

SOVEREIGN IMMUNITY IN INDIANA: A PROPOSAL TO PROTECT WHISTLEBLOWERS AGAINST THE STATE THROUGH LEGISLATIVE ACTION

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INTRODUCTION

The doctrine of sovereign immunity in the United States provides that the federal government cannot be sued in its own courts unless authorized through an act of Congress.¹ This doctrine was adopted from English common law following the Revolutionary War and was based on “the premise that the new government was not financially secure enough to face claims of negligence in its governmental activities.”² Similar to the federal government, Indiana has also recognized common law sovereign immunity since the early nineteenth century when the state legislature enacted a statute that adopted portions of the English common law encompassing sovereign immunity.³ Over time, the Indiana Supreme Court slowly chipped away at the State’s protections afforded by sovereign immunity, the culmination of which was seen in the 1972 Indiana Supreme Court case *Campbell v. State*, where the Court abrogated virtually all of the State’s sovereign immunity from tort liability.⁴

Following the *Campbell* decision, the Indiana legislature passed the Indiana Tort Claims Act which carved out exceptions to this wholesale abrogation of sovereign immunity by reinstating the State’s immunity from tort liability in certain enumerated instances.⁵ However, as the law currently stands today, the State still retains its immunity from non-tort claims based on statute.⁶ While the Indiana Constitution permits the legislature to make provisions by general law to allow for suits to be brought against the State, consent to suit “can be given by the state only by a legislative enactment *clearly evincing* such consent.”⁷

On November 2, 2017, the Indiana Supreme Court held that a state employee is precluded from bringing a wrongful termination suit against the State under Indiana’s False Claims and Whistleblower Protection Act (“Indiana’s whistleblower statute”) because the Act does not contain an “unequivocal affirmative statement that clearly evinces the legislature’s intention to subject the

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1. *United States v. Clarke*, 33 U.S. 436, 443 (1834); *Esserman v. Ind. Dep’t of Env’tl. Mgmt.*, 84 N.E.3d 1185, 1188 (Ind. 2017).

2. *Campbell v. State*, 284 N.E.2d 733, 734 (Ind. 1972).

3. *See Esserman*, 84 N.E.3d at 1189; IND. CODE § 1-1-2-1 (2022).

4. *See Campbell*, 284 N.E.2d at 735.

5. IND. CODE § 34-13-3-3 (2022).

6. *Esserman*, 84 N.E.3d at 1191.

7. *State ex rel. Indiana Dep’t of Conservation v. Pulaski Circuit Court*, 108 N.E.2d 185, 187 (Ind. 1952) (emphasis added); IND. CONST. art. IV, § 24.

State to suit for the specific statutory claim asserted.”⁸ The Court reasoned that “[t]he statute, while clearly stating that an employee may sue her employer, does not name the State (or one of its agencies or officials) as a permissible whistleblower defendant.”⁹ In holding that the statute’s term “employer” is not to be read as including the State, the Court diverged from classic canons of statutory interpretation that generally require “words and phrases to be taken in their plain, ordinary, and usual sense.”¹⁰ This holding paints a picture of the convoluted rationales that the courts have used to protect the State’s sovereign immunity and highlights how strictly the courts will construe any purported waiver.¹¹

Sovereign immunity is a safety net that is afforded to the State at the cost of justice and fairness to Indiana’s citizens. The need for this immunity has long been outdated, yet the courts and state legislature have shown very little motivation for taking any substantial steps to roll the protections back.¹² Recent Indiana cases dealing with sovereign immunity have shown that the opportunity for legislative action to address the issue is ripe.¹³ By gaining a holistic understanding of the doctrine and proposing a rational way to synthesize the antiquated objectives of the doctrine with the modern needs of today’s government, Indiana’s legislature will have all the tools it needs to amend Indiana’s whistleblower statute to provide Indiana’s citizens the justice and fairness that they deserve.

Part I of this Note will explore the history of sovereign immunity in the United States by analyzing the driving rationales behind the doctrine’s early expansion and subsequent curtailment at the federal level. After understanding the history of sovereign immunity in the federal context, this Note will conduct the same analysis of the doctrine’s history in the context of Indiana, with a specific focus on its troubling intersection with Indiana’s whistleblower statute. Part II of this Note will then analyze the contrasting policy rationales for either maintaining or abrogating Indiana’s sovereign immunity from claims arising under Indiana’s whistleblower statute, specifically focusing on concerns related to the additional financial burden that the State would be exposed to and the effect that a waiver of immunity would have on the court systems. After analyzing the advantages and disadvantages of exposing the State to more liability under the whistleblower statute, Part III of this Note will propose a series of legislative amendments for Indiana’s legislature to consider integrating into the statute to further balance the needs of both the State and the whistleblower claimants.

8. *Esserman*, 84 N.E.3d at 1192.

9. *Id.*

10. *Id.* at 1193 (David, J., dissenting).

11. *See, e.g., id.* at 1192 (majority opinion).

12. *See, e.g.,* IND. CODE § 34-13-3-3 (2022).

13. *See infra* Part II.

I. HISTORY OF SOVEREIGN IMMUNITY

A. Development of Sovereign Immunity in the United States

The theory of sovereign immunity originated in English common law, and it existed under the theory that a governing authority cannot be sued under a law that it created without first consenting to such suit, thereby giving the king, the highest authority in England, complete immunity from liability.¹⁴ Consent to suit being the one exception to sovereign immunity is a product of the theory that “the King can do no wrong,” which legal scholars have interpreted to mean that the King shall not do wrong, and if he were to do wrong, that he shall allow the courts to proceed.¹⁵

Common law sovereign immunity was adopted by the courts in the United States following the Revolutionary War, and its adoption was based on “the premise that the new government was not financially secure enough to face claims of negligence in its governmental activities.”¹⁶ However, in the 1793 case *Chisholm v. Georgia*, a South Carolina citizen sued the State of Georgia on a contract claim in federal court under Title III jurisdiction shortly after the passage of the Judiciary Act of 1789.¹⁷ The Court held that under the Judiciary Act, a state could be sued in federal court by a citizen of another state and that the Court had original jurisdiction over such a case.¹⁸ The Court justified this holding by reflecting on the ability of one state to sue another state, stating, “justice is the same whether due from one man [to] a million, or from a million to one man.”¹⁹ Justice Iredell expounded on this idea by providing a philosophical elucidation of what a “sovereign” truly means in the context of the rights and obligations it is bound by, stating,

[t]he only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised [sic] by those laws. If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully [sic] refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right,

14. Miles McCann, *State Sovereign Immunity*, NAT’L ASS’N OF ATT’YS GEN. (2017), <https://www.naag.org/publications/nagri-journal/volume-2-issue-4/state-sovereign-immunity.php> [<https://perma.cc/HR7R-23EQ>].

15. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963).

16. *Campbell v. State*, 284 N.E.2d at 733, 734 (Ind. 1972).

17. 2 U.S. 419 (1793).

18. *Id.* at 420.

19. *Id.* at 479.

shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a Sovereign State? Surely not.²⁰

Following *Chisholm*, Congress acted quickly to draft and ratify the Eleventh Amendment to prohibit suits against a state in federal court by citizens of another state but, notably, not suits against one state by another state.²¹ The rationale that was used for maintaining the ability of one state to sue another state, but to not allow a citizen of one state to sue another state, is the product of the federal government's attempt to avoid future physical conflict between states by providing an avenue to air grievances in a structured forum before "appeal[ing] to the sword."²² This reasoning can be seen in *Chisholm* when the Court stated:

But I conceive the reason of the thing, as well as the words of the Constitution, tend to show that the Federal Judicial power extends to a suit brought by a foreign State against any one of the United States. One design of the general Government was for managing the great affairs of peace and war and the general defence [sic]; which were impossible to be conducted, with safety, by the States separately. Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremities [sic] and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity.²³

By allowing one state to sue another state but not allowing a citizen of one state to sue another state, the Eleventh Amendment effectively barred suits based on the party's status, not based on the nature of the subject matter.²⁴ Fast forward to modern day, it is relevant to note that Eleventh Amendment immunity has since been expanded through court interpretation to also "apply to suits by a State's own citizens," unless the state otherwise consents to such suit.²⁵

The reasoning for Congress's rush to disallow suits against a state brought by citizens can be inferred from the states' strong reverence to the idea of federalism, which the court in *Alden v. Maine* articulated by stating,

[u]nquestionably the doctrine of sovereign immunity was a matter of importance in the early days of independence. Many of the States were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like

20. *Id.* at 456.

21. Cong. Rsch. Serv., *Amdt11.1.1 Eleventh Amendment: Early Doctrine*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt11_1_1/ (last visited Mar. 10, 2021) [<https://perma.cc/M7AE-H8TM>]; U.S. CONST. amend. XI.

22. *Chisholm*, 2 U.S. at 467.

23. *Id.*

24. Cong. Rsch. Serv., *supra* note 19.

25. *Esserman*, 84 N.E.3d at 1189 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)).

lower English lords, to suits in the courts of the ‘higher’ sovereign.²⁶

Here, it is clear to see how Congress’s urgency to immunize states from suit was a direct result of the volatility of states’ financial security in a hyper-unique war time in the United States.²⁷ While this concern may have made sense at the time of its conception, the strength of this argument has lost much of its force over the past century with the continued growth and sophistication of the states’ respective economies and legal systems.

Since the passage of the Eleventh Amendment, courts have continuously held that Eleventh Amendment sovereign immunity will not apply only in circumstances where (1) a state consents to the suit or (2) Congress has taken action to abrogate states’ immunity.²⁸ Additionally, courts have expanded the application of the Eleventh Amendment by holding that “[s]tate agencies are treated the same as states for purposes of the Eleventh Amendment.”²⁹ These narrow exceptions to Eleventh Amendment immunity are based on the Eleventh Amendment’s presupposition that, first, “each State is a sovereign entity in our federal system; and second, that ‘[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.’”³⁰ The Court in *Alden v. Maine* reiterated the importance of maintaining sovereign immunity with only very narrow exceptions when it reflected on the founding generation’s understanding of sovereign immunity as an inherent component of the Constitution, stating, “[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.”³¹ This provides one of the first glimpses into the shifting rationalization for maintaining state sovereign immunity, thus moving away from arguing the importance of protecting a state’s financial security and now looking toward emphasizing the importance of maintaining a state’s status as a sovereign entity.³² With each shift in the rationales that were used to support sovereign immunity historically, the application of the doctrine became increasingly more fluid and continued to move further and further away from its original purpose.

In addition to a state’s immunity from suit in federal court, the Court in *Alden*

26. *Alden v. Maine*, 527 U.S. 706, 716 (1999) (quoting *Nevada v. Hall*, 440 U.S. 410, 418 (1979)).

27. *See id.*

28. *See King v. Indiana Supreme Court*, No. 1:14-CV-01092-JMS-MJD, 2015 WL 2092848, at *9 (S.D. Ind. May 5, 2015) (citing *Tucker v. Williams*, 682 F.3d 654, 658 (7th Cir. 2012)); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

29. *See King*, 2015 WL 2092848, at *9 (quoting *Tucker*, 682 F.3d at 658); *Ranyard v. Bd. of Regents*, 708 F.2d 1235, 1238 (7th Cir. 1983) (“the critical inquiry [into whether a state entity is the arm of the State for purposes of the Eleventh Amendment] is whether a judgment would be paid from public funds in the state treasury.”).

30. *Alden*, 527 U.S. at 729 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)).

31. *Id.* at 727 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 (1985)).

32. *See id.*

v. Maine discussed the reach of a state's sovereign immunity in its own state courts.³³ The Court reaffirmed principles of federalism by recognizing the division of power between the state and federal government, holding that "[s]tates retain immunity from private suit in their *own* courts, an immunity beyond the congressional power to abrogate by Article I legislation."³⁴ This holding thus expanded the reach of sovereign immunity from the original, plain language understanding of the Eleventh Amendment which states that states are not able to be sued in federal court, to now include even further state protections by saying that Congress could not use legislation to abrogate a state's immunity from suit in its own court without the state's express consent.³⁵ The Court emphasized the "dignity and respect afforded a State"³⁶ in coming to this conclusion, stating, "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."³⁷ To further support its holding, the Court made an apparent attempt to avoid the same type of backlash from states that was received from its previous holding in *Chisholm* when it noted that while the Eleventh Amendment does specifically state that "the judicial power of the *United States*" shall not extend to any suit against a state by a citizen, this phrase should not be read so literally.³⁸ The Court went on to say, "[t]o rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*."³⁹ However, while the holding in *Alden* officially clarified that a state's sovereign immunity extends to private suits brought against the state in its own courts,⁴⁰ Indiana courts had been operating under this presumption for years prior to *Alden*.⁴¹

B. Development of Sovereign Immunity in Indiana

Parallel to federal sovereign immunity, Indiana has also recognized the doctrine of sovereign immunity since the early nineteenth century when the legislature enacted a statute that adopted portions of the English common law encompassing sovereign immunity.⁴² In cementing the historical significance of the immunity in Indiana, the Indiana Supreme Court has drawn on principles of federalism to rationalize its continued deference to the doctrine, stating,

33. *Id.* at 754.

34. *Id.* (emphasis added).

35. *Id.* at 709-10.

36. *Id.* at 749.

37. *Id.* at 748.

38. *Id.* at 742.

39. *Id.*

40. *Id.* at 754.

41. *See, e.g., State v. Rendleman*, 603 N.E.2d 1333, 1335 (Ind. 1992).

42. IND. CODE § 1-1-2-1 (2022); *see also* *Esserman v. Indiana Dep't of Env'tl. Mgmt.*, 84 N.E.3d at 1189.

[i]n addition to the national government, States also enjoy sovereign immunity, which predates the nation’s founding and survived ratification of the U.S. Constitution. “[T]he States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today[.]”⁴³

Over time, however, Indiana’s courts and the state legislature have slowly chipped away at the State’s protections afforded by sovereign immunity.⁴⁴ This abrogation of immunity has been allowed in part due to Indiana’s Constitution, which clearly recognizes that the State does maintain sovereign immunity, but which also allows for laws to be made to limit the immunity.⁴⁵ From its inception, Indiana’s Constitution has provided that a “[p]rovision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution.”⁴⁶

The first such legislative waiver of sovereign immunity in Indiana came when the legislature passed legislation authorizing the State to execute bonds that were secured by the “irrevocable faith of the state to the payment of the sum” to the payee.⁴⁷ The language of this legislation effectively allowed individuals to hold the State liable for breaching the terms of a bond contract, which, as the holding in *Carr v. State* demonstrated, effectively opened the State up to liability for contract claims.⁴⁸ In the 1891 case *Carr v. State*, the Indiana Supreme Court held that when the State binds itself by contract, it is bound by the same rights and responsibilities as individuals regarding the laws of contracts.⁴⁹ This holding provided the first glimpse into the court’s willingness to reel in the distorted balance of power that the State held over its citizens through its sovereign immunity protections. While the policy rationales used in this holding seem to mirror those that were used in *Chisholm v. Georgia*⁵⁰ a century earlier, *Carr v. State* did not receive even remotely the same level of criticism that *Chisholm* did. The Indiana Supreme Court continued to enforce the holding of *Carr* in subsequent cases, rationalizing its continued deference to the decision by recognizing general policy considerations of fairness, once stating that

43. *Esserman*, 84 N.E.3d at 1188 (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

44. *See, e.g.*, IND. CODE § 34-13-3-3 (2022); *Perkins v. State*, 251 N.E.2d 30 (1969).

45. IND. CONST. art. IV, § 24.

46. *Id.* The State legislature amended this Section of the State Constitution in 1984, deleting “as to all liabilities originating after the adoption of this Constitution.” Removal of this clause had no effect on the legislature’s ability to pass laws limiting the State’s immunity.

47. 1847 Ind. Acts. 3; *see Carr v. State ex rel. Du Coetlosquet*, 26 N.E. 778, 779 (1891); *Esserman*, 84 N.E.3d at 1189.

48. *Carr*, 26 N.E. at 783; *but cf. Esserman*, 84 N.E.3d at 1189 (citing *State v. Rendleman*, 603 N.E.2d 1333, 1335 (Ind. 1992)) (*Carr* deals with the State’s liability for issued bond contracts, which could arguably be extended to the employment contract liability in *Esserman*).

49. 26 N.E. at 779.

50. 2 U.S. 419 (1793).

[t]here is not one law for the state, and another for its subjects. When the state engages in business and business enterprises, and enters into contracts with individuals, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law.⁵¹

While the holding in *Carr* demonstrated one of the first major inroads into the abrogation of the State's common law sovereign immunity, the court also made a point in the opinion to clarify that the State, through its Auditor or through another state official in a payor capacity, cannot be sued under a valid contract claim if an appropriation by the Legislature to pay for such a claim did not exist.⁵² However, if an appropriation had in fact been made by the Legislature, and if there existed a valid claim for payment by the payee, then there may be a proceeding against the Auditor to compel such payment.⁵³ This clarification by the Court set the stage for holdings in subsequent Indiana sovereign immunity cases where the Court would go on to distinguish the State's proprietary functions from its governmental functions in determining whether sovereign immunity applied.⁵⁴

The next step that the Indiana Supreme Court took in curtailing sovereign immunity was in the 1960 case *Flowers v. Board of Commissioners of Vanderburgh County*, when the court clarified that a county, recognized as a sovereign government and claiming sovereign immunity as an extension of the State's sovereign immunity, could be held liable for torts committed in exercising its "proprietary functions," but that it would remain immune from tort liability in exercising its "governmental functions."⁵⁵ Generally, a government function has been defined as "those functions which are essential to the unit's existence," while a proprietary function is defined as "those functions which a unit in its discretion may perform to promote the comfort, convenience, safety, and happiness of citizens."⁵⁶ For example, a governmental function would include the operation of a public service that only the government performs, such as issuing health and safety licenses, while a proprietary function would include instances of the government engaging in business-like activities that are typically done by private parties, such as operating a municipal airport.⁵⁷ The court noted that an exception to the governmental-function immunity rule would be if the government had purchased insurance to protect itself against actions arising from

51. *State v. Feigel*, 178 N.E. 435, 437 (Ind. 1931) (citing *Carr*, 26 N.E. at 779).

52. *Carr*, 26 N.E. at 780.

53. *Id.* at 782.

54. *See Flowers v. Bd. Of Comm'rs of Vanderburgh Cnty.*, 168 N.E.2d 224, 225 (Ind. 1960).

55. *See id.* (the court here recognized the significance of its holding in *Haag v. Board of Commissioners of Vanderburgh County*, 60 Ind. 511, 515 (1878), which allowed an individual to recover from a county in a nuisance claim. But the court here also acknowledged a series of cases where a county was not liable in tort when performing a governmental function).

56. *St. John Town Bd. v. Lambert*, 725 N.E.2d 507, 513 (Ind. Ct. App. 2000).

57. *See id.*

its exercise of a governmental function.⁵⁸ In such a case, the insurance policy would serve as a waiver of the government's immunity.⁵⁹

Seven years after *Flowers*, the Indiana Court of Appeals held in the 1967 case *Brinkman v. City of Indianapolis* that cities could be liable for tort claims arising from its actions performed in both its proprietary and governmental function, touching on the inherent inequalities that would inevitably result from attempting to distinguish between the two functions.⁶⁰ The court relied on a Kentucky Court of Appeals case that rationalized holding municipalities and individual citizens to the same standard by stating,

[m]unicipal functions have become so varied and extensive that public safety demands that municipal employees be held to the same safety standards as other citizens. Private citizens voluntarily and for good economic reasons insure themselves against tort liability. Why shouldn't a collection of citizens classified as a municipality do likewise?⁶¹

A year later, the Indiana Court of Appeals relied on the reasoning used in the *Brinkman* decision to hold that counties, in addition to cities, could now also be liable for tort claims arising from actions in both its proprietary and governmental functions.⁶² By questioning why governments should not be held to the same standards as its private citizens, the opinions in these two cases provided insight into the judiciary's growing skepticism about the historically large breadth of protections granted to the government through sovereign immunity, signaling the likelihood of even more rollbacks to the immunity in future cases.⁶³

Just two years later, in the 1969 case *Perkins v. State*, the Indiana Supreme Court held that similar to counties, the State should be held liable for tort claims arising from its proprietary functions.⁶⁴ In so holding, the court reasoned that counties are a part of the State by way of being supported by taxes, and that any immunities that the counties enjoy are simply by way of an extension of the State's immunity.⁶⁵ Thus, if a county can be liable for actions under its proprietary functions, then the State should be liable too.⁶⁶ The Court reasoned that "[i]t is of little concern to the injured party whether the injury was caused by a city, county or state."⁶⁷ In recognizing that this holding would allow the State

58. *Flowers*, 168 N.E.2d at 227.

59. *Id.*

60. 231 N.E.2d 169, 171 (Ind. Ct. App. 1967) ("Neither does it seem to be good policy to find that a municipal garbage truck is engaged in a nonimmune proprietary function when enroute from a wash rack to the garage while the same truck is engaged in an immune governmental function when enroute to a garbage pickup.")

61. *Id.* at 172 (quoting *City of Louisville v. Chapman*, 413 S.W.2d 74 (Ky. 1967)).

62. *Klepinger v. Bd. of Comm'rs of Miami Cty.*, 239 N.E.2d 160, 173 (Ind. Ct. App. 1968).

63. *See Brinkman*, 231 N.E.2d at 172; *Klepinger*, 239 N.E.2d at 173.

64. 251 N.E.2d 30, 35.

65. *Id.* at 34.

66. *Id.*

67. *Id.* at 35.

to now be liable under both contracts claims and tort claims arising from its proprietary functions, the Court stated, “[t]he common law changes. The principle of stare decisis should not always confine our thinking in any case,” and continued that “the common law of today is not a frozen mold of ancient ideas, but such law is active and dynamic and thus changes with the times and growth of society to meet its needs.”⁶⁸ Additionally, in what could be viewed as an effort to anticipatorily respond to any criticisms of the holding from those who might claim that the Court was participating in a form of judicial activism, the Court went on to say that

[t]he argument that the legislature—not the Court—is the one to make the change, is answered by the fact that the principle was created by the courts as part of the common law, and if error exists or if the principle has become antiquated, it is the duty of the Court to change it.⁶⁹

Shortly after holding that the State is immune from tort liability in its governmental functions but not its proprietary functions, the Indiana Supreme Court officially threw this distinction out altogether in *Campbell v. State*.⁷⁰ The court held that unless the legislature had expressly granted immunity via legislation, the State could be held liable for a tort regardless of whether it arose from governmental or proprietary action.⁷¹ The exceptions to this abrogation of immunity, the *Esserman* court stated, are in “preventing crime, appointing officials to public office, and decision-making by the courts.”⁷² The court rationalized this precedent-breaking holding by reasoning that if cities and counties are already able to bear this burden, then the State should be able to as well.⁷³ The court argued that “the elimination of sovereign immunity means a more equitable distribution of losses in society caused by the government unto members of society, rather than forcing individuals to face the total loss of the injury.”⁷⁴ Thus, the holding did not eliminate sovereign immunity from all actions that caused damage to a person, such as for non-tort actions based on statute or for actions based in one of the three exceptions of crime prevention, government appointments, and court decisions, but rather the holding only eliminated sovereign immunity for actions that caused damage to a person in situations where the State breached a duty that it owed to an individual.⁷⁵

Following *Campbell*, Indiana’s legislature closed the gates on any further derogation of sovereign immunity by passing the Indiana Tort Claims Act, which granted the State immunity from tort liability for conduct stated in section three of the Act, thus signaling a change in direction back toward favoring more state

68. *Id.* at 33.

69. *Id.* at 34.

70. 284 N.E.2d 733, 737 (1972).

71. *See id.* at 737.

72. *Esserman*, 84 N.E.3d at 1190 (citing *Campbell*, 284 N.E.2d at 737).

73. *Campbell*, 284 N.E.2d at 736.

74. *Id.*

75. *Id.* at 737.

protections.⁷⁶

C. What Is Left of Sovereign Immunity in Indiana?

As the law currently stands in Indiana, the State and its agencies maintain sovereign immunity from non-tort claims based on statute and from claims arising under any of the twenty-four subsections of section 3 of the Tort Claims Act.⁷⁷ While the Indiana Constitution permits the legislature to make provisions by general law to allow for suits to be brought against the State, such consent to suit will be said to have been “given by the state only by a legislative enactment *clearly evincing* such consent.”⁷⁸ The Indiana Supreme Court has provided that any supposed waiver of sovereign immunity by the legislature must be construed narrowly because of its potential derogation of still-valid common law.⁷⁹ The Court has stated that a statute purporting to waive immunity must provide

an affirmative “expression” or “declaration” of the legislature’s intention to waive the State’s immunity. [The Court] will thus find a waiver of sovereign immunity only when the statute at issue contains an unequivocal affirmative statement that clearly evinces the legislature’s intention to subject the State to suit for the specific statutory claim asserted.⁸⁰

The reason for this high standard for finding that the Legislature has waived immunity is due to the Court’s application of the same standards that federal courts use to determine whether Congress has waived the federal government’s immunity.⁸¹ The standard needed to find that the federal government has waived sovereign immunity requires that a waiver be “unequivocally expressed” in the language of a statute.⁸² With courts now construing any legislative language purporting to waive the State’s sovereign immunity so narrowly, the avenues of recourse available to citizens with valid statutory claims against the State are severely limited by the courts’ deference to the Legislature.

II. PROPOSAL TO WAIVE SOVEREIGN IMMUNITY FOR CLAIMS BROUGHT UNDER INDIANA’S WHISTLEBLOWER STATUTE

A. Sovereign Immunity Meets Indiana’s Whistleblower Statute

On May 11, 2005, Indiana Governor Mitch Daniels signed into law a bill that put measures in place to protect employees from retaliation by their employers

76. IND. CODE § 34-13-3-3 (2022).

77. *Esserman*, 84 N.E.3d at 1191; IND. CODE § 34-13-3-3 (2022).

78. *State ex rel. Indiana Dep’t of Conservation v. Pulaski Circuit Court*, 108 N.E.2d 185, 187 (Ind. 1952) (emphasis added); IND. CONST. art. IV, § 24.

79. *Esserman*, 84 N.E.3d at 1191.

80. *Id.* at 1192.

81. *Id.* at 1191.

82. *Id.* (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)).

for whistleblowing on acts of misconduct, misdeeds, and theft in state government.⁸³ The statute, commonly referred to as Indiana's whistleblower statute, provides that

[a]n employee who has been discharged, demoted, suspended, threatened, harassed, or otherwise discriminated against in the terms and conditions of employment by the employee's *employer* because the employee:

- (1) objected to an act or omission described in section 2 of this chapter; or
- (2) initiated, testified, assisted, or participated in an investigation, an action, or a hearing under this chapter;

is entitled to all relief necessary to make the employee whole,

and goes on to state that “[a]n employee may bring an action for the relief provided in this section in any court with jurisdiction.”⁸⁴ Thus, this statute generally provides recourse to individuals who have been wronged by their employer for whistleblowing wrongful acts.⁸⁵

The intersection of Indiana's whistleblower statute and the State's sovereign immunity came to fruition when a former state employee tried to sue the Indiana Department of Environmental Management in state court under the statute.⁸⁶ The Indiana Supreme Court affirmed the trial court's dismissal of the suit by stating that the Court “will not presume the legislature intended the Act to apply to the State,” and that if the legislature had intended for the term “employer” to apply to the State, “it could have expressed that intention any number of ways.”⁸⁷ While a plain reading of the statute would seem to imply that the term “employer” would apply to all employers, the Court's interpretation that the statute did not include the State as an “employer” only reinforced how narrowly a legislative waiver of State immunity will be construed.⁸⁸

B. Comparing Arguments For and Against Waiving Sovereign Immunity for Whistleblower Claims

While the undesirable outcome of *Esserman* provides a legitimate argument for the need to reform Indiana's whistleblower laws in order to roll back state employers' sovereign immunity protections, it is first necessary to analyze the benefits and disadvantages that could result from reducing these protections. Several arguments have been made in favor of rolling back sovereign immunity,⁸⁹

83. Act of May 11, 2005, Pub. L. No. 222-2005, § 23; IND. CODE § 5-11-5.5-8 (2022).

84. IND. CODE § 5-11-5.5-8(a), (c) (2022) (emphasis added).

85. *Id.* § 5-11-5.5-8(a).

86. *See Esserman*, 84 N.E.3d at 1187.

87. *Id.* at 1192.

88. *Id.* at 1191.

89. *See, e.g., Perkins v. State*, 251 N.E.2d 30, 33 (1969).

while several arguments have also been made in favor of maintaining status quo.⁹⁰ As will be shown below, the arguments for the latter rest on much shakier ground than the former.

First, it has been argued that exposing the State to more liability by further rolling back sovereign immunity “will impose a disastrous financial burden upon the [S]tate.”⁹¹ While this alarmist rationalization may seem to have a logical basis on its surface, the Indiana Supreme Court has explained the lack of evidence to support this proposition in the context of tort related claims when it stated, “[i]f city and county governments can withstand the consequences of such liability, where traffic hazards seemingly are greater, the state should be able to also bear such burden.”⁹² The Indiana Supreme Court has further contested this argument by discussing policy concerns regarding fairness, stating, “[i]t has been stated: Why should the individual bear the loss and injury resulting from a negligent act of the government, when a private industry or individual is bound under law to pay for damages for its tortious acts and the government is better able to do so?”⁹³ This argument bears significant weight because this same reasoning has been used by the Court several times in previous sovereign immunity cases to rationalize expanding tort liability from (1) private citizens to cities, (2) from cities to counties, and (3) from counties to the State.⁹⁴

Additionally, there are certain ways to provide protections against exposing the State to a disastrous financial burden. One such way to do this is by adding statutory language to the whistleblower statute that would require all governmental entities to purchase liability insurance to cover these claims.⁹⁵ Many businesses hold a unique type of insurance policy called Employment Practices Liability Insurance, which typically covers claims made against the business as a result of a wrongful termination.⁹⁶ While allowing these types of insurance policies to be issued to the State and its agencies would likely require a coalition of insurance companies agreeing to structure their policies in a way that would fit the government’s needs, it is hard to imagine that insurers would turn down the opportunity to realize massive insurance premium payments from the State, those payments of which would be backed by the public funds contained in the State’s treasury. One way that insurance companies have mitigated their financial risk when selling these types of policies to other policyholders is by including a co-insurance feature requiring the policyholder to pay a percentage of the loss and defense costs.⁹⁷ With the increased risks that

90. *See, e.g., Campbell*, 284 N.E.2d at 736.

91. *Id.*.

92. *Id.*

93. *Perkins*, 251 N.E.2d at 33.

94. *See, e.g., Brinkman v. City of Indianapolis*, 231 N.E.2d 169, 171 (Ind. Ct. App. 1967); *Klepinger v. Bd. of Comm’rs of Miami Cty.*, 239 N.E.2d 160, 173 (Ind. 1968); *Perkins*, 251 N.E.2d at 35; *Campbell*, 284 N.E.2d at 736.

95. *See Perkins*, 251 N.E.2d at 33.

96. GARY LOCKWOOD, *LAW OF CORP. OFFICERS & DIR.: INDEMN. & INS.* § 4:58 (2020).

97. *Id.*

would attend the issuance of these types of liability insurance policies to the State, insurance companies have the prerogative to include such a feature in their contracts with the State as well.

For the State to fund these insurance policy premiums, Indiana's legislature could include language in the Whistleblower statute that would allow for premiums to be paid out of the state general fund, similar to the operation of the Indiana Tort Claims Act.⁹⁸ The marginal additional costs that taxpayers would incur by maintaining funds in that account for such a purpose would be far outweighed by the importance of providing an avenue for more full relief for the wrongful actions of the State.⁹⁹ This view has been utilized by state legislators to support legislative waivers of sovereign immunity for tort-based claims in other states, with sponsors of those legislative waivers drawing on the "enterprise theory" to rationalize the additional costs that citizens will bear as a result of the waiver.¹⁰⁰ Justice Shaw of the Supreme Court of Florida discussed this theory in a dissenting opinion of a sovereign immunity case after a lower court made the argument that a waiver of sovereign immunity would impose a substantial financial burden on some governmental entities.¹⁰¹ Justice Shaw dismissed the "financial burden" argument by quoting a sponsor of Florida's sovereign immunity waiver legislation, with the bill's sponsor stating:

We are trying to protect everybody. If everyone shares in the cost of that protection [government], then everyone benefits This whole concept that we are seeking now, not the individual bill, but the whole concept of waiving sovereign immunity, we are trying to provide for rights. If you are a conservative person, then you believe in conserving human life, you believe in protecting people against the willful or negligent acts of others and we have a responsibility to the people of this state. The only excuse for government is to help the people, and if we are not going to help the people, we shouldn't have government. It costs to operate government and the people share in that cost. So, they are doing it for their own benefit.

I pay my taxes here to support the schools, and I don't mind paying a little bit more to see that my children are protected and that my friends are protected, and that I am protected if I am using the property. I don't mind and I don't think you should either. I think it is ridiculous for any person—the law is so strong in this area that we are going to require this session that everyone have insurance, and be against the law to drive without insurance. It ought to be against the law for you [] to operate without insurance to protect the people of this state.¹⁰²

98. IND. CODE § 34-13-3-24 (2020).

99. *Everton v. Willard*, 468 So. 2d 936, 951 n.15 (Fla. 1985) (Shaw, J., dissenting).

100. *Id.*

101. *Id.*

102. *Id.*

These statements reinforce the idea that the marginal additional costs that taxpayers would incur as a result of waiving the State's sovereign immunity for specific claims is far outweighed by the benefits that such a waiver would provide.¹⁰³

However, it is relevant to recall that the Indiana Supreme Court stated in *Flowers v. Commissioners of Vanderburgh County* that when a governmental entity has purchased insurance to protect itself against tort claims arising from its exercise of a governmental function, it has effectively waived its ability to use sovereign immunity as a defense to any claim that the insurance policy is purchased to protect against.¹⁰⁴ Thus, for the State to avoid unintentionally exposing itself to liability for claims not arising under the whistleblower statute, it would want to ensure that the language of the insurance policy is very narrowly tailored to the specific claims that the policy is intended to cover, namely, claims arising under Indiana's whistleblower statute.¹⁰⁵

As an additional financial safeguard to requiring the State to purchase liability insurance, Indiana's legislature could cap the amount that a party could recover in an action against the State to the amount of the insurance policy.¹⁰⁶ By limiting recoverable damages to the amount of the insurance policy, the State would have the option to purchase a cheaper policy, which in turn would put it in a better position to negotiate with insurance companies for lower premium payments. However, with such an additional safeguard in place, it would be vital that the Legislature provide additional language in the legislation that sets a minimum policy amount that the State would be required to purchase in order to prevent the State from avoiding liability altogether.

As an alternative to requiring the State to purchase liability insurance, Indiana's legislature could simply include a straightforward statutory cap on damages, similar to that of the Tort Claims Act.¹⁰⁷ There have already been a few states that have implemented a similar structure of straightforward damages caps for these types of claims after waiving the state's sovereign immunity from whistleblower claims.¹⁰⁸ In 1995, Texas amended its public employee whistleblower statute to include the State as a permissible whistleblower defendant, and it added statutory caps on the amount of compensatory damages, including noneconomic damages, that could be recovered by public employees suing their employer under the statute.¹⁰⁹ Similarly, Idaho has waived sovereign immunity for whistleblower claims brought by state employees,¹¹⁰ and in March 2020, the State amended its public employee whistleblower statute to include a

103. *Id.*

104. *Flowers v. Bd. of Comm'rs of Vanderburgh Cnty.*, 168 N.E.2d 224, 227 (Ind. 1960).

105. *See id.*

106. *See, e.g.*, IND. CODE § 34-13-3-20(a)-(b) (2022).

107. *See Id.* § 34-13-3-4(a).

108. *See, e.g.*, TEX. GOV'T CODE ANN. § 554.003 (West 2019).

109. *Id.*

110. IDAHO CODE ANN. § 6-2104 (West 2020).

statutory cap on noneconomic damages that could be recovered by a claimant.¹¹¹ With more and more states providing these protections for public employee whistleblowers, none of which having suffered any sort of unrecoverable financial burden as a result, Indiana's refusal to make these changes will only continue to become more of a stain on the State's reputation for promoting citizen welfare the longer that it waits to take initiative.

A second argument that has been made against further rolling back sovereign immunity is that voluminous amounts of frivolous lawsuits would clog the court system and put a strain on government efficiency.¹¹² As the Indiana Supreme Court has stated, one of the legislative policies behind the immunities granted in the Indiana Tort Claims Act is to ensure "that public employees can exercise their independent judgment necessary to carry out their duties without threat of harassment by litigation or threats of litigation over decisions made within the scope of their employment."¹¹³ Although there is indeed the possibility of many frivolous lawsuits being brought against the State under this statute if immunity were waived, such a fear is outweighed by the justice that individuals with valid claims may never receive if the State were to maintain its immunity.¹¹⁴ The plaintiff's attorney in *Esserman* reiterated this idea when she argued that government immunity from whistleblower claims "insulat[es] the State from liability for its own misconduct and penalizes the employee who tries to stand up for the taxpayers."¹¹⁵ As deterrence against frivolous law suits, there are sanctions in place that already serve to prevent this problem in other areas of the law, and it is the Legislature's prerogative to increase the severity of those sanctions if it believes that doing so would further prevent the issue when applied to claims brought under Indiana's whistleblower statute.¹¹⁶ The issue of frivolous lawsuits clogging the court system is an inherent issue that arises with any law that creates new liability, and the existing mechanisms for deterring such an issue already have enough flexibility to give the Legislature room to respond to the changing circumstances that arise with new laws creating additional liability.

As a final point against the potential for an over-clogged court system, there already exists one avenue of recourse for employees who were wrongfully terminated for whistleblowing, which is found under Indiana Code section 4-15-10-4.¹¹⁷ The Indiana Supreme Court has pointed out that "[t]he remedy, which is not as generous as that provided by the False Claims and Whistleblower Protection Act, consists of thirty days' back pay and reinstatement in the former

111. IDAHO CODE ANN. § 6-2105(5) (West 2022).

112. *See, e.g., King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 483 (Ind. 2003).

113. *Id.* (quoting *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450, 452 (Ind. 2000)).

114. Kara Kenney, *CALL 6: Indiana Supreme Court rules against whistleblower*, WRTV (Nov. 13, 2017 3:49 PM), <https://www.wrtv.com/news/call-6-investigators/call-6-indiana-supreme-court-rules-against-whistleblower> [<https://perma.cc/CD7E-VWD3>].

115. *Id.*

116. *See, e.g., IND. CODE § 34-52-1-1(b)* (2020).

117. IND. CODE § 4-15-10-4 (2020); *see also Esserman v. Indiana Dep't of Env'tl. Mgmt.*, 84 N.E.3d 1185, 1193 (Ind. 2017).

position. But the personnel law provides a quicker review process.”¹¹⁸ By allowing an employee to sue in state or federal court through a legislative waiver of the State’s immunity, while also keeping this existing route open as a non-exclusive option, employees with less egregious claims can choose to settle quicker through the administrative claims process, while an employee who has been more seriously injured may choose to go through the courts. Thus, the increase of claims filed in state or federal court would only be marginal by having these two avenues of recourse available.

III. SAMPLE WAIVER LANGUAGE TO INCLUDE IN INDIANA’S WHISTLEBLOWER STATUTE

A. Waiving Immunity with Certain Guardrails in Place

In light of the aforementioned benefits and concerns that have been considered in waiving the State’s sovereign immunity for claims brought under Indiana’s whistleblower statute, several amendments should be made to the statute.

First, the Legislature should incorporate the language proposed by Representative DeLaney in 2018, which clarifies that the term “‘Employee’ refers to any employee, including a state employee”, and that the term “‘Employer’ refers to any employer, including the state of Indiana as an employer of a state employee.”¹¹⁹ As a result, the statute should read:

- (a) As used in this section, the following apply: (1) “Employee” refers to any employee, including a state employee. (2) “Employer” refers to any employer, including the state of Indiana as an employer of a state employee.¹²⁰

Second, the Legislature should include a cap on *special damages* described in Indiana Code Section 5-11-5.5-8(b)(4) to be limited to specific amounts based on the number of employees that work for that arm of the State government, thus mirroring Texas’s public employee whistleblower statute caps.¹²¹ Such a provision might use the following language:

- (4) Relief under this section may include compensation for any special damages sustained as a result of the act described in subsection (b), including costs and expenses of litigation and reasonable attorney’s fees. If the employer is the State of Indiana, the employee may not recover special damages in an amount that exceeds:
 - (A) \$50,000, if the state agency has fewer than 101 employees

118. *Esserman*, 84 N.E.3d at 1193.

119. H.B. 1182, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018).

120. *See id.*

121. *See* TEX. GOV’T CODE ANN. § 554.003 (West 2019).

in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;
(B) \$100,000, if the state agency has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;
(C) \$200,000, if the state agency has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;
and
(D) \$250,000, if the state agency has more than 500 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year.¹²²

As an alternative to this staggered cap structure, the Legislature could instead include a provision requiring the State to obtain an insurance policy to protect against claims brought under Indiana's whistleblower statute.¹²³ Such a provision might use the following language:

- (c) The State shall procure and continuously maintain employment practices liability insurance, or its equivalent, against any loss or defense costs associated with a cause of action brought against it under this section. The insurance policy shall have a coverage limit of
- (1) no more than two hundred and fifty thousand dollars (\$250,000); and
 - (2) no less than fifty thousand dollars (\$50,000).

If the Legislature chooses to require the State to obtain an insurance policy, the statute should also include a cap on damages limited to the amount of the insurance policy.¹²⁴ Such a provision might use the following language:

- (1) The combined aggregate liability of the State for a cause of action brought under this section shall not exceed the amount stated in subsection (c)(1) for a cause of action that accrues on or after January 1, 2022.

Third, the Legislature should include a provision stating that claims must be brought within 270 days after the incident, mirroring the statute of limitations under the Indiana Tort Claims Act.¹²⁵ If included, the limitation should be tolled starting at the initiation of a proceeding in either the administrative setting or in state or federal court, whichever is earlier. Such a provision might use the

122. *See id.*

123. *See* IND. CODE § 34-13-3-20(a)-(b).

124. *See id.*

125. IND. CODE § 34-13-3-6(a) (2020).

following language:

- (d) A claim against the State of Indiana under this section is barred unless notice is filed with the attorney general or the state agency involved within two hundred seventy (270) days after the loss occurs. However, if notice to the governmental agency involved is filed with the wrong governmental agency, that error does not bar a claim if the claimant reasonably attempts to determine and serve notice on the right agency. The limitations described herein shall be tolled from the earlier of the initiation of a proceeding
- (1) under Indiana Code § 4-15-10-1, -4; or
 - (2) in any court with jurisdiction.¹²⁶

Lastly, the Legislature should include a provision regarding the appropriations for payments of claims and expenses by the State. Such a provision should mirror the section of the Indiana Tort Claims Act, which states that the general fund will have sufficient funds to settle claims or satisfy judgements, pay interest on claims and judgements, and pay liability insurance premiums.¹²⁷ Such a provision might use the following language:

- (e) There is appropriated from the state general fund sufficient funds to:
- (1) settle claims and satisfy judgments obtained against the State under this section;
 - (2) pay interest on claims and judgments; and
 - (3) subject to approval by the budget director, pay:
 - (A) liability insurance premiums; and
 - (B) expenses incurred by the attorney general in employing other counsel to aid in defending or settling claims or civil actions against the State.¹²⁸

By amending the whistleblower statute to include some or all of the aforementioned language, the Legislature would be able to adequately balance the benefits of waiving sovereign immunity against the concerns that may arise as a result of the waiver.¹²⁹ At the very minimum, Indiana's legislature should incorporate language clarifying that the term "Employee" refers to any employee, including a state employee, and that the term "Employer" refers to any employer, including the State of Indiana as an employer of a state employee.¹³⁰ By making just this simple clarification, Indiana's state employees would finally have an avenue for fuller relief from the injustices that they suffer at the hands of their state employers, and the Legislature could observe the financial effects of the

126. *See id.*

127. IND. CODE § 34-13-3-24 (2020).

128. *See id.*

129. *See* discussion *supra* Section II.B.

130. *See* H.B. 1182, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018).

waiver on the State over time and decide whether to include additional guardrail language to the statute only once the circumstances call for it.

CONCLUSION

Sovereign immunity is a safety net that is afforded to the State at the cost of justice and fairness to Indiana's citizens. The original need for this immunity has long been outdated, yet Indiana's courts and the state legislature have shown very little motivation in recent history to take any substantial steps toward rolling these immunities back.¹³¹ Recent Indiana cases dealing with sovereign immunity have shown that the Indiana courts' ability to further tweak this issue through adjudication is limited and that the opportunity for legislative action is ripe.¹³²

This Note first examined how the doctrine of sovereign immunity migrated to the United States and how it has become increasingly distorted by the courts in an effort to fit the square peg of its original purpose into the circle hole of the modern needs of state and federal governments. This Note then examined the reasoning that courts have used to rationalize rolling back this immunity over the years, specifically focusing on its application in Indiana. After addressing the potential concerns associated with stripping away the State's sovereign immunity even further in Indiana by waiving immunity under Indiana's whistleblower statute, this Note provided possible solutions to help mitigate those adverse effects by implementing additional guardrail language in the statute. By providing this holistic understanding of the history and issues that this doctrine continues to present, the state legislature is now armed with a rational way to synthesize the antiquated objectives of sovereign immunity with the modern needs of today's government. The time has come to provide Indiana's citizens with the justice and fairness that they deserve under Indiana's whistleblower statute.

131. See discussion *supra* Part I.

132. See discussion *supra* Part II.