SUPREME COURT OF ARKANSAS

No. CV-21-581

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF ARKANSAS; SHARON BROOKS; BILENDA HARRIS-RITTER; WILLIAM LUTHER; CHARLES ROBERTS; JAMES SHARP; AND J. HARMON SMITH, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS APPELLANTS V. THE LEAGUE OF WOMEN VOTERS OF ARKANSAS; ARKANSAS UNITED; DORTHA DUNLAP; LEON KAPLAN; NELL MATTHEWS MOCK; JEFFERY RUST; AND PATSY WATKINS APPELLEES	**Opinion Delivered:** February 17, 2022 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. 60CV-21-3138] HONORABLE WENDELL L. GRIFFEN, JUDGE CONCURRING OPINION.

RHONDA K. WOOD, Associate Justice

I write separately to address the importance of interpreting the constitution according to its original meaning. *Board of Trustees v. Andrews*[1] marked this court's return to interpreting article 5, section 20 of the Arkansas Constitution as the framers intended. The General Assembly lacks the power to override this provision, which states, "The State

[1]2018 Ark. 12, 535 S.W.3d 616.

of Arkansas shall never be made defendant in any of her courts."[2] But following *Andrews*, the language "the State shall never be made a defendant" has been plucked out of context and misinterpreted in a way that could strip our citizens of vital constitutional protections. This provision, when properly understood, (i) limits money-damage claims against the State but (ii) allows declaratory and injunctive relief against state officials who act illegally or unconstitutionally.

We should first look to the constitutional text. If uncertainty and ambiguity exist, we can then consider the text according to its original meaning. The question raised here involves how to define "the State" as described in article 5, section 20.[3] We have one clue about the scope of "the State" in our caselaw about administrative appeals from agency adjudications. We have allowed those appeals to proceed in the face of sovereign-immunity challenges. Even though the agency was a state entity and was the named defendant in circuit court, we held that the agency was really a tribunal or quasi-judicial decision maker.[4]

[2]Ark. Const. art. V, § 20.

[3]I disagree with the dissent that the critical interpretive point is the meaning of "never" rather than "the State." The dissent also cites numerous minority opinions from this court and the U.S. Supreme Court to explain its sudden shift to sovereign-immunity absolutism. Some of these citations don't support the propositions for which they are cited; for example, one case involved the interpretation of "qualified electors" and never discussed sovereign immunity. *Barrett v. Thurston*, 2020 Ark. 36, at 13, 593 S.W.3d 1, 9 (Wood, J., dissenting). Other citations are self-refuting; for example, the dissent cites a case discussing charitable immunity—an affirmative defense—to "prove" that sovereign immunity isn't an affirmative defense. *Davis Nursing Ass'n v. Neal*, 2019 Ark. 91, at 8, 570 S.W.3d 457, 462 (Wood, J., concurring); *Seth v. St. Edward Mercy Med. Ctr.*, 375 Ark. 413, 417, 291 S.W.3d 179, 183 ("[C]haritable immunity is an affirmative defense that must be specifically pled.").

[4]*Ark. Oil & Gas Comm'n v. Hurd*, 2018 Ark. 397, at 11, 564 S.W.3d 248, 255.

Article 5, section 20 did not consequently bar the "appeal." No sitting justice disagrees with this view.[5] Likewise, this court has unanimously allowed inmates to pursue civil complaints against the State in the context of their incarceration.[6]

Nor does the provision bar claims against State officials who act illegally, unconstitutionally, or ultra vires.[7] These actions are not truly against the State, but against rogue State officials whom the courts can enjoin. This is similar to the U.S. Supreme Court's doctrine that a lawsuit to enjoin a State official from taking unlawful action does not implicate State sovereign immunity under the Eleventh Amendment because such an officer is "stripped of his official or representative character" and may be "subjected . . . to the consequences of his individual conduct."[8] In other words, a state official who acts unlawfully does so "without the authority of . . . the state in its sovereign . . . capacity."[9]

The historical record provides other helpful guidance in determining the provision's original meaning. As we said in *Andrews*, before the 1874 Constitution, the General Assembly had the power to pass laws authorizing citizens to sue the State of Arkansas for

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[5]*E.g.*, *Ark. Dep't of Hum. Servs. v. Mitchell*, 2021 Ark. 188 (affirming unanimously agency decision based on substantial evidence rather than sovereign immunity).

[6]*E.g.*, *Muntaqim v. Hobbs*, 2017 Ark. 97, at 4, 514 S.W.3d 464, 468 (requiring circuit court to further consider a prisoner's First Amendment claim against prison officials).

[7]*Martin v. Haas*, 2018 Ark. 283, at 7, 556 S.W.3d 509, 514.

[8]*Ex parte Young*, 209 U.S. 123, 159–60 (1908); *see also* 17A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4231 (2019) (characterizing *Ex parte Young* as "one of the three most important decisions the Supreme Court of the United States has ever handed down," alongside *Marbury v. Madison* and *Martin v. Hunter's Lessee*).

[9]*Id.*

monetary damages.[10] But a dramatic shift happened between the Constitution of 1868 and the current Constitution of 1874: the State's citizens wanted to protect themselves from government overreach and to protect an overspending government from itself.[11] These concerns about excessive government power show that the original meaning of article 5, section 20 was to prevent the legislature from enacting laws subjecting the State to financial liability.

The 1874 Convention reflected the State's perilous financial condition. The State carried debt totaling approximately 20 million dollars.[12] Taxes were at an all-time high.[13] "Foremost in the minds of the delegates was the dangerous financial condition of the State."[14] One of the first acts at the convention was to call for a report on the State's finances, and the delegates spent weeks focusing on financial issues.[15] The changes between the 1868 Constitution and the 1874 Constitution reveal decision after decision to limit the government's ability to further financially strain the State. Some examples include the prohibition on incurring debts and the "severe restraints on the taxing powers of both state

[10]2018 Ark. 12, at 6, 535 S.W.3d at 620.

[11]*See generally* Rodney Waymon Harris, Arkansas's Divided Democracy: The Making of the Constitution of 1874 (2017) (Graduate Theses and Dissertations), available at http://scholarworks.uark.edu/etd/2446 [https://perma.cc/DLQ7-BBVK].

[12]*Id.* at 62.

[13]Walter Nunn, *The Constitutional Convention of 1874*, Arkansas Historical Association, The Arkansas Historical Quarterly 177, 182 (Winter 1968).

[14]*Id.* at 193

[15]*Id.* at 194.

and local governments by imposing low maximum rates."[16] Article 5, section 20 also highlights these concerns about the State's purse. The provision "almost certainly was a reaction to the lawsuits filed over the years to collect" the State's outstanding bond debt.[17]

The 1874 Convention also took place when many were concerned with excessive government power. "Opposition to centralization . . . became an overarching theme."[18] The delegates at the 1874 Constitutional Convention "enable[d] people to exercise more direct control over their elected officials."[19] Most scholars emphasize the shift from 1868 to 1874 as being "devoted to what the state and local governments" could not do.[20] Commentators often call the 1874 Constitution the "thou shalt not" constitution.[21] This constitution was designed to protect the people from overreach and "precluded . . . strong executive leadership and activist government."[22]

The *Andrews* decision fits perfectly within this textual and historical context. There, the legislature had enacted the Arkansas Minimum Wage Act, allowing individuals to

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[16]Ark. Const. art. XVI, § 1 ("Neither the State nor any city, county, town . . . shall ever lend its credit . . . ."); Jeannie Whayne et al., *Arkansas: A Narrative History* 256 (2d ed. 2013); *see also* Nunn, *supra* note 12, at 194–200.

[17]Mark H. Allison, Sovereign Immunity: Holford Bonds, the Brooks-Baxter War, and the Constitutional Convention of 1874, Ark. Law., Winter 2019, at 44.

[18]Harris, *supra* note 11, at 30.

[19]Nunn, *supra* note 13, at 200.

[20]*Id.* at 201.

[21]Id.

[22]Whayne, *supra* note 16, at 256.

recover monetary damages against the State. This court correctly found the Act to be an impermissible legislative waiver.[23] We said never means never and returned to prior case law that did not allow such a waiver. We reached the same conclusion about the Arkansas Whistle-Blower Act when the plaintiff there sued a State agency for money damages.[24] Put simply, article 5, section 20 insulates the State's treasury from monetary claims—whether sanctioned by the legislature or not.

The same week that this court decided *Andrews*, we also decided *Williams v. McCoy*, a case where the plaintiff alleged state officials acted illegally.[25] We did not extend the *Andrews* holding but rather considered the case on the merits and whether the plaintiffs pled sufficient facts. That the court decided two cases implicating the State as a defendant, with different results based on the relief sought, speaks volumes. Since *Andrews*, this court has continually interpreted article 5, section 20 as allowing citizen-led claims against State officials who act illegally or unconstitutionally.[26]

And no historical document suggests the provision's original meaning stripped power from the people to hold their government officials accountable. Any such document would be anomalous: the 1874 delegates wanted more citizen control over government—not less.

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[23]2018 Ark 12, at 11, 535 S.W.3d at 622

[24]*Ark. Cmty. Correction v. Barnes*, 2018 Ark. 122, at 3, 542 S.W.3d 841, 843.

[25]2018 Ark. 17, 535 S.W.3d 266.

[26]*See, e.g., Martin v. Haas, supra*; *McCarty v. Ark. State Plant Bd.*, 2021 Ark. 105, 622 S.W.3d 162; *Ark. Dep't of Fin. & Admin. v. Carpenter Farms Med. Grp., LLC*, 2020 Ark. 213, 601 S.W.3d 111; *Ark. Dep't of Hum. Servs. v. Ledgerwood*, 2017 Ark. 308, 530 S.W.3d 336.

To now interpret the provision as handcuffing the people from seeking relief in state court for other constitutional rights enshrined in the 1874 Constitution would upend that document's primary goal. And it is the people of Arkansas—not government bureaucrats—who are truly sovereign under our constitution.[27] Why would the people of Arkansas pass a constitution that gave them individual liberty, freedom of speech, freedom of assembly, and the right to bear arms, and at the same time destroy their ability to vindicate such rights in state court? Article 5, section 20 cannot be elevated above these rights.

Consider the following factual scenario: during a state of emergency, members of the executive branch issue interim orders aimed at curbing the emergency. But the orders plainly contradict the Arkansas Constitution and statutory law. Sovereign-immunity absolutism would bar citizens from filing lawsuits to enjoin the officials from enforcing these illegal orders. Some might say the legislature can step in.[28] But even then, the legislature can't enforce its own laws—it has the power of the purse, not the power of contempt. The judicial branch provides constitutional harmony and a forum for citizens to enforce their rights. Sovereign-immunity absolutism would decimate the judicial branch and render Arkansas's separation-of-powers perilously asymmetrical. The framers would have abhorred this imbalance.

The dissent responds with three points. None have merit. First, it argues that "never means never," that the majority has created unwritten exceptions, and that the constitutional

[27]Ark. Const. art. II, § 1.

[28]Ark. Const. art. V, § 42 (allowing legislative review of agency rules); Act 403 of 2021 (limiting scope of emergency orders).

language is clear. But if so clear, why has the Arkansas Supreme Court debated its meaning for over a hundred and fifty years? If so clear, why did the dissent admittedly write or join opinions specifically stating the contrary?[29] Second, the dissent contends sovereign-immunity implicates subject-matter jurisdiction and must be addressed before any other issue. If that's true, why did the dissent just last week affirm the dismissal of a lawsuit against a *state* district court judge without ever confronting the "jurisdictional" issue of sovereign

[29]While the dissent confesses error in a few cases, many more exist. *See, e.g.*, *Martin v. Haas*, 2018 Ark. at 7, 556 S.W.3d at 514 (joining majority opinion that held sovereign immunity inapplicable when complaint sought declaratory and injunctive relief from an illegal act); *Steve's Auto Ctr. of Conway, Inc. v. Ark. State Police*, 2020 Ark. 58, at 4, 592 S.W.3d 695, 698 (same); *Ark. Dev. Fin. Auth. v. Wiley*, 2020 Ark. 395, at 4, 611 S.W.3d 493, 498 (same); *Harris v. Hutchinson*, 2020 Ark. 3, at 4, 591 S.W.3d 778, 781 (same); *Ark. Game & Fish Comm'n v. Heslep*, 2019 Ark. 226, at 7–8, 577 S.W.3d 1, 6 (joining majority's holding that "claims for injunctive and declaratory relief are not necessarily barred by the doctrine of sovereign immunity"); *Monsanto Co. v. Ark. State Plant Bd.*, 2019 Ark. 194, at 9, 576 S.W.3d 8, 13 (joining majority's holding that "the ultra vires exception is alive and well, and it applies in this case"); *Hutchinson v. McArty*, 2020 Ark. 190, at 7, 600 S.W.3d 549, 553 ("We have previously determined that sovereign immunity does not bar actions for declaratory or injunctive relief.") (Womack, J., dissenting).

The dissent has also written majority opinions applying "exceptions" to sovereign immunity. *See, e.g.*, *Harmon v. Payne*, 2020 Ark. 17, at 4, 592 S.W.3d 619, 623 (acknowledging ultra vires exception in prisoner lawsuit alleging cruel and unusual punishment); *Muntaqim v. Lay*, 2019 Ark. 203, at 4–6, 575 S.W.3d 542, 546–47 (recognizing prison may restrict First Amendment rights despite constitutional text that says "Congress shall make no law"); *Muntaqim v. Hobbs*, 2017 Ark. at 5, 514 S.W.3d at 468 (reversing and remanding for consideration whether prisoner's First Amendment rights were violated). Indeed, the dissent would have allowed affirmative relief or potential affirmative relief against state officials who have acted unconstitutionally. *See McCarty*, 2021 Ark. 105, at 5–6, 622 S.W.3d at 165 (joining majority opinion ordering removal of members of Plant Board); *Carpenter Farms*, 2020 Ark. 213, at 20, 601 S.W.3d at 123 (joining majority opinion to the extent that it allowed equal-protection claim against Medical Marijuana Commission) (Womack, J., concurring in part and dissenting in part); *Ledgerwood*, 2017 Ark. 308, at 15, 530 S.W.3d at 346 (joining opinion upholding TRO against Department of Human Services).

immunity?[30] Last, the dissent attacks the concurrence and the majority not with law, but with rhetoric and by citing cases that tend to incite political discourse on a national level. But abortion and gay marriage have nothing to do with state sovereign immunity. Objective observers will see this ploy for what it is.

Neither the constitution's text, history, nor its function prohibits citizen-led suits against illegal state actors. These are no exceptions written into to the constitution; rather, the constitutional provision is simply not applicable when the State is not acting as the State. My originalist interpretation adheres to the original intent to provide citizens with more protection and to restrict governmental abuse. For the above reasons, I will continue to apply the plain language and original meaning of the Arkansas Constitution and allow our citizens to seek declaratory and injunctive relief when state officials act illegally.

[30] *See Mahoney v. Derrick*, 2022 Ark. 27 (holding that the affirmative defense of judicial immunity protected a district judge of the 23rd district from suit); *see also* Ark. Code Ann. § 16-7-1110(18)(A) (designating the judges of the 23rd district as state district court judges).