Andrews*, 2018 Ark. 12, at 8, 535 S.W.3d at 621.

160. *Id.* at 10, 535 S.W.3d at 622.

161. *See id.* at 11-12, 535 S.W.3d at 623.

162. *Id.* at 10, 535 S.W.3d at 622.

163. *Id.*

164. *Andrews*, 2018 Ark. 12, at 13-19, 535 S.W.3d at 624-27 (Baker, J., dissenting).

III. THE PROBLEMS OF *ANDREWS* AND SUBSEQUENT DEVELOPMENTS

Beyond inciting the confusion that comes along with upending over twenty years of precedent, the *Andrews* opinion limits the power of the General Assembly in a very material sense. An untold number of peripheral questions and concerns now abound from that historic holding which will doubtlessly take years of work and barrels of ink to resolve. Perhaps chief among them is the State's revived immunization from suits authorized by statutes meant to protect the common citizen – primarily the AMWA (the statute at the center of *Andrews*)¹⁶⁵ and the Arkansas Whistle-Blower's Act ("AWBA").¹⁶⁶

One of the primary concerns Justice Baker discussed in her dissent is that the *Andrews* opinion "has effectively revived the antiquated doctrine that 'the king can do no wrong.'"¹⁶⁷ By choosing to follow a strict interpretation of Section 20, the Court has suggested that it is endorsing that old doctrine. Now, since the State cannot be sued for violating the AMWA, it can freely decide to pay its workers well below the statutory level required for all other employers and the State's employees could only turn to the State Claims Commission for relief.¹⁶⁸ Following the Court's holding in *Arkansas Community Correction v. Barnes*, the State is similarly free to take retaliatory action against its whistleblowing employees without fear of sanction by the courts as allowed under the AWBA.¹⁶⁹ In addition to blocking suits under the AWBA and AMWA, the *Andrews* opinion likely means that the State and its agencies are also now also protected from suits arising under freedom of information laws, suits against state-owned hospitals, Freedom of Information Act claims, and more.¹⁷⁰

By first allowing these suits, the legislature was obviously attempting to provide the citizens it represents with avenues of

165. ARK. CODE ANN. §§ 11-4-201 to -222 (Repl. 2012 & Supp. 2017); *Andrews*, 2018 Ark. 12, at 1, 535 S.W.3d at 617.

166. ARK. CODE ANN. §§ 21-1-601 to -610 (Repl. 2016); *Andrews*, 2018 Ark. 12, at 1, 535 S.W.3d at 617.

167. *Andrews*, 2018 Ark. 12, at 17-18, 535 S.W.3d at 626-27 (Baker, J., dissenting).

168. *See id.* at 12, 535 S.W.3d at 623.

169. *Ark. Cmty. Corr. v. Barnes*, 2018 Ark. 122, at 3, 542 S.W.3d 841, 843; *Andrews*, 2018 Ark. 12, at 18, 535 S.W.3d at 627 (Baker, J., dissenting).

170. *Andrews*, 2018 Ark. 12, at 18-19, 535 S.W.3d at 626-27 (Baker, J., dissenting).

redress other than the State Claims Commission – namely, the opportunity to press their claims in a court of law rather than apply for relief from an administrative body.¹⁷¹ The majority opinion in *Andrews* unquestionably strips that ability from the people where it was not clearly necessary to do so. As Justice Baker noted in her dissent, even under the old “the king can do no wrong” approach, “the law has always recognized the sovereign’s right to submit to suit.”¹⁷² The Court has previously said that it is “axiomatic” that the State can consent to suit and has contemplated statutory waiver as consent to suit provided by the legislature.¹⁷³ Therefore, despite the *Andrews* majority’s assertion that the AMWA’s immunity waiver is “repugnant” to Section 20,¹⁷⁴ it would not have been improper to instead follow the view that that the State may provide its consent to suit through a statute. Furthermore, considering public policy interests, it certainly would have been far less disruptive to our State’s legal status quo and would have preserved the citizen’s’ power to have their day in court. The AMWA is meant to ensure hard-working people are paid a living wage and the AWBA is meant to allow employees to expose their employers’ wrongdoings without fear of retaliation. The State should not be free to infringe on those legislatively-created protections with little fear of recourse while private employers are rightfully subject to judicial discipline.

A. The Cases Following Andrews and Continued Complications

Subsequent to issuing its disruptive opinion in *Andrews*, the Court has handed down a number of key decisions that somewhat assist in understanding the *Andrews* holding, but which mostly constitute collections of various concurring and dissenting opinions that address issues and concerns arising out of *Andrews* and other ensuing majority opinions.¹⁷⁵ Instead of clarifying the law, these cases muddy the sovereign immunity waters even

171. *Id.* at 18, 535 S.W.3d at 626-27 (Baker, J., dissenting).

172. *Id.* at 18-19, 535 S.W.3d at 627 (Baker, J., dissenting).

173. *See supra* Part II(A)(2).

174. *Andrews*, 2018 Ark. 12, at 10, 535 S.W.3d at 622.

175. *See generally* Ark. Dep’t of Veterans Affairs v. Mallett, 2018 Ark. 217, 549 S.W.3d 351; Ark. Cmty. Corr. v. Barnes, 2018 Ark. 122, 542 S.W.3d 841; Walther v. FLIS Enters., 2018 Ark. 64, 540 S.W.3d 264.

further with the sharp divides that have emerged among the current members of the Court on this issue.

The first of these cases to come after *Andrews* was *Walther v. FLIS Enterprises*, discussed previously, which was primarily concerned with sovereign immunity's status as an affirmative defense.¹⁷⁶ As noted in Section I(A), *supra*, the Court in *FLIS* expressly held that sovereign immunity is to be treated like an affirmative defense and that it is not a question of subject matter jurisdiction.¹⁷⁷ Interestingly, the issue of sovereign immunity was not raised in the circuit court below – the Court's analysis in *FLIS* came about because it ordered supplemental briefing sua sponte after one of the parties filed a notice that it was going to cite the *Andrews* opinion.¹⁷⁸ Since the Court found that sovereign immunity is not a subject matter jurisdiction issue, it also stated that it would not raise the defense for the State on its own volition.¹⁷⁹ Confronted with prior authority stating that sovereign immunity is a jurisdictional issue that may or must be raised by a court sua sponte, the Court dismissed those holdings as "dicta."¹⁸⁰ The concurring and dissenting opinions took issue with, among other things, treating Section 20 immunity as a defense that may be waived for various reasons, with their criticisms centered on the meaning and impact of *Andrews*.¹⁸¹

The next case to follow *Andrews* was *Arkansas Community Correction v. Barnes*.¹⁸² As noted above, the short majority opinion in that case held that, in light of *Andrews*, the provision in the AWBA authorizing suits against public employers for violating the act was unconstitutional, just like the AMWA provision at issue in *Andrews*.¹⁸³ The Court also made an attempt to narrow its holding, perhaps because it realized the far-reaching implications of its recent decisions, stating: "We emphasize here, as in *Andrews*, that the only issue before this court is whether the

176. 2018 Ark. 64, at 3-5, 540 S.W.3d 264, 266-68.

177. *Id.* at 4-5, 540 S.W.3d at 267-68.

178. *Id.* at 3, 540 S.W.3d at 266.

179. *Id.* at 5, 540 S.W.3d at 267 n.3.

180. *Id.* at 3-4, 540 S.W.3d at 267.

181. See *FLIS*, 2018 Ark. 64, at 12-14, 540 S.W.3d 264, 271-72 (Wynne, J., concurring); *Id.* at 21-24, 540 S.W.3d at 275-77 (Baker, J., dissenting); *Id.* at 24-25, 540 S.W.3d at 277 (Hart, J. dissenting).

182. 2018 Ark. 122, 542 S.W.3d 841.

183. *Id.* at 2-3, 542 S.W.3d at 842-43.

General Assembly's choice to abrogate sovereign immunity in the AWBA is prohibited by the constitution. We hold that it is."¹⁸⁴ In response to this majority opinion, Justice Hart filed a relatively lengthy dissenting opinion that provides a solid history of sovereign immunity law and outlines her arguments for overruling *Andrews*.¹⁸⁵ Ultimately, she concluded that the constitutional analysis in *Andrews* is lacking, and therefore flawed, and that the majority's attempt to nominally narrow its holding represents walking back of the broad precedent set by *Andrews*.¹⁸⁶

Next came *ADVA v. Mallet*, wherein the Court dismissed another AMWA claim.¹⁸⁷ The Court sided with the Arkansas Department of Veterans Affairs ("ADVA") and dismissed the action against it after ADVA filed a motion to dismiss on sovereign immunity grounds, despite the fact that the motion first raising the defense came about three and a half years after the initial complaint was filed.¹⁸⁸ The dissenters in *Mallett* made note of this discrepancy and raised legitimate concerns about what troubles this lax standard might generate.¹⁸⁹ In her dissent, Justice Goodson went so far as to argue that the *Mallett* majority completely abandoned the decision in *FLIS*, which held that sovereign immunity should be treated like an affirmative defense.¹⁹⁰

While the above three cases did not alter the law on sovereign immunity following *Andrews*, discussions of the problems with *Andrews* and its consequences are pervasive throughout the various opinions contained in those cases. It is clear from that the specter of the *Andrews* decision will continue to haunt Arkansas's Section 20 jurisprudence for the foreseeable future. Considering the sheer number of questions raised by *Andrews*, there is likely to be a considerable amount of litigation in the coming months and years that will hopefully yield some valuable answers.

184. *Id.* at 3, 542 S.W.3d at 843.

185. *Id.* at 6-22, 542 S.W.3d at 844-52 (Hart, J., dissenting).

186. *Id.* at 20-22, 542 S.W.3d at 851-52.

187. 2018 Ark. 217, at 1-3, 549 S.W.3d 351, 351-52.

188. *Id.* at 5, 549 S.W.3d at 353-54 (Baker, J., dissenting).

189. *Id.* at 3-6, 549 S.W.3d at 352-54 (Baker, J., dissenting); *Id.* at 6-9, 549 S.W.3d at 354-55 (Goodson, J., dissenting).

190. *Id.* at 7, 549 S.W.3d at 354 (Goodson, J., dissenting).

IV. CONCLUSION

Since the law is developing as I write, it is highly likely that at least some of what is contained herein will no longer be accurate by the time this comment reaches its readers. As the Court once noted in the quote at the beginning of this comment, the framers knew that their inclusion of Section 20 immunity in our State's constitution would result in instances of hardship, but they chose to include it anyway.¹⁹¹ Many of these hardships have just been discussed, while many more could not fit in these pages or have yet to materialize. In light of the present issues and chaos surrounding our sovereign immunity law,¹⁹² it is high time that we question the framers' decision to include the narrow and severe language of Section 20 in the state constitution. Section 20 has thus far served only to lock the doors of the courthouse to plaintiffs with genuine injuries while greatly confusing the legal profession in the process.

The high degree of uncertainty in our sovereign immunity law is by no means necessary, but it can be resolved rather painlessly with a constitutional amendment. The Arkansas Constitution is notoriously riddled with amendments and is fairly easy to change,¹⁹³ so it is certainly not uncommon for us to depart from the framers' original vision. Being one of the last three states to retain an absolute guarantee of sovereign immunity, Arkansas is behind the modern trend of granting the legislature the power to determine the extent of the State's immunity.¹⁹⁴ Such an arrangement in Arkansas would alleviate much of the current burden on lawyers attempting to decipher the Court's holdings while also opening up the court system and making the State more accountable to its people.

For some, however, granting the General Assembly the power to determine the State's immunity from suit is not an

191. See *supra* text accompanying note 1.

192. Particularly the problems most recently presented by the issuance of *Andrews*. See *supra* Part III.

193. See Steve Sheppard, *Intelligible, Honest, and Impartial Democracy: Making Laws at the Arkansas Ballot Box, or Why Jim Hannah and Ray Thornton Were Right About May v. Daniels*, 2005 ARK. L. NOTES 123, 124.

194. See *supra* Part I.

acceptable solution. Professor Joshua Silverstein has developed a proposal that would amend Section 20 to ensure the State could be sued in her courts like any other private party.¹⁹⁵ Professor Silverstein sees the entire concept of sovereign immunity as a holdover from monarchical rule that is incompatible with the values of a constitutional republic.¹⁹⁶ One such example of this incompatibility that he points to is the fact that Arkansas has no judicial tribunal to review the State Claims Commission's decisions akin to the Court of Federal Claims¹⁹⁷ – a concern not unrecognized by at least some on the Arkansas Supreme Court.¹⁹⁸ Professor Silverstein's proposal would undeniably open the courts and increase State accountability much more than giving control to the legislature, which would surely tinge the breadth of the State's immunity with political motivations that may not be in the best interest of the general public. More troubling still, the legislature could just re-enact Section 20 word-for-word as a statute.

After decades of opinions struggling to interpret Section 20, it is painfully obvious that any attempt by the Court to resolve the current problems in the law would be a palliative at best.¹⁹⁹ Perhaps recognizing this fact and feeling pressure following *Andrews*, Chief Justice Kemp filed a two sentence concurring opinion in *Mallett* flatly saying, "I write separately to state that the people of Arkansas have the ability by constitutional amendment to decide the rights and privileges granted in their fundamental document."²⁰⁰ Whether an amendment is placed on the ballot by the General Assembly or earns a spot through a private petition effort, the constitutional provision itself must change to truly rectify the situation. Until that day comes, however, Arkansas lawyers will continue to wrestle with the

195. Telephone Interview with Joshua M. Silverstein, Professor of Law, William H. Bowen School of Law (Sept. 4, 2018). Proposal and interview on file with author.

196. *Id.*

197. *Id.*

198. *Barnes*, 2018 Ark. 122, at 20, 542 S.W.3d at 851 (Hart, J., dissenting).

199. At least two current members of the Court agree: "...the majority has managed to tie into a knot the law on sovereign immunity and cannot untangle it." Ark. Dep't of Veterans Affairs v. Mallett, 2018 Ark. 217, at 5, 549 S.W.3d 351, 353 (2018) (Baker, J., dissenting).

200. ' *Id.* at 3, 549 S.W.3d at 352 (Kemp, C.J., concurring).

Court's tangled and irregular opinions that this comment has hopefully made more coherent.

ROBERT C. DALBY