

# An Overview of Sovereign Immunity and Board of Trustees of the University of Arkansas v. Andrews

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# Arkansas Constitution, Article 5, § 20

The State of Arkansas shall never be made defendant in any of her courts.

## When looking at state constitutions, Arkansas' provision is fairly unique:

- ▶ 24 state constitutions do not address sovereign immunity
- ▶ 23 state constitutions address sovereign immunity by providing in various forms that the legislature may provide for suit against the state
- ▶ Three states (Arkansas, Alabama, West Virginia) provide that the state shall never be made a defendant in its courts.

# The facts of Andrews:

- ▶ Rich Mountain Community College employed Andrews as a bookstore manager from November 15, 2010 through May 9, 2013.
- ▶ When Andrews began working for RMCC he received overtime compensation - in 2011 he was classified as exempt from the overtime requirements under the federal Fair Labor Standards Act and the Arkansas Minimum Wage Act.
- ▶ In 2013, Andrews filed a complaint against RMCC for failing to compensate him for overtime under the Arkansas Minimum Wage Act. He sought a variety of relief, including damages for unpaid overtime compensation, prejudgment interest, attorney's fees, and costs.

Andrews brought his action consistent with the Arkansas Minimum Wage Act, which provides at § 11-4-218(e):

An employee may bring an action for equitable and monetary relief against an employer, including the State of Arkansas or a political subdivision of the state, if the employer pays the employee less than the minimum wages, including overtime wages, to which the employee is entitled under or by virtue of this subchapter.

The Andrews opinion provides an overview of the history of sovereign immunity in the state which is important to understanding and interpreting the case.

Article 5, § 45 of the 1868 Arkansas Constitution provided that "The general assembly shall direct by law in what manner and in what courts suits may be brought by and against the state."

When the fifth and current version of the Arkansas Constitution was adopted by the people of the state in 1874, this language had been altered to read that "The State of Arkansas shall never be made a defendant in any of her courts."

The majority opinion in Andrews notes that sovereign immunity has been interpreted differently by the court throughout the years and cites specific cases as evidence.



# Arkansas Highway Commission v. Nelson Brothers, 191 Ark. 629 (1935).

- ▶ The plaintiffs in the case sought to collect funds from the Arkansas Highway Commission for construction work done on state highways under a contract with the commission.
- ▶ The court in Nelson Brothers noted some confusing precedent on whether the state could consent to suits against the highway commission. The court distanced itself from that confusing precedent and held that the state had no power to waive its sovereign immunity as "[t]he language of the quoted prohibition is so precise and clear as to admit of no room for interpretation or for any refinement of judicial construction which would obscure or change the common and ordinary meaning of the words employed."
- ▶ The court cited language from a past case that "[a]ll who contract with the state must do so with full knowledge that they must rely solely on the legislative branch for performance of the contract and for satisfaction of the state's just obligations."

# Fairbanks v. Sheffield, 226 Ark. 703 (1956).

- ▶ The plaintiffs sought declaratory judgment holding that an act authorizing construction of improvements in the state park system was either unconstitutional or had been repealed and sought an injunction to stop the project.
- ▶ The court held that the majority of the act was constitutional, but found unconstitutional a provision stating that in the event of default any bondholder may apply for the appointment of a receiver, who could take possession of the properties and fix and collect fees sufficient to provide revenues for the payments of the bonds and the costs of receivership. This was deemed an unconstitutional attempt by the General Assembly to consent to a suit against the state.

- ▶ The court held that Article 5, § 20, is mandatory and cannot be waived by the General Assembly. "It is immaterial that the petition for a receivership would not involve a money judgment against the State. An action for the recovery of property sold to the State under a title-retaining contract cannot be maintained. . . for 'any suit, whether in law or equity, which has the purpose and effect, directly or indirectly, of coercing the state, is one against the state.'" (Citations omitted).
- ▶ The court held that the unconstitutional provisions were severable from the rest of the act and did not "impair any remedy that the bondholders may have in the form of an action for a writ of mandamus to compel the Commission to perform ministerial duties imposed by law."

## Arkansas Department of Human Services v. State, 312 Ark. 481 (1993).

- ▶ The Juvenile Court had assessed costs and restitution against DHS for delinquent acts by juveniles that were in the custody of DHS when the acts occurred. The court held that the doctrine of sovereign immunity precluded the assessment of costs and restitution against DHS.
- ▶ The court noted that in this case, no one had filed a lawsuit against DHS seeking costs and restitution - the juvenile court had imposed the costs against the juvenile's custodian as provided by statute. Regardless, the court's action coerced the state to bear a financial obligation and violated sovereign immunity.
- ▶ The cases contains citations to instances where exceptions to the doctrine of sovereign immunity have occurred, such as punishment for contempt and when an agency voluntarily enters an appearance seeking affirmative relief. The case notes that when the State is the moving party seeking affirmative relief, it is prohibited from raising sovereign immunity as a defense. The court notes that since DHS was under an obligation to appear, it did not voluntarily waive sovereign immunity.

## Arkansas Department of Finance and Administration v. Staton, 325 Ark. 341 (1996).

- ▶ A taxpayer purchased a car and an extended service contract and paid sales tax on both. She alleged that the extended service contract was not taxable and filed a refund claim with DFA, which was denied. She then filed suit against DFA for the amount of the tax while seeking class certification for all other persons who had paid tax on extended service contracts.
- ▶ A statute allowed taxpayers to sue the state for improperly collected sales tax only if a refund had been sought and refused. It appears the department did not contend that sovereign immunity barred the taxpayer's claim, but asserted that class certification was improper because those persons had presumably not complied with the statute by filing refund claims.


- ▶ The court cited the statute that granted legislative permission to a taxpayer to sue the State after a claim for refund has been filed and refused. The court noted that "there must be full compliance with this type of statute before sovereign immunity is waived." Because the taxpayer's claim was the only one filed and rejected, sovereign immunity was waived in only that case.
- ▶ The court noted that "[i]nterwoven with the doctrine of sovereign immunity in tax cases is sound fiscal public policy." The court observed that throughout the years, with one exception, it had required taxpayers to comply with statutory requirements before sovereign immunity is waived so that government was put on notice of the claim and could make appropriate financial allowances.

## Arkansas Department of Finance and Administration v. Tedder, 326 Ark. 495 (1996).

- ▶ The facts are similar to the Staton case and they were decided within a week of one another. A taxpayer purchased a used vehicle and paid sales tax. He filed a claim for a sales tax refund, alleging that the vehicle was exempt as an isolated sale. The request was refused and the taxpayer filed suit on behalf of himself and all others similarly situated.
- ▶ The decision tracked the Staton case. The court observed that "[o]ur constitution generally prohibits suits against the state." However, the statute at issue permitted a taxpayer to sue the state for improperly collected sales tax only after a refund was sought and refused. Since only the taxpayer had complied with the statute, the proposed class of similarly situated plaintiffs did not enjoy a waiver of sovereign immunity.
- ▶ This began a trend of cases upholding statutory waivers of sovereign immunity.

- ▶ Post-1996, the Arkansas Supreme Court had recognized that a claim of sovereign immunity may be overcome in three instances: (1) when the state is the moving party seeking relief; (2) when an act of the legislature has created a specific waiver of sovereign immunity; and (3) when the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial act required by statute.
- ▶ The Andrews court acknowledged that if it applied its post -1996 case law, "the plain language of § 11-4-218(e) would qualify as an exception to sovereign immunity because it contains an express waiver created by the legislature."
- ▶ However, the court concluded that there was a clear incompatibility between § 11-4-218(e) and the Arkansas Constitution.



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- ▶ To reach this conclusion, the court interpreted the constitutional provision "The State of Arkansas shall never be made a defendant in any of her courts", precisely as it read.
  - ▶ The court observed the differences between the 1868 and 1874 constitutions on sovereign immunity, specifically noting the addition of the word "never". The court concluded that the General Assembly does not have the power to override a constitutional provision.

The court held that under the doctrine of stare decisis (latin for "to stand by things decided"), it could not ignore the precedent prior to the Staton case. The court quoted from Nelson Brothers:

The human element in legislatures and courts, following a natural impulse, abhors an injustice perpetrated without a forum in which the right denied or the wrong suffered may be asserted or redressed. Therefore, we find legislatures devising means for the assertion of rights or the redress of wrongs even when the state is involved and the courts are as sensitive to such impulse as the legislatures. . . we are impelled by the conviction that these decisions are wrong. . . No one has a vested right to sue the state even when that privilege may be, and has been given; it may be withdrawn even where a suit has been commenced without disturbing any vested right.

- ▶ The court concluded that Nelson Brothers, Fairbanks, and Arkansas Department of Human Services are the correct precedent for the court to follow in its conclusion that the General Assembly cannot waive the State's sovereign immunity under Article 5, § 20. To the extent cases conflicted with this holding, they were overruled.
- ▶ The court noted that suits subjecting the state to financial liability are barred by sovereign immunity and are properly brought before the Arkansas Claims Commission.

Andrews had argued that the rights under Article 2 of the Arkansas Constitution trumped Article 5 and that the state should be answerable in court for violations of the law, as well as that sovereign immunity had been waived. However, the court did not address these issues as the circuit court did not rule on them.

## Two justices filed a dissenting opinion which contained 5 points:

1. The opinion produced the untenable result that while private employers were required to comply with the Arkansas Minimum Wage Act, the state was not because state employees had no recourse to enforce the act.

2. Per the dissent, the majority opinion appears to attempt to limit its holding to only legislative waivers of sovereign immunity; however, its holding is much more far-reaching. The dissent considered this holding to render any waiver of sovereign immunity impossible. The dissent stated that "the majority's attempt to limit its holding to money judgments is disingenuous to the literal text of Article 5, Section 20" as "[a]bsent from our Constitution is any language limiting sovereign immunity to money judgments." The dissent felt the opinion prevented not only the legislative branch from waiving sovereign immunity, but the executive and judicial branches as well.

The dissent also argued that the word "made" in Article 5, § 20 should be interpreted to mean "compel" so that the state could consent to be sued but could not be forced to be submit to a suit.

3. The dissent stated that because of the opinion, specific sections of Article 2 of the Arkansas Constitution conflicted with Article 5, Section 20.

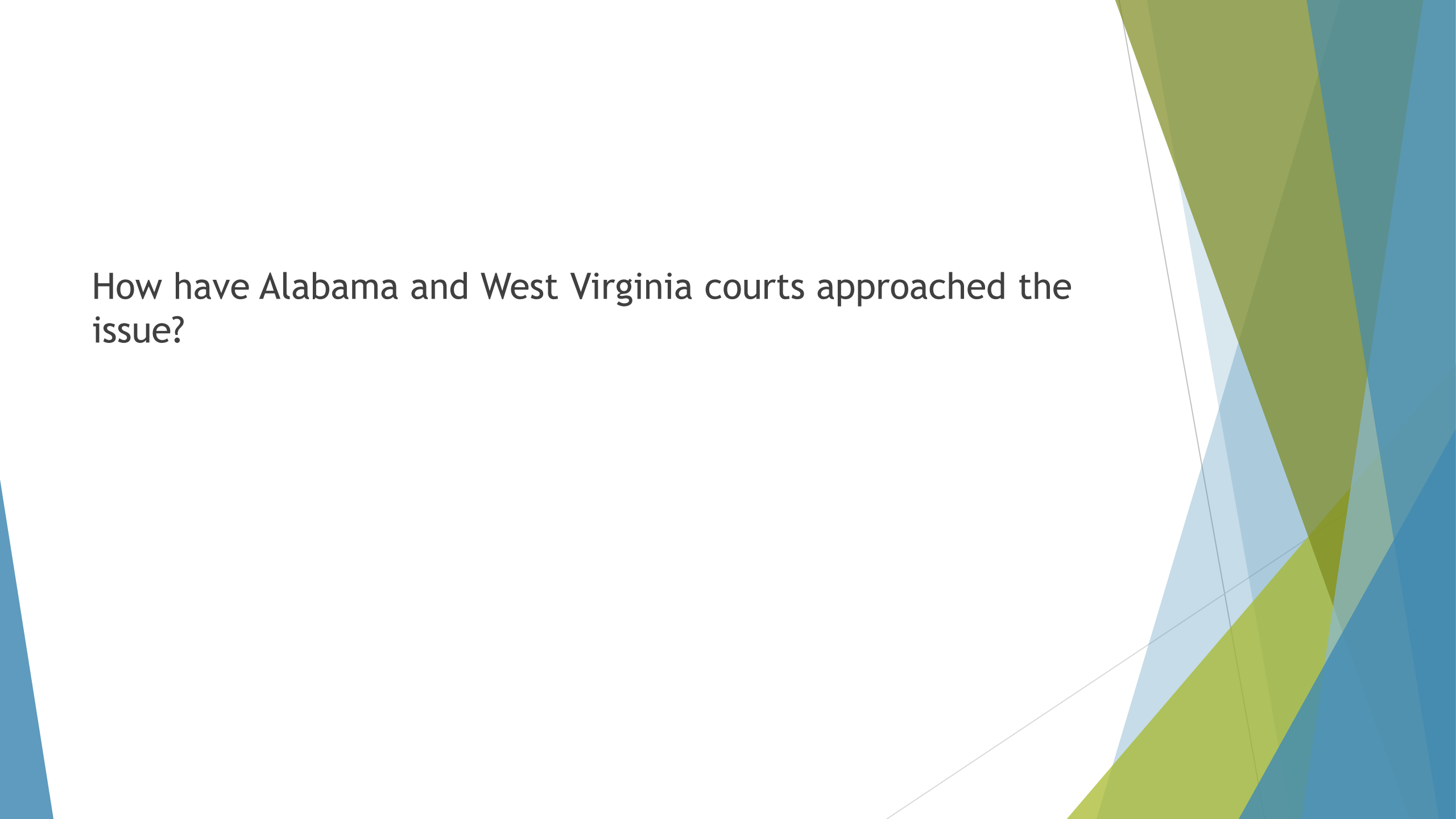
4. The dissent noted the confusing precedent that preceded Nelson Brothers in 1935, which had allowed suits to proceed against the state. The dissent felt that this represented a third treatment of sovereign immunity, while the majority opinion observed only two interpretations.



5. The dissent felt that the doctrine of stare decisis should apply to the twenty years of precedent that followed Staton and Tedder, as the doctrine was designed to "lend predictability and stability to the law." The dissent felt that the majority opinion left "the state of law on sovereign immunity in complete disarray" and called into question the following types of actions:

- ▶ -- Arkansas Minimum Wage Act
- ▶ -- Arkansas Whistle Blower's Act
- ▶ -- Post-conviction cases
- ▶ -- Land-condemnation cases
- ▶ -- Illegal-exaction cases
- ▶ -- Suits against State owned hospitals
- ▶ -- Freedom of Information Act
- ▶ -- Suits filed against DHS, including dependency-neglect cases

How have Alabama and West Virginia courts approached the issue?



# In Alabama:

"It is familiar law that § 14 'wholly withdraws from the Legislature, or any other state authority, the power to give consent to a suit against the state.'" Alabama State Docks v. Saxon, 631 So.2d 943 (Ala.1994).

"Section 14 has been described as a 'nearly impregnable' and 'almost invincible' 'wall' that provide the State an unwaivable, absolute immunity from suit in any court. When an action is one against the State or a State agency, § 14 wholly removes subject matter jurisdiction from the courts." Ex parte Town of Lowndesboro, 950 So.2d 1203, 1206 (Ala. 2006)(citations omitted)

# There are 7 general exceptions in Alabama:

- (1) Actions brought to compel state officials to perform their legal duties;
- (2) Actions brought to enjoin state officials from enforcing an unconstitutional act;
- (3) Actions to compel state officials to perform ministerial acts;
- (4) Declaratory judgment actions seeking construction of a statute and its application in a given situation;

# Other actions that are not prohibited:

- (5) Valid inverse condemnation actions brought against State officials in their representative capacity;
- (6) Actions for injunction brought against State officials in their representative capacity where it is alleged that they acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law; and
- (7) Actions for damages brought against State officials in their individual capacity where it is alleged that they had acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law, subject to the limitation that the action not be, in effect, one against the state.

Drummond Co. v. Alabama Department of Transportation, 937 So.2d 56, 58 (Ala.2006), Ex parte Moulton, 116 So.3d 1119 (Ala.2013).

West Virginia courts have observed that the "constitutional grant of immunity is absolute and, as we have consistently held, cannot be waived by the legislature or any other instrumentality of the State." The policy of this provision was to prevent the diversion of State monies from legislatively appropriated purposes. Mellon-Stuart Co. v. Hall, 359 S.E.2d 124 (1987).

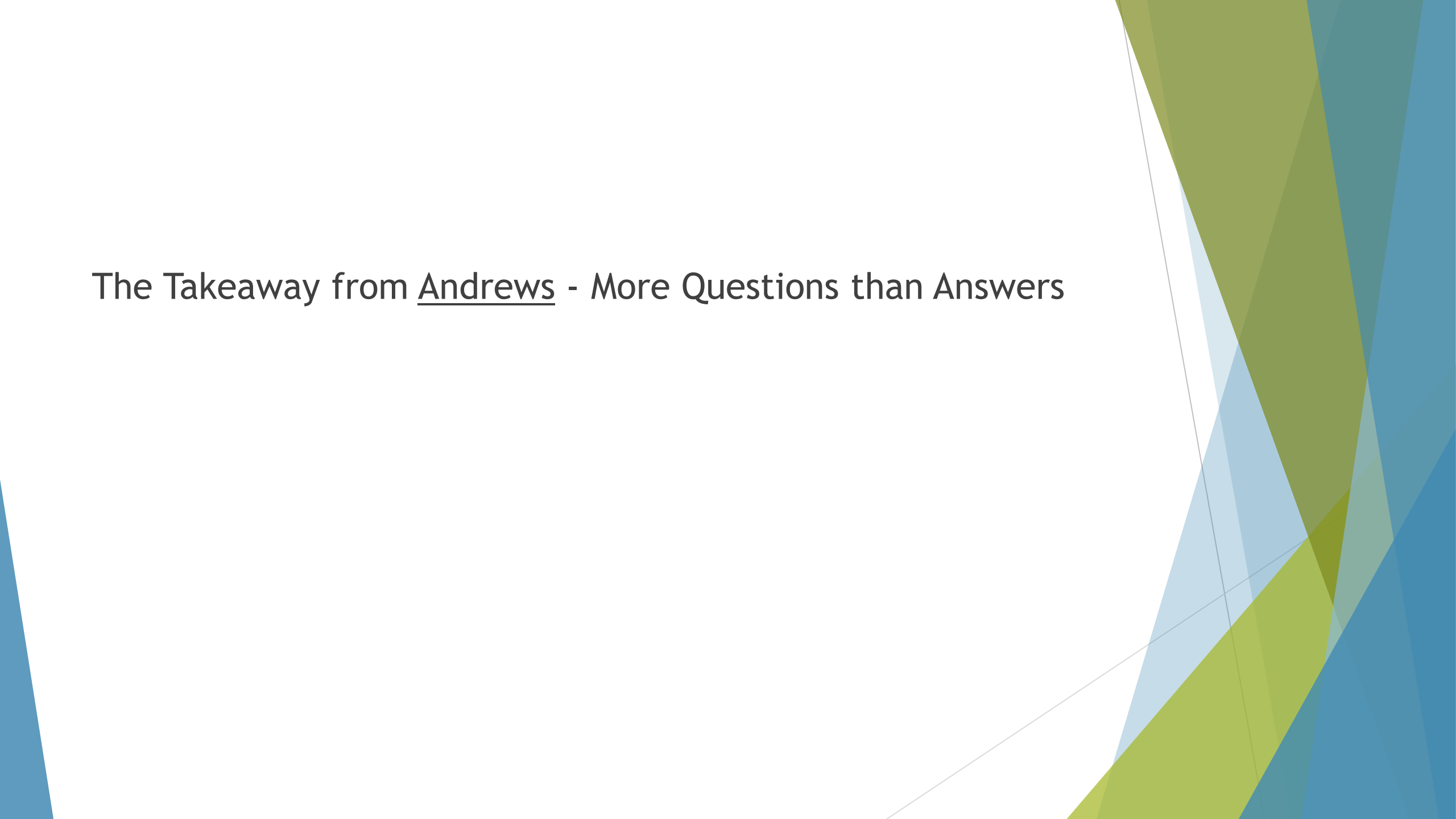
However, if a remedy sought against the state does not require the expenditure of state funds, sovereign immunity is not triggered. West Virginia Lottery v. A-1 Amusement Inc, 807 S.E.2d 760 (W.VA.2017).

In that vein, legislative provisions for the purchase of insurance provides an exception for the state's constitutional immunity. In other words, West Virginia law provides that the state is liable up to the limits of liability insurance held by the state and this has been upheld by West Virginia courts. It appears the rationale is that these insured sums are not "state funds". Eggleston v. West Virginia Department of Highways, 429 S.E.2d 636 (W.Va. 1993)

The dissent in University of West Virginia Board of Trustees ex rel. West Virginia University v. Graf, 516 S.E.2d 741 (W.Va. 1998) contains a list of 12 other exceptions, such as injunctions to restrain or require State officers to perform ministerial duties, counterclaims growing out of transactions where the State institutes actions at law against a citizen, and mandamus relief to compel State officers who have acted arbitrarily, capriciously, or outside the law to perform their duties.



The Takeaway from Andrews - More Questions than Answers

The background of the slide features abstract, overlapping geometric shapes, primarily triangles, in various shades of blue and green. These shapes are layered, creating a sense of depth and movement. The colors range from light, airy blues to darker, more saturated greens and blues. The overall composition is modern and minimalist, with the text centered on a white background that contrasts with the colorful, geometric elements on the right side of the slide.

The one thing we know for sure -- Arkansas Code § 11-4-218(e) is unconstitutional and an employee cannot bring an action against the State of Arkansas under the Arkansas Minimum Wage Act.

It's probably safe to assume that the holding applies to other legislative waivers of sovereign immunity. The question is what exactly those are.

- ▶ The Administrative Procedure Act provides that persons who consider themselves injured by final agency action are entitled to judicial review - a Pulaski County circuit court has dismissed an appeal under this section post-Andrews.
- ▶ The Religious Freedom Restoration Act provides that a person may assert a violation in a judicial proceeding and obtain relief against a government - the Supreme Court alleged in a brief that the General Assembly could not authorize suit in state court in RFRA matters.
- ▶ The Freedom of Information Act allows persons denied rights to appeal to Pulaski County Circuit Court - is this section affected?

# Is the decision limited to monetary damages?

- ▶ The dissent suggests this, but the majority opinion does not seem to focus on that issue.
- ▶ The court found § 11-4-218(e) unconstitutional, which allowed actions for equitable and monetary relief. The court did not draw a distinction between equitable and monetary relief.
- ▶ In a brief, the Supreme Court suggested that the state could not authorize suit in state court under the Religious Freedom Restoration Act. Relief under that act would often be equitable relief.

# If the decision is not limited to monetary damages, how expansive is it?

- ▶ The decision says that "we interpret the constitutional provision 'The State of Arkansas shall never be made a defendant in any of her courts' precisely as it reads" and that Nelson Brothers, Fairbanks, and Arkansas Department of Human Services are the correct precedent to follow in its conclusion that the General Assembly cannot waive the State's immunity.
- ▶ Fairbanks and Arkansas Department of Human Services note some exceptions to sovereign immunity, specifically actions to compel agencies to perform ministerial acts and voluntary waivers of sovereign immunity by state agencies. Under these cases, "never" did not mean "never".
- ▶ Similar provisions in Alabama and West Virginia have been interpreted to allow multiple exceptions.
- ▶ Does this mean the holding is limited to waivers of sovereign immunity by the General Assembly?

# What are the implications for the Arkansas State Claims Commission?

- ▶ The Andrews opinion references that the Claims Commission is the proper avenue for suits subjecting the state to financial liability.
- ▶ Presumably actions under the Arkansas Minimum Wage Act would now fall under the Claims Commission.
- ▶ If the opinion impacts equitable relief, can that constitute a claim before the Claims Commission?

- ▶ The commission shall have jurisdiction only over those claims which are barred by the doctrine of sovereign immunity from being litigated in a court of general jurisdiction. Arkansas Code § 19-10-204.
- ▶ The term "claim" is not defined in the commission's enabling legislation.
- ▶ However, a complaint before the commission is required to state the amount claimed.
- ▶ Depending on how the Andrews case impacts the commission's caseload, it may need statutory adjustments to its jurisdiction and the relief it may grant.

# Final observations -

- ▶ The Andrews case has clearly caused profound changes to how certain actions will proceed against the state.
- ▶ It's difficult at this point to ascertain exactly what the implications are, although the opinion raises obvious questions.
- ▶ As these questions and issues arise in the coming months, it is fair to expect that we will learn more about how to interpret the opinion.



# Questions?

