SUPREME COURT OF ARKANSAS

No. CV-21-581

Opinion Delivered: February 17, 2022

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

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION [NO. 60CV-21-3138]

HONORABLE WENDELL L. GRIFFEN, JUDGE

DISSENTING OPINION.

SHAWN A. WOMACK, Associate Justice

What does it mean when the constitution commands that something *never* happen? This court has read never as *except for three circumstances*. *See, e.g.*, *Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, at 5, 535 S.W.3d 616, 619–20. There are few clearer commands in our constitution than article 5, section 20. "The State of Arkansas *shall never* be made defendant in any of her courts" leaves no room to read in any of the exceptions that this court has previously recognized. Ark. Const. art. 5, § 20 (emphasis added). Nowhere does

the Arkansas Constitution contemplate an exception to sovereign immunity for unconstitutional, illegal, or ultra vires acts; a conclusion otherwise is purely this court's attempt at crafting public policy for the State. *Cf. Ark. Game & Fish Comm'n v. Heslep*, 2019 Ark. 226, at 8, 577 S.W.3d 1, 6.

A faithful interpretation of our constitution requires this court to recognize that the State can never properly be before any of its courts as a defendant. *Ark. Dev. Fin. Auth. v. Wiley*, 2020 Ark. 395, at 9, 611 S.W.3d 493, 500 (Baker, J., concurring). To the extent any of our precedents hold otherwise, they clearly conflict with the unambiguous requirements of our constitution. *See* Ark. Const. art. 5, § 20. The constitution's use of the word "courts" rather than the term "courts of equity" or "courts of law" bolsters this conclusion, as the constitution originally permitted the division of equitable and legal remedies between courts. Ark. Const. art. 7, §§ 1, 15, *repealed by* Ark. Const. amend. 80, § 22. A blanket prohibition against the State being a defendant in any of its courts is fatal to the suggestion that there are any exceptions, even for unconstitutional, illegal, or ultra vires acts. *See Barrett v. Thurston*, 2020 Ark. 36, at 13, 593 S.W.3d 1, 9 (Wood, J., concurring) ("Fundamental principles of constitutional interpretation require us to read laws as they are written and to give words their obvious and natural meaning.") (cleaned up).

Because the State—absent an express constitutional provision to the contrary—shall never be a defendant in any of its courts, Arkansas courts lack jurisdiction to hear any case where the State is a defendant. *See Wiley*, 2020 Ark. 395, at 9, 611 S.W.3d at 500 (Baker, J., concurring) (noting that "sovereign immunity is jurisdictional immunity from suit"); *see also Andrews*, 2018 Ark. 12, at 5, 535 S.W.3d at 619 ("Sovereign immunity is jurisdictional

immunity from suit . . . ."). Doctrines of immunity exist to prevent litigation, not liability. *Davis Nursing Ass'n v. Neal*, 2019 Ark. 91, at 8, 570 S.W.3d 457, 462 (Wood, J., concurring) (discussing charitable immunity, although this general principle of immunity equally applies to sovereign immunity). Once litigation proceeds against an immune defendant, the defendant has essentially lost this protection, regardless of the outcome. *Id.* This is no different when the State is the defendant, and the concurrence does not explain why it should be. *See* Ark. Const. art. 5, § 20.[1]

The concurrence admirably attempts to defend our precedent as harmonious with the original meaning of article 5, section 20. But it fails to make a convincing argument. This court first recognized an ultra vires exception to sovereign immunity seventy-nine years after we ratified our current constitution.[2] *Shellnut v. Ark. State Game & Fish Comm'n*, 222 Ark. 25, 31, 258 S.W.2d 570, 574 (1953). In *Shellnut*, this court held:

> [E]quity will exercise jurisdiction to restrain acts or threatened acts of public corporations or of public officers, boards, or commissions which are *ultra vires* and beyond the scope of their authority, outside their jurisdiction, unlawful or without authority, or which constitute a violation of their official duty, whenever the execution of such acts would cause irreparable injury to, or destroy rights and privileges of, the complainant, which are cognizable in equity, and for the protection of which he would have no adequate remedy at law.

[1]Framing sovereign immunity as an affirmative defense similarly offends the clear text of article 5, section 20; *never* means *never*, and the State is without authority to waive the requirements of our constitution. *Contra Walther v. FLIS Enters.*, 2018 Ark. 64, at 16, 540 S.W.3d 264, 273 (Womack, J., concurring in part and dissenting in part) (joining the majority's holding that sovereign immunity is an affirmative defense).

[2]Although this court considered whether certain actions by the State were ultra vires in *State ex rel. Utley v. Cox*, there, the State initiated the lawsuit and, therefore, article 5, section 20 does not apply. 154 Ark. 493, 502, 243 S.W. 651, 652 (1922).

Id. (quoting *Jensen v. Radio Broad. Co.*, 208 Ark. 517, 520, 186 S.W.2d 931, 932 (1945)). While this was the first time this court explicitly recognized the availability of such relief for ultra vires acts by the State, it offered no explanation why this departure from the constitution was appropriate. The case the court cited in support concerned ultra vires acts of *county officials* rather than state actors. *Shellnut*, 222 Ark. At 31, 258 S.W.2d at 574 (citing *Jensen v. Radio Broad. Co.*, 208 Ark. At 520, 186 S.W.2d at 932).

Though similar to ultra vires acts, this court recognized an exception to sovereign immunity for illegal state action only twenty-eight years after ratification. In *McConnell v. Arkansas Brick & Mfg. Co.*, this court affirmed an injunction against the Board of Commissioners of Arkansas State Penitentiary to stop the rescission of a contract via resolution. 70 Ark. 568, 589, 69 S.W. 559, 567 (1902). Though the court stated that "[n]o order of the court can be against the state, nor against the defendants to compel them to perform these duties as officers and agents of the state," the majority found equitable relief appropriate when there was a valid, enforceable contract. *Id.* at 591, 69 S.W. at 564, 567. This inconsistent reasoning drew the ire of three dissenting justices, but seven years later, this court overruled *McConnell* and held that there was no vested right to sue the State. *Pitcock v. State*, 91 Ark. 527, 539, 121 S.W. 742, 746 (1909); *accord Caldwell v. Donaghey*, 108 Ark. 60, 66, 156 S.W. 839, 842 (1913) (holding that the lawsuit cannot be maintained because it's against the State). Yet, this court once more reversed course and again recognized an exception for illegal acts forty years later—the same court that decided *Shellnut*. *Fed. Compress & Warehouse Co. v. Call*, 221 Ark. 537, 541, 254 S.W.2d 319, 321 (1953).

In *Hickenbottom v. McCain*, this court held that sovereign immunity did not bar a lawsuit challenging the constitutionality of the Employment Security Division in the Department of Labor because the relief would impose no obligation on the State. 207 Ark. 485, 490, 181 S.W.2d 226, 228 (1944).[3] This exception was apparently unknown until seventy years after ratification of our current constitution. *See id*. As with the exceptions for illegal acts and ultra vires acts, decades passed between the State's adoption of sovereign immunity and any assumption that the defense was not absolute. And although the ratifying generation's interpretation of the constitution is not infallible, it is as persuasive as the concurrence's historical analysis of the Constitutional Convention's apparent intentions. *Cf.* Mark H. Allison, *Sovereign Immunity: Holford Bonds, the Brooks-Baxter War, and the Constitutional Convention of 1874*, Ark. Law., Winter 2019, at 44; *cf.* Walter Nunn, *The Constitutional Convention of 1874*, Arkansas Historical Association, The Arkansas Historical Quarterly 177, 182 (Winter 1968). Simply put, *Shellnut, Hickenbottom, McConnell, and Federal Compress* do not sufficiently explain why we should depart from the clear text of our constitution; their disregard of the plain text of article 5, section 20 is shocking.

There is no legitimate reason for this court's decision to depart from such a clear textual command. The drafters of our constitution chose to *never* permit a lawsuit in Arkansas courts when the State is a defendant. Ark. Const. art. 5, § 20. There is no exception if a lawsuit raises the magic words. When advancing an originalist theory, we must focus on the original *public* meaning: what did those who ratified the constitution

[3]At best, that reasoning is simplistic and specious. Any lawsuit that challenges the constitutionality of an act of the General Assembly obliges the State to defend the law.

understand article 5, section 20 to mean? *See Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1666 (2020) (Thomas, J., concurring). It is beyond comprehension to suggest they read never to mean *except for these three exceptions*.[4] Especially considering the absence of these three exceptions for several decades following ratification.

Insofar as the concurrence focuses the constitution's use of *state* in article 5, section 20, neither the parties nor the majority opinion disagrees that the defendants in this lawsuit are branches of the State. Every sitting justice on this court agrees, for example, that State officials sued in their official capacity are entitled to sovereign immunity. *E.g.*, *Ark. Dep't of Fin. & Admin. v. Lewis*, 2021 Ark. 213, at 3, 633 S.W.3d 767, 770. Yet, as with the exceptions made for unconstitutional, illegal, or ultra vires acts, the concurrence cannot cite any constitutional basis to support its suggestion that certain State officials are undeserving of sovereign immunity when acting in their official capacities. *See Arkansas Oil & Gas Comm'n v. Hurd*, 2018 Ark. 397, at 10, 564 S.W.3d 248, 255. Next, the concurrence will argue that article 5, section 20's use of *defendant* does not really mean *defendant*—merely another attempt to make the words of our constitution mean something they do not. The concurrence should not attempt to disguise its argument as textual or originalist, when it better resembles the capacious judicial philosophizing of *Roe v. Wade*, 410 U.S. 113 (1973) and *Obergefell v. Hodges*, 576 U.S. 644 (2015). The concurrence offers a brand of faux originalism that cherry picks a few historical events while ignoring the plain text in an effort

[4]A court errs when it uses the literal meaning over the original, ordinary meaning. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting). Here, however, there is no difference. The literal and original meaning of *never* is the same. It means the same thing in 2022, as it did in 1874.

to bolster a results-driven jurisprudence, and, further, it confuses "rhetoric" and "political discourse" with recognition of its judicial philosophy.

Despite its legal shortcomings, I join the concurrence's lamentation of the costs of this interpretation. Indeed, there are legitimate policy considerations for the protection of our citizens that weigh in favor of creation of the exceptions. There are undoubtedly times when the State and its officials injure the public. But results oriented jurisprudence perverts the role of the judiciary. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting).

When the constitution is clear in its language, as it is here, there is no need for further interpretation. The structural design of our constitution dictates that the power to change article 5, section 20 lies not with the courts, but rather exclusively with the people of the state of Arkansas; our precedent recognizing exceptions to the constitution usurps this constitutionally enshrined prerogative. Ark. Const. art. 5, § 1; Ark. Const. art. 19, § 22.[5] Moreover, reading article 5, section 20 to mean what it says will not completely divest people of relief from the State. Putative plaintiffs in many cases may still recover from the State through the Arkansas State Claims Commission, and federal courts offer avenues of relief for certain claims against the State. *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress can abrogate sovereign immunity when legislating under its power to enforce the Fourteenth Amendment).

[5]As recently as last spring, the General Assembly introduced a proposed ballot initiative to amend article 5, section 20, which would allow the State to be sued in its courts, as if it were any other party. S.J. Res. 3, Arkansas 93rd General Assem., Reg. Sess. (2021).

Although this marks a momentous departure from this court's precedent, multiple wrongs do not make a right. When this court's precedent so clearly conflicts with our constitution, we must not blindly follow it for the sake of stare decisis. *See Edwards v. Thomas*, 2021 Ark. 140, at 27, 625 S.W.3d 226, 240–41 (Webb, J., concurring in part and dissenting in part). Stare decisis is an important principle that provides consistency to legal interpretation, but it is more important that we not cleave to mistakes simply because we have maintained them for decades. The common law doctrine of sovereign immunity springs from the theory that "the King can do no wrong." A version of that policy was adopted for the state of Arkansas when the people, as is their right, ratified our current constitution. We must be cautious not to let stare decisis become so absolute in our opinions that we view it as "the court can do no wrong." We took an oath to uphold the Arkansas Constitution, not the *Arkansas Reports*.

Although I have either written or joined opinions[6] that recognized exceptions to sovereign immunity, "it is never too late to surrender former views to a better considered position." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring) (cleaned up). A careful study of our constitution and recognition that it controls

[6] *See, e.g.*, *Ark. Dep't of Educ. v. McCoy*, 2021 Ark. 136, at 12, 624 S.W.3d 687, 694 (Womack, J., concurring in part and dissenting in part); *Hutchinson v. McArty*, 2020 Ark. 190, at 7, 600 S.W.3d 549, 553 (Womack, J., dissenting); *Harmon v. Payne*, 2020 Ark. 17, at 4, 592 S.W.3d 619, 623; *Banks v. Jones*, 2019 Ark. 204, at 4, 575 S.W.3d 111, 115; *FLIS Enters.*, 2018 Ark. 64, at 16, 540 S.W.3d at 273 (Womack, J., concurring in part and dissenting in part). Relatedly, the concurrence's invocation of *Mahoney v. Derrick*, 2022 Ark. 27 is misleading. In *Mahoney*, the plaintiffs brought the bulk of their claims under 42 U.S.C. 1983. The Supreme Court of the United States has held that states cannot divest their courts of general jurisdiction from the ability to hear federal claims. *Haywood v. Drown*, 556 U.S. 729, 740–41. Accordingly, sovereign immunity could not operate as a bar to those unique claims. *Id.*

this State's law rather than our precedent makes this departure not only appropriate but also necessary.

For these reasons, I respectfully dissent.