No. 13-14624-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL WEAVER,

Plaintiff-Appellee

v.

MADISON CITY BOARD OF EDUCATION, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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No. 13-14624-F, *Michael E. Weaver* v. *Madison City Board of Education, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for intervenor-appellee, the United States, certifies that in addition to the persons and entities identified in the Alabama Association of School Boards' amicus brief, the following persons may have an interest in the outcome of this case:

Dimsey, Dennis J. (Attorney for the United States as Intervenor-appellee)

Gross, Mark L. (Attorney for the United States as Intervenor-appellee)

Counsel for intervenor, the United States, certifies further that the following person, included on the certificate of interested persons in appellant's brief, no longer has an interest in this case:

Silver, Jessica Dunsay (former Attorney for the United States)

s/ Nathaniel S. Pollock
NATHANIEL S. POLLOCK
Attorney

Date: March 14, 2014

STATEMENT REGARDING ORAL ARGUMENT

Oral argument may be helpful to the Court in this case, particularly if the Court believes that there is a possibility it will address the constitutional issue – whether Congress's War Powers provide a valid basis for subjecting States to private suit. Should the Court schedule oral argument, the United States requests the opportunity to participate.

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LEGISLATIVE HISTORY:

MISCELLANEOUS:

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INTRODUCTION

The United States has intervened in this case to defend the constitutionality of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq*. But this Court should not reach that issue: if the Board of Education is not entitled to Eleventh Amendment immunity – and it is not – the question of USERRA's constitutionality is not presented. The district court had the right approach when it ruled that the Board is not an "arm of the State" for Eleventh Amendment purposes and declined to address alternative

issues. Deciding the arm-of-the-State issue is just a matter of applying binding authority from this Court that is directly on point. This Court should thus affirm the district court's denial of the Board's motion to dismiss.

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. 1331. This court has jurisdiction under 28 U.S.C. 1291. See *Summit Med. Assocs., P.C.* v. *Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999) (explaining that the denial of a motion to dismiss on Eleventh Amendment immunity grounds is immediately appealable under the collateral order doctrine).

STATEMENT OF THE ISSUES

1. Whether the Madison City Board of Education is an "arm of the State" for Eleventh Amendment purposes.[1]

2. Whether, if (contrary to the United States' argument) this Court concludes that the Board is an "arm of the State" for Eleventh Amendment purposes, USERRA purports to subject States to private suit in federal court.

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[1] Appellant's brief addresses only this first issue, but asks (Br. 83) this Court to dismiss the case. This Court need only address the first issue to rule (as we argue it should) for the plaintiff. But if it were to rule for the Board on the first issue, the arm-of-the-State issue, it could not simply dismiss the case. It would need either to remand to the district court for consideration of the alternative issues, or to consider one or both of those issues in the first instance. This brief thus addresses all three issues that were before the district court on the motion to dismiss.

3. Whether, if USERRA does purport to subject States to private suit in federal court, it does so validly under Congress's Article I War Powers.

STATEMENT OF THE CASE

1. USERRA generally prohibits employment discrimination on the basis of membership in the armed forces and provides servicemembers with a right to reemployment after a period of active duty. USERRA applies to both public and private employers and can be enforced by private suit. See 38 U.S.C. 4323(a)(3). It also can be enforced by the Attorney General in an action in which "the Attorney General * * * appear[s] on behalf of, and act[s] as attorney for" the servicemember. 38 U.S.C. 4323(a)(1). But, in the case of a suit against a State, an action initiated by the federal government is "brought in the name of the United States as the plaintiff in the action." 38 U.S.C. 4323(a)(1). USERRA gives courts jurisdiction over three types of suit:

> (1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.
>
> (2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.
>
> (3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

38 U.S.C. 4323(b). Section 4323(i) provides that "a political subdivision of a State" is included in the definition of a "private employer," and thus makes clear that a private suit against a political subdivision of a State may be brought in federal court.[2]

2. Plaintiff-appellee Michael Weaver is the Executive Director of Finance and Business and Chief Financial Officer for the Madison City School System. Doc. 1 at 5.[3] He is also a member of the United States Army Reserve. Doc. 1 at 5.[4] He has been deployed both to Afghanistan and to Iraq. Doc. 1 at 5-8. He alleges that, after he returned from Afghanistan in 2007, the Madison City Board of Education significantly reduced his authority and level of responsibility. Doc. 1 at 6-8. The Board also removed him from the salary schedule that applies to other employees, and as a result he no longer receives the scheduled annual raises that other employees receive. Doc. 1 at 8-9. And the Board moved him from a corner

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[2] Counties, cities, and other political subdivisions of a State are not part of the State for purposes of Eleventh Amendment immunity. See, *e.g.*, *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47, 115 S. Ct. 394, 404 (1994) (explaining that "cities and counties do not enjoy Eleventh Amendment immunity") (citing *Lincoln Cnty.* v. *Luning*, 133 U.S. 529, 530, 10 S. Ct. 363 (1890)).

[3] This Statement recounts the allegations in Plaintiff's Complaint. The United States takes no position on any factual disputes between the parties.

[4] "Doc. __" refers to the number assigned to a document on the district court's docket sheet.

office on an upper floor to a small office in the basement, and no longer provided him secretarial assistance. Doc. 1 at 7-8. The same treatment continued after a later deployment. Doc. 1 at 8. In March 2011, the Board advertised the job of chief operational officer. Doc. 1 at 9. That position appeared to be very similar, if not identical, to the job Weaver did before he was deployed – and even included some of Weaver's present responsibilities. Doc. 1 at 9. Weaver applied for that job but was told that the Board had decided not to fill it due to budgetary considerations. Doc. 1 at 9.

3. On October 4, 2011, Weaver filed suit against the Madison City Board of Education and Dee Fowler, the Superintendent of Education for Madison City Schools (who is sued only in his official capacity). Doc. 1 at 2. Defendants moved to dismiss, arguing that USERRA and the Eleventh Amendment bar the suit. Doc. 17. The United States intervened under 28 U.S.C. 2403(a) to defend the constitutionality of a federal statute. Doc. 37.

A magistrate judge issued a report and recommendation concluding that the Board is not an arm of the State for Eleventh Amendment purposes. Doc. 50. The district court adopted that report and recommendation. Doc. 69 at 8. It thus denied the motion to dismiss. Doc. 69 at 8. Recognizing that the arm-of-the-State ruling resolved the motion to dismiss, the district court declined to decide whether

Congress possesses the constitutional authority to subject States to private USERRA suits. Doc. 69 at 7-8.

SUMMARY OF THE ARGUMENT

Binding precedent establishes that local school boards in Alabama do not have Eleventh Amendment immunity. This appeal should thus be resolved by applying *Stewart* v. *Baldwin County Board of Education*, 908 F.2d 1499, 1511 (11th Cir. 1990). *Stewart* is not only binding and directly on point, it expressly rejected the very argument the Board advances here: it held that a local school board is *not* an arm of the State for Eleventh Amendment purposes simply because it is an arm of the State for state-law sovereign immunity purposes. That was the right ruling. If state-law sovereign immunity conferred Eleventh Amendment immunity, state legislatures and courts would have the power to dole out Eleventh Amendment immunity merely by extending state-law sovereign immunity. Other federal courts of appeals – following related Supreme Court jurisprudence – have reached the same conclusion this Court reached in *Stewart*.

If, however, this Court accepts the Board's contention that it is an arm of the State for Eleventh Amendment purposes, Weaver will be unable to pursue his claim for two reasons. First, the language of the relevant statutory provision, its history, and its purpose reveal that Congress provided for only state-court jurisdiction over private USERRA suits against States. Second, while the statute

provides the plaintiff with a cause of action in state court, the Alabama Supreme Court has refused to recognize that cause of action.

Finally, though this Court should not reach the constitutional issue, if it does it should hold that Congress has the authority under its War Powers to authorize private USERRA suits against state employers. Because the Founding Fathers did not want the federal government to be limited in its ability to wage war, the Constitution delegates war powers exclusively to the national government and prohibits States from going to war without the approval of Congress (except in very limited circumstances). Where exclusive power is given to the Federal Government, States' sovereignty – including immunity to private suit – is subordinate to national authority.

ARGUMENT

I

THE MADISON CITY BOARD OF EDUCATION IS NOT AN "ARM OF THE STATE" FOR ELEVENTH AMENDMENT PURPOSES[5]

The Eleventh Amendment does not shield the Madison City Board of Education from application of federal employment law. Binding precedent – *Stewart* v. *Baldwin County Board of Education*, 908 F.2d 1499 (11th Cir. 1990) – settles that. *Stewart* could not be more on point: there, as here, a local school board in Alabama sought to avoid liability for a federal employment-law claim by asserting Eleventh Amendment immunity. *Id.* at 1501. This Court ruled that the school board "is not an 'arm of the State' for purposes of Eleventh Amendment immunity." *Id.* at 1511. Here, the Board's central argument is that it should be immune under the Eleventh Amendment because state-court jurisprudence gives it state-law sovereign immunity. That argument is (1) foreclosed by *Stewart*, (2)

[5] Eleventh Amendment immunity is a legal issue that this Court reviews de novo. *Summit Med. Assocs., P.C.* v. *Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999) ("[A] district court's denial of a motion to dismiss on Eleventh Amendment grounds is a question of law subject to *de novo* review."). Though this Court's Eleventh Amendment decisions do not discuss burden of persuasion, other courts of appeals have held that the "the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity." *Woods* v. *Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237 (2d Cir. 2006) (citing cases).

wrong, and (3) at odds with decisions of other courts of appeals and with the reasoning of a related Supreme Court decision.

A. Stewart *Is Directly On Point And Consistent With Other Authorities*

In *Stewart*, this Court held that a local school board in Alabama is not entitled to Eleventh Amendment immunity. This Court carefully applied its test for determining whether an entity is an arm of the State for Eleventh Amendment purposes. That test (essentially the same test this Court applies now[6]) looked at "(1) how the state law defines the entity; (2) the degree of state control over the entity; and (3) the entity's fiscal autonomy – *i.e.*, where the entity derives its funds and who is responsible for judgments against the entity." 908 F.2d at 1509.

The test required this Court to examine state law. This Court did just that, citing more than a dozen provisions of the Alabama Code applicable to local school boards. This Court determined that state law gave local school boards "the power to establish general education policy for the schools," assigned them "general administration and supervision responsibility for the schools," and

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[6] More recently, this Court has broken the third factor from *Stewart* into two separate factors. See *United States ex rel. Lesinski* v. *South Florida Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014) (describing "four factors: '(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity'") (quoting *Manders* v. *Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003) (en banc)). The change in numbering does not affect the substance of the test.

provided them "with the authority to assign teachers and to place students." *Stewart*, 908 F.2d at 1511 (citing Alabama statutes). The Court determined further that "[b]oard members are elected by 'the qualified electors of the county,'" and that that board members "receive compensation from the public funds of the county." *Ibid.* (citing Alabama statutes). This Court considered further that Alabama law authorized school boards to: "raise revenues by selling interest-bearing tax anticipation warrants"; "expend money raised by taxes in support of public schools in the district or county in which it was raised"; "spend revenues from county sales and use-tax funds for educational purposes"; and "borrow funds." *Id.* at 1510 (citing Alabama statutes). This Court also noted that "school boards are required to hold 'a meeting for the purpose of giving the public an opportunity of presenting to the board matters relating to the allotment of public school funds.'" *Ibid.* (quoting Ala. Code § 16-8-3 (2014)). Based on these characteristics, this Court concluded that the School Board had significant authority over local schools, was "subject to a significant amount of local control," and that "it cannot be said that a judgment against a county school board will come from state funds." *Id.* at 1510-1511.

Stewart followed decisions of this Court and the Supreme Court. In *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 280-281, 97 S. Ct. 568, 573 (1977), the Supreme Court ruled that local school boards in

Ohio are not arms of the State for Eleventh Amendment purposes. Likewise, this Court (or its predecessor circuit) has ruled that local school boards in Florida, Louisiana, and Mississippi were not arms of the State for Eleventh Amendment purposes. See *Travelers Indem. Co.* v. *School Bd. of Dade Cnty.*, 666 F.2d 505, 509 (11th Cir. 1982); *Moore* v. *Tangipahoa Parish Sch. Bd.*, 594 F.2d 489, 493-494 (5th Cir. 1979); *Adams* v. *Rankin Cnty. Bd. of Educ.*, 524 F.2d 928, 929 (5th Cir. 1975). The common thread in these cases was that the school boards had "a substantial amount of control over their own affairs, *e.g.*, the boards possessed power to contract, to sue and be sued, to purchase and sell property, to borrow funds, and to levy and collect taxes," and that the school boards "had the means to raise funds, so that any judgment for the plaintiff could be paid out of local funding rather than out of the state treasury." *Stewart*, 908 F.3d at 1510. In *Stewart*, this Court concluded that local school boards in Alabama shared those same relevant characteristics and were thus also not entitled to Eleventh Amendment immunity. See *ibid*.

Finally, *Stewart* rejected the School Board's argument that state-law sovereign immunity establishes Eleventh Amendment immunity. This Court recognized "[t]hat Alabama state courts provide county boards of education with sovereign immunity in state tort law actions" but ruled that this fact had no bearing on whether the School Board also had Eleventh Amendment immunity. 908 F.2d

at 1510 n.6. This Court concluded that the Board's attempt to "conflate sovereign immunity with regard to a state-created tort with Eleventh Amendment immunity for a federal cause of action is unavailing." *Ibid.* It also found the Supreme Court's decision in *Mt. Healthy* "instructive" on this point because "[a]t the time that *Mt. Healthy* was decided, the case law in Ohio was clear that a local school board was cloaked in sovereign immunity to the same degree as the state itself from suits arising in tort." *Ibid.* So *Stewart* is not only controlling authority, it rejected the very argument the School Board advances here.

Stewart is by no means an outlier. The majority of federal courts of appeals that have considered whether local school boards are arms of the State entitled to Eleventh Amendment immunity have ruled that they are *not*. See, *e.g.*, *Febres* v. *Camden Bd. of Educ.*, 445 F.3d 227, 229 (3d Cir. 2006) (holding that a local board of education in New Jersey is not an arm of the state and explaining that "[s]chool boards and school districts are typically considered political subdivisions of a state, not entitled to immunity"); *Woods* v. *Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 239 (2d Cir. 2006) (same for New York); *Cash* v. *Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 226 (4th Cir. 2001) (same for North Carolina); *Duke* v. *Grady Mun. Sch.*, 127 F.3d 972, 978 (10th Cir. 1997) (same for New Mexico); *Ambus* v. *Granite Bd. of Educ.*, 995 F.2d 992, 994-997 (10th Cir. 1993) (en banc) (same for Utah); *Rosa R.* v. *Connelly*, 889 F.2d 435, 437-438 (2d Cir. 1989) (same

for Connecticut); *Minton* v. *Saint Bernard Parish Sch. Bd.*, 803 F.2d 129, 131-132 (5th Cir. 1986) (same for Louisiana); *Travelers Indem. Co.*, 666 F.2d at 509 (same for Florida); *Adams*, 524 F.2d at 929 (same for Mississippi).[7] Indeed, this majority position is so entrenched that, in *Missouri* v. *Jenkins*, the Supreme Court simply stated that the Eleventh Amendment "does not afford local school boards * * * immunity from suit." 495 U.S. 33, 56 n.20, 110 S. Ct. 1651, 1665 n.20 (1990) (citing *Mt. Healthy*).[8]

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[7] Federal courts of appeals have also frequently ruled that school districts, like school boards, are *not* entitled to Eleventh Amendment immunity. See, *e.g.*, *Black* v. *North Panola Sch. Dist.*, 461 F.3d 584, 596 (5th Cir. 2006) (Mississippi); *Holz* v. *Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1180 (9th Cir. 2003) (Alaska); *Savage* v. *Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1051 (9th Cir. 2003) (Arizona); *Eason* v. *Clark Co. Sch. Dist.*, 303 F.3d 1137, 1144 (9th Cir. 2002) (Nevada); *Duke*, 127 F.3d at 978 (New Mexico); *Lester H. ex rel. Octavia P.* v. *Gilhool*, 916 F.2d 865, 870 (3d Cir. 1990) (Pennsylvania); *Lopez* v. *Houston Indep. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987) (Texas), overruled on other grounds by *Walton* v. *Alexander*, 44 F.3d 1297 (5th Cir. 1995); *Gary A.* v. *New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 943-944 (7th Cir. 1986) (Illinois); *Stoddard* v. *School Dist. No. 1*, 590 F.2d 829, 835 (10th Cir. 1979) (Wyoming); *Unified Sch. Dist. No. 480* v. *Epperson*, 583 F.2d 1118, 1121 (10th Cir. 1978) (Kansas).

[8] The Ninth Circuit ruled that California school districts are arms of the State for Eleventh Amendment purposes. See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992). But it has explained that its holding in *Belanger* was based on the "unique structure of the California school system," which mandated equal per pupil spending by every school in the State and State control of all education funds. See *Holz*, 347 F.3d at 1183 (quoting *Eason*, 303 F.3d at 1192, and citing *Belanger*). The Alabama school system does not appear to be at all analogous to California's and the Board does not attempt to argue that it is.

B. Stewart *Is Still Good Law*

Stewart is so exactly on all fours with this case that the Board makes no attempt to distinguish it on its facts. Instead, the Board argues that *Stewart* is wrong and that it has been "abrogated if not implicitly overruled." Br. 10. Of course, unless this Court decides to consider this case *en banc*, it cannot overrule *Stewart*. See *Perez-Guerrero* v. *United States Attorney Gen.*, 717 F.3d 1224, 1231 (11th Cir. 2013) ("[A] panel cannot overrule a prior one's holding even [if] convinced it is wrong.") (citation omitted), cert. denied, 134 S. Ct. 1000 (2014). So we focus on the Board's erroneous contentions that *Stewart* has been "abrogated" by: (1) changes in the legal relationship between local boards of education and the State; and (2) changes in state and federal sovereign immunity jurisprudence.

1. Stewart*'s State-Law Foundation Is Sound*

Stewart's analysis of the legal relationship between Alabama's local school boards and the State itself remains correct. The state statutes *Stewart* relied on are mostly the same today. See Doc. 32 at 43-45. Thus, the features of local school boards (recounted above, pp. 9-10) that convinced this Court that they are not arms of the State are largely unchanged.[9]

[9] Notably, members of city boards of education are not elected but rather are appointed by the city council or commission, making the Board in this case even

(continued…)

Moreover, other state-law provisions that *Stewart* did not cite confirm the correctness of *Stewart*'s analysis. For example, city school board members must be residents of the city and, where board members represent a particular district, they must live in that district. Ala. Code § 16-11-2(b) and (d) (2014). In some cities, the city mayor appoints one member of the board. Ala. Code § 16-11-3.1 (2014). City school boards may enter into contracts to purchase, sell, and maintain property, and "any action brought" to enforce such contracts "shall be brought by and in the name of the city." Ala. Code § 16-11-12 (2014). Indeed, in several places, the Alabama Code expressly defines city school boards as political subdivisions or local entities – not as agencies of the State. See, *e.g.*, Ala. Code § 1-1-13 (2014) (providing that previously passed acts validating "any bonds, notes, warrants, certificates or other evidences of indebtedness issued by any city, town, county, county board of education, *city board of education or other political subdivision* of the state" remain in force even if omitted from the state code) (emphasis added); Ala. Code § 41-4-35 (2014) ("[T]he Department of Finance shall have no power to adopt any rule which shall impose any mandatory duties upon counties, municipal corporations, *political subdivisions and local public bodies, including county and city boards of education* and district boards of

(…continued)
more attached to the local government than an elected county school board is. See Ala. Code § 16-11-3 (2014).

education of independent school districts, other than such mandatory duties as may be imposed upon them by law.") (emphasis added); Ala. Code § 16-6A-2(6) (2014) (defining "[c]ounty and city boards of education and the school systems over which these boards of education have authority" as "local educational agencies").

The Board of Education's particular authority over employment further confirms *Stewart*'s correctness and continued vitality. The Board's powers in this area are important because, in applying the arm-of-the-State test, this Court considers "the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Manders* v. *Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003). Here the potential liability arises from the Board's function as an employer. The Board has the authority to "fix the salaries of all employees" and to "suspend or dismiss" employees "on the written recommendation of the city superintendent of schools for immorality, misconduct in office, incompetency, willful neglect of duty or when, in the opinion of the board, the best interests of the schools may require." Ala. Code § 16-11-17 (2014). The Board – not the State – controls the plaintiff's salary, level of responsibility, and working conditions. Thus the Board cannot plausibly maintain that the State has control over "the actions out of which liability is asserted to arise." See *Manders*, 338 F.3d at 1308.

In 2008, the Alabama Supreme Court had a chance to clear up any error in *Stewart*'s account of the relationship between school boards and the State. Instead, it confirmed that *Stewart*'s understanding of state law is still correct. In *Ex parte Madison County Board of Education*, 1 So. 3d 980 (Ala. 2008), the Alabama Supreme Court recognized that federal law determines whether an entity is an arm of the State for Eleventh Amendment purposes, but that the federal test "is dependent on an analysis of state law." *Id.* at 987. It then applied that test (see p. 9 & n.6, *supra*) and, citing many of the state-law provisions referenced in *Stewart*, 908 F.2d at 1510-1511, and above (pp.15-16), held that the school board had not established a right to Eleventh Amendment immunity. *Madison Cnty.*, 1 So. 3d at 988-989.

2. Eleventh Amendment Decisions Do Not Undermine – Indeed, They Confirm – Stewart*'s Ruling*

The Board also argues that *Stewart* has been abrogated by state court decisions granting local school boards state-law sovereign immunity. The argument seems to posit two relevant changes in the law: first, school boards' receipt of full state-law immunity, and second, an altered Eleventh Amendment standard that makes an entity's state-law sovereign immunity dispositive. In reality, neither of the changes the Board describes has happened.

a. Long before *Stewart* was decided, local school boards had state-law sovereign immunity. Specifically, Alabama courts recognized school boards as

"local agencies of the [S]tate" for purposes of the state-law sovereign immunity provided by the Alabama Constitution. See, *e.g.*, *Hutt Through Hutt* v. *Etowah Cnty. Bd. of Educ.*, 454 So. 2d 973, 974 (Ala. 1984); *Belcher* v. *Jefferson Cnty. Bd. of Educ.*, 474 So. 2d 1063, 1065 (Ala. 1985). The Board paints *Ex parte Hale County Board of Education*, 14 So. 3d 844 (Ala. 2009), as a major change in the law. Br. 19-20. But the truth is *Hale* simply resolved an inconsistency in prior caselaw over whether contract claims were an exception to school boards' state-law immunity. The court made clear that there is no contract-claim exception to school boards' state-law sovereign immunity. *Hale*, 14 So. 3d at 848. So state law has not changed: Alabama school boards were immune to state-law employment discrimination claims before *Stewart* was decided, and long before *Hale* was decided. See, *e.g.*, *Hickman* v. *Dothan City Bd. of Educ.*, 421 So. 2d 1257, 1258-1259 (Ala. 1982) (ruling that a city board of education was immune under the Alabama Constitution to the employment discrimination claims of a teacher).

b. Far more importantly, the federal Eleventh Amendment immunity standard has not changed. That means a State's grant of state-law sovereign immunity to the Board *cannot* also impart constitutional Eleventh Amendment immunity. As we have seen already (pp. 11-12), *Stewart* rejected a school board's argument that its state-law sovereign immunity gives it Eleventh Amendment immunity. That ruling is binding.

The Board attempts to use Alabama's state-law sovereign immunity jurisprudence to wriggle out from under *Stewart*. This effort would fail no matter what the Alabama Supreme Court had said about *Stewart* and the relationship between state sovereign immunity and Eleventh Amendment immunity because the legal standard for the latter is a federal-law standard, not a state-law standard. But the irony is that the Alabama Supreme Court has acknowledged *Stewart*'s continued vitality, and has pinpointed the distinction between state-law sovereign immunity and immunity under the Eleventh Amendment. In *Ex parte Madison County Board of Education*, the Alabama Supreme Court not only confirmed that school boards are not arms of the State for Eleventh Amendment purposes, it also rebuffed the School Board's argument that the court "should not find *Stewart* persuasive." 1 So. 3d at 989. The Alabama Supreme Court recognized that state-law sovereign immunity and Eleventh Amendment immunity are distinct, so that a school board's state-law immunity does not establish Eleventh Amendment immunity. *Id*. at 989-990; see also *Colbert Cnty. Bd. of Educ.* v. *James*, 83 So. 3d 473, 479, 481 (Ala. 2011) (explaining that while a school board is "absolutely immune under § 14 [of the Alabama Constitution] from the state-law claims filed against it," it is "not immune under § 14 from * * * federal-law claims").

Stewart is binding, and that resolves this case. See *Perez-Guerrero*, 717 F.3d at 1231. It is also correct. If the Board is entitled to Eleventh Amendment

immunity simply because it has state-law sovereign immunity then States become the arbiters of Eleventh Amendment immunity. Entities with identical characteristics would be treated differently under the United States Constitution based on the happenstance of whether they enjoy state-law sovereign immunity. And the meaning of the United States Constitution would depend on the jurisprudence of 50 different state supreme courts interpreting 50 different state-law sovereign immunity rules.

Other courts of appeals have rejected this absurd outcome, just as this Court rejected it in *Stewart*. The Third Circuit held that a state legislature cannot confer Eleventh Amendment protection simply by defining an entity as a state agency and making it immune from suit under state law. *Bolden* v. *Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 817 (3d Cir. 1991). Indeed, the Third Circuit determined that accepting the same argument the Board advances here "would revolutionize the meaning of the Eleventh Amendment." *Ibid.* ("If [defendant's argument] were accepted, each state legislature apparently could confer Eleventh Amendment protection on any entity it wished, including counties and cities, by enacting a statute clothing these entities with 'sovereign immunity' from suit on state claims."); see also, *e.g.*, *Black* v. *North Panola Sch. Dist.*, 461 F.3d 584, 595, 597 (5th Cir. 2006) (explaining that "no state may employ its common law principles of sovereign immunity to redefine the contours of a federally created right or

defense" and concluding that a state court's or legislature's assertion "that a school district is * * * [an] arm of the state does not determine whether [it] is entitled to Eleventh Amendment protection"); *Ambus* v. *Granite Bd. of Educ.*, 995 F.2d 992, 995 (10th Cir. 1993) (en banc) ("Even though state sovereign immunity protects Utah school districts from state-law suits, they may still be subject to federal causes of action.") (citation omitted).

The Supreme Court's decision in *Howlett By & Through Howlett* v. *Rose*, 496 U.S. 356, 110 S. Ct. 2430 (1990) – cited in *Bolden*, *Black*, and *Ambus* – is also instructive. In *Howlett*, the Supreme Court reversed a state-court decision that held that local school boards could not be sued under Section 1983 in state court because they were entitled to state-law sovereign immunity.[10] The Supreme Court explained that a State's decision to shield local entities from suit "cannot override the dictates of federal law." *Id.* at 377-378, 110 S. Ct. at 2444. The Court reasoned that if States could exempt entities "from federal liability by relying on their own common-law heritage" then they "would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People." *Id.* at 383, 110 S. Ct. at 2447. *Howlett*'s reasoning applies here. If state-

[10] The questions whether an entity is immune under Section 1983 and whether an entity is immune under the Eleventh Amendment are essentially the same because the Supreme Court has held that "an entity with Eleventh Amendment immunity is not a 'person' within the meaning of § 1983." *Howlett*, 496 U.S. at 365, 110 S. Ct. at 2437 (citation omitted).

sovereign-immunity law cannot alter an entity's liability in a federal statutory claim brought in state court, it certainly cannot confer upon an entity constitutional immunity to a federal claim in federal court.

The Board relies heavily on *Versiglio* v. *Board of Dental Examiners of Alabama*, 686 F.3d 1290 (11th Cir. 2012), and *Ross* v. *Jefferson County Department of Health*, 701 F.3d 655 (11th Cir. 2012). See Br. 15-18, 22, 44-45, 66-67, 70. Neither case purports to overturn *Stewart*. Nor do they involve local school boards.

Versiglio considered whether the Alabama Board of Dental Examiners is an arm of the State for Eleventh Amendment purposes. Alabama law makes clear that it is the State of Alabama itself that licenses dentists. See, *e.g.*, Ala. Code § 34-9-2(c) (2014) (explaining that "[t]he licensure *by this state* of nonresident dentists who engage in dental practice and persons who engage in the practice of dental hygiene within this state are within the public interest") (emphasis added). The Alabama Code controls the licensing and practice of dentistry and creates the Alabama Board of Dental Examiners as the state entity empowered "with the authority to carry out the purposes [of] and enforce [those laws]." Ala. Code § 34-9-40(a) (2014). So the Alabama Board of Dental Examiners is comparable to a state department of education, not a local board of education.

Moreover, *Versiglio* recognized, as this Court has said in many other cases, that "[w]hether an agency qualifies as an arm of the state is a federal question with a federal standard." *Versiglio*, 686 F.3d at 1291. *Versiglio* also explained that "if a state creates an institution in such a way that gives it independence, '[w]hatever may have been the state's reason for doing it [that] way, it must live with the consequences.'" *Id.* at 1292 (quoting *Williams* v. *Eastside Mental Health Ctr., Inc.*, 669 F.2d 671, 678 (11th Cir. 1982)). This Court also said that courts must consider "the provisions of state law that define the agency's *character*." *Ibid.* (quoting *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5, 117 S. Ct. 900, 904 n.5 (1997)) (emphasis added).

In *Ross*, this Court considered whether a county department of health is an arm of the State for Eleventh Amendment purposes. Like this case, *Ross* involved an employment discrimination claim. See 701 F.3d at 657. But unlike this case, in *Ross* the State, not the local entity, controlled personnel decisions like hiring and firing. *Id.* at 660. And, under this Court's functional approach (see *Manders*, 338 F.3d at 1308), that fact was very significant.

It is true that in *Versiglio* this Court appeared to change its mind about whether the Dental Board is an arm of the State for Eleventh Amendment purposes because of a switch in the Dental Board's state-law sovereign immunity status, and that it said that if the Dental Board was "immune from suit under state law but not

federal law" that would be an "incongruous result." 686 F.3d at 1292-1293. But, concern over the incongruity between state and federal immunity notwithstanding, *Versiglio*'s discussion of the law (see p. 23, *supra*) reaffirms that an entity cannot gain Eleventh Amendment immunity based on a State's mere say so.

In *Ross*, this Court considered as relevant to the Eleventh Amendment arm-of-the-State test that "Alabama courts have uniformly treated county boards of health as state agencies." 701 F.3d at 559. Yet this Court did not look first to state-law sovereign immunity decisions, but instead to a state-court decision holding that county health department employees are State employees. *Ibid.* (citing *Pack* v. *Blankenship*, 612 So. 2d 399, 400 n.1 (Ala. 1992)). That sort of deference to state-court decisions – deference to a state-court's ruling about the character of an entity (see *Regents of the Univ. of Cal.*, 519 U.S. at 429 n.5, 117 S. Ct. at 904 n.5) – is certainly appropriate.

That is the kind of deference to state-court decisions this Court's Eleventh Amendment decisions encourage. Notably, both *Versiglio* and *Ross* (as well as the Board here) quote *Tuveson* v. *Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730, 732 (11th Cir. 1984), for the proposition: "the most important factor [in determining an entity's Eleventh Amendment arm-of-the-State status] is how the entity has been treated by the state courts." See *Ross*, 701 F.3d at 559; *Versiglio*, 686 F.3d at 1292; Br. 14-15. But in *Tuveson*, this Court did not just

defer to state-law sovereign immunity decisions. In fact, it did not look at the entity's state-law sovereign immunity status at all. Instead, *Tuveson* looked at a state court decision for guidance in defining – for purposes of the federal test – the substantive legal relationship between the defendant entity (the Florida Governor's Council on Indian Affairs) and the State itself. In so doing, it zeroed in on the particular area that was the focus of the lawsuit (employment). So, in *Tuveson*, this Court considered as relevant to the Eleventh Amendment arm-of-the-State inquiry, although not dispositive, that a state court had "held that for the purposes of a state anti-discrimination statute and the state administrative procedures act the Council was a state agency." 734 F.2d at 733. The takeaway from *Tuveson* is *not* that state-court decisions interpreting state-law sovereign immunity expansively warrant deference in the Eleventh Amendment context. Instead the takeaway is that state-court decisions that shed light on the character of the entity and the nature of the relationship between the entity and the State warrant deference.

The Board's reading of *Versiglio* and *Ross* results in serious problems. As we have explained, making state-law sovereign immunity status the key to Eleventh Amendment immunity is wrong and at odds with the Supreme Court's jurisprudence (*Howlett*), this Court's own jurisprudence (*Stewart*), and the jurisprudence of other federal courts of appeals (*Bolden*, *Black*, and *Ambus*). This

Court should avoid interpreting *Versiglio* and *Ross* as precedent-defying, circuit-split creating, reversals of its prior Eleventh Amendment jurisprudence.

In short: (1) *Stewart* is controlling precedent; (2) its state-law foundation is sound; (3) no change in the law has abrogated it; and (4) interpreting *Versiglio* and *Ross* to make state-law sovereign immunity the key to Eleventh Amendment immunity is unnecessary, wrong, and at odds with a bevy of authorities. This Court should thus rule that the Board has failed to establish that it is an arm of the State entitled to Eleventh Amendment immunity. That means the Board falls under Section 4323's definition of a "private employer" – a term statutorily defined to include a political subdivision of a State. See 38 U.S.C. 4323(i). The district court therefore has jurisdiction over this case under Section 4323(b)(3). And so this Court should affirm and remand the case for further proceedings.

II

IF THE COURT REACHES THE ISSUE, IT SHOULD RULE THAT USERRA DOES NOT AUTHORIZE PRIVATE SUITS AGAINST STATES IN FEDERAL COURT

As we have explained, the correct way for this Court to handle this case is to affirm the district court's ruling that the Board is not an arm of the State and remand the case so the district court can exercise jurisdiction under Section 4323(b)(3). If, however, this Court rules that the Board is an arm of the State for Eleventh Amendment purposes and elects to reach the statutory jurisdiction issue,

it should follow the three courts of appeals that have addressed the issue and conclude that USERRA allows servicemembers to sue state employers only in state court. See *McIntosh* v. *Partridge*, 540 F.3d 315, 320-321 (5th Cir. 2008); *Townsend* v. *University of Alaska*, 543 F.3d 478, 482-485 (9th Cir. 2008); *Velasquez* v. *Frapwell*, 165 F.3d 593, 593-594 (7th Cir. 1999). Indeed, this Court has already followed this line of cases in an unpublished decision. See *Wood* v. *Florida Atl. Univ. Bd. of Trustees*, 432 F. App'x 812, 814-815 (11th Cir. 2011). So if (contrary to the United States' argument) this Court were to hold that the Board is an arm of the State for Eleventh Amendment purposes, it should direct the district court to dismiss the case.

Ideally, the plaintiff would then be able to sue in state court, but Alabama's Supreme Court has (erroneously) ruled that Congress lacked authority to subject the State to USERRA claims by state employees in Alabama state courts. See *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 361 (Ala. 2001). Thus, despite the plaintiff's apparent Section 4323(b)(2) right to sue his state employer in state court, he cannot do so in Alabama unless he succeeds in getting the State Supreme Court to reverse itself.

Nevertheless, the plain language of 38 U.S.C. 4323(b) reveals that Congress has authorized private suits against state employers in state court but has not authorized such suits in federal court. The statutory language (quoted in full p. 3,

supra) provides three distinct statements of jurisdiction for particular cases. Under Section 4323(b)(1) and (3), federal courts are given jurisdiction over suits against non-state parties and over suits against States brought by the United States. Section 4323(b)(2), which deals with suits by private individuals against States, provides that an "action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." To be sure, Section 4323(b)(2) uses the word "may" rather than the word "shall," but it also gives no indication at all that private suits against States may be brought in federal court. Particularly where both the immediately preceding and immediately following statutory provisions describe causes of action over which "the district courts of the United States shall have jurisdiction," this omission speaks volumes. See 38 U.S.C. 4323(b)(1) and (3). There is simply no reason to think that Congress intended to give federal district courts jurisdiction over individual suits against States but failed to address that point expressly in the statute's text.

The circumstances that led Congress to enact Section 4323(b), and that provision's legislative history confirm the correctness of this interpretation. Before 1998, federal and state courts had jurisdiction over all USERRA actions. See Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2, 108 Stat. 3165 (providing that "[t]he district courts of the United States shall have jurisdiction" over all USERRA actions, including suits against a

state employer), amended by the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211(a), 112 Stat. 3329. Congress changed that provision in the wake of the Supreme Court's decision in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996). See *Hearing on USERRA, Veterans' Preference in the VA Education Services Draft Discussion Bill: Hearing Before the Subcomm. on Educ. Training, Emp't and Hous. of the H. Comm. on Veterans' Affairs*, 104th Cong., 2d Sess. 17-23, 85-87 (1996) (statement and written testimony of Prof. Jonathan Siegel, George Washington University Law School); H.R. Rep. No. 448, 105th Cong., 2d Sess. 3 (1998). In *Seminole Tribe*, the Court set out what appeared to be a categorical rule that Congress could not abrogate States' Eleventh Amendment immunity when acting under Article I of the Constitution. See 517 U.S. at 72-73, 116 S. Ct. at 1131-1132. When Congress amended USERRA in the wake of *Seminole Tribe*, it believed that it lacked the authority to subject States to private USERRA suits in federal court. Indeed, the purpose of the new enforcement provision codified in Section 4323(b) was to work around the *Seminole Tribe* decision. Congress attempted to deal with the perceived limitation on its authority in two ways: 1) it allowed the United States to bring an action in its own name, but on behalf of an aggrieved state employee, in federal court; and 2) it reaffirmed that individuals can bring their own suits against state

employers in state court. See 38 U.S.C. 4323(a) and (b); see also H.R. Rep. No. 448, 105th Cong., 2d Sess. 5-6 (1998).

Finally, the Supreme Court has made clear that legislation in which Congress seeks to abrogate States' immunity from suit must "unequivocally express[]" Congress's intent to provide for private suits against States in federal court. See, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 517, 124 S. Ct. 1978, 1985 (2004) (citation omitted); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 635, 119 S. Ct. 2199, 2205 (1999). USERRA contains no such clear statement.

III

IF THE COURT REACHES THE ISSUE, IT SHOULD RULE THAT CONGRESS HAS THE AUTHORITY TO GRANT FEDERAL COURTS JURISDICTION OVER PRIVATE USERRA CLAIMS AGAINST STATE EMPLOYERS

For the reasons explained above, this Court should not reach this issue. The Board of Education is not an arm of the State under the relevant constitutional analysis (Issue I), and so it lacks Eleventh Amendment immunity; thus the constitutional question is not presented. And, if the Board is an arm of the State for Eleventh Amendment purposes, the district court lacks jurisdiction as a statutory matter over plaintiff's USERRA claim (Issue II) and, accordingly, this case does not present the question whether Congress has the constitutional authority to authorize individuals to bring USERRA claims against state employers

in federal court. Indeed, the Supreme Court has often said that federal courts have a "'deeply rooted' commitment" and obligation "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." See, *e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11, 124 S. Ct. 2301, 2308 (2004) (citation omitted). That principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress. *Rostker* v. *Goldberg*, 453 U.S. 57, 64, 101 S. Ct. 2646, 2651 (1981); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 1323 (1988).

But if this Court does reach the issue, it should rule that Congress has the authority, under its War Powers, to subject state employers to private USERRA claims.[11]

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[11] In *United States* v. *Alabama Department of Mental Health And Mental Retardation*, 673 F.3d 1320, 1325 (11th Cir. 2012), this Court ruled that the Eleventh Amendment does not prevent the United States from enforcing USERRA on a servicemember's behalf. In that case, this Court said that "[i]f [the servicemember] had been the plaintiff [instead of the United States], it is undisputed that sovereign immunity would have barred his suit because a State cannot be sued by an individual without its consent." *Ibid.* The question whether the Eleventh Amendment would bar a USERRA suit against a State by an individual plaintiff was not before this Court in *Alabama Department of Mental Health And Mental Retardation*. This statement was *dicta*. The parties in that case did not address the issue, and the United States did not concede in that case that an individual suit would be constitutionally barred. This Court would have had no reason to consider in that case the argument the United States makes here: that the War Powers provide an exception to the general rule that Congress may not

(continued…)

A. USERRA Is War Powers Legislation

As an initial matter, Congress enacted USERRA under its War Powers. USERRA protects members of the armed forces from employment discrimination and grants them a right to reemployment when they return to work after military service. Congress's stated purpose in enacting this statute was "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). That purpose is directly relevant to Congress's War Powers authority; that is, Congress's ability to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "[r]egulat[e] * * * the land and naval Forces." U.S. Const. Art. I, § 8, C1. 11-14; Cf. *Johnson* v. *Robison*, 415 U.S. 361, 376, 94 S. Ct. 1160, 1170 (1974) (legislation providing educational benefits to veterans "is plainly within Congress's Art. I, § 8, power 'to raise and support Armies'").

(…continued)
abrogate States' Eleventh Amendment immunity when acting pursuant to Article I of the Constitution. In the event that this Court reaches this issue of Congress's authority to subject States to suit under the War Powers, the *dicta* from *Alabama Department of Mental Health And Mental Retardation* should not prevent it from resolving the issue on a clean slate.

Courts have uniformly held that Congress enacted USERRA under the authority of its War Powers. See, *e.g.*, *Bedrossian* v. *Northwestern Mem'l Hosp.*, 409 F.3d 840, 843 (7th Cir. 2005); *Diaz-Gandia* v. *Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996); *Reopell* v. *Massachusetts*, 936 F.2d 12, 15-16 (1st Cir.), cert. denied, 502 U.S. 1004, 112 S. Ct. 637 (1991). Moreover, Congress viewed States' assertions of sovereign immunity in the wake of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996), as a particular threat to national security. The House Report accompanying the passage of the amended statute stated that the cases dismissing USERRA claims on sovereign immunity grounds "threaten not only a long-standing policy protecting individuals' employment right[s], but also raise serious questions about the United States' ability to provide for a strong national defense." See H.R. Rep. No. 448, 105th Cong., 2d Sess. 5 (1998). The Report explained further that the proposed legislation was "to assure that the policy of maintaining a strong national defense is not inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA." *Ibid.*

B. Katz *Invalidates The Assumption That Congress May Not Subject States To Private Suit Under Any Article I Power*

In *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 363, 126 S. Ct. 990, 996 (2006), the Court rejected the assumption, articulated in *Seminole Tribe*, that no Article I power could provide authority for Congress to subject

States to private suit. In *Katz*, the Court decided that, although the Bankruptcy Clause is in Article I, Congress can, at least in some instances, rely on the Bankruptcy Clause to subject States to private suit. *Id.* at 379, 126 S. Ct. at 1005.

The Court reached this conclusion based on a historical analysis of the Bankruptcy Clause. It examined the intent of the Framers in drafting and including the Bankruptcy Clause in the Constitution, the understanding of the States in ratifying the Constitution, as well as early congressional efforts to exercise authority under the Clause. *Katz*, 546 U.S. at 363-373, 126 S. Ct. at 996-1002. The Court concluded that States largely ceded their authority in the area of bankruptcy to the national government, and thereby gave up their immunity to certain private suits. In other words, as to certain bankruptcy proceedings, "the States agreed in the plan of the Convention not to assert [sovereign] immunity." *Id.* at 373, 126 S. Ct. 1002. Thus, the Court ultimately held that:

> The relevant question is not whether Congress has 'abrogated' States' immunity in proceedings to recover preferential transfers. The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.' We think it beyond peradventure that it is.

Id. at 379, 126 S. Ct. at 1005 (citation omitted). [12]

[12] In *National Association of Boards of Pharmacy* v. *Board of Regents of the University System of Georgia*, 633 F.3d 1297 (11th Cir. 2011), this Court ruled that *Katz* should not be extended to allow Congress to abrogate States' sovereign

(continued…)

C. The War Powers, Like The Bankruptcy Clause, Give Congress The Authority To Subject States To Private Suit

A historical analysis of Congress's War Powers leads to the same conclusion. The Constitution delegates war powers to the national government exclusively and prohibits States from making war absent consent of Congress (except in very limited circumstances). In addition, the individual States never possessed war powers and therefore could not retain sovereignty in that area.

1. History Reveals That The Exclusive Nature Of Congress's War Powers Gives Rise To Authority To Subject States To Private Suit

The Founding Fathers recognized the unique importance of the federal government's power to wage and prepare for war and the need for that power to be uninhibited. All the powers enumerated in Article I are important to the federal government's effectiveness and vitality, but Congress's War Powers are qualitatively different. The very survival of the nation depends directly on

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immunity under the Copyright and Patent Clause. *Id.* at 1314-1315. It explained that the Supreme Court already held in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627, 119 S. Ct. 2199 (1999), that the Copyright and Patent Clause did not give Congress that authority, and it explained further that *Katz* did not purport to overrule *Florida Prepaid*. *Ibid.* The Supreme Court has never ruled that Congress lacks authority under its War Powers to subject States to private suit, and the history of the War Powers Clause is more analogous to that of the Bankruptcy Clause than the history of the Copyright and Patent Clause is. Our argument here is fully consistent with this Court's determination in *National Association* that *Katz* is a narrow exception to the basic *Seminole Tribe* rule that Congress may not abrogate States sovereign immunity under Article I.

Congress's ability to exercise its War Powers. Having just fought a war for independence, the Founding Fathers were keenly aware that the nation's existence depended on its ability to raise and support an army and a navy. In order to create a central government strong enough to defend the nation, the Founding Fathers opted to locate all of the War Powers within the federal government, allotting certain powers to Congress and others to the President. The Founders understood the danger of limiting the nation's ability to wage war; as Alexander Hamilton wrote in Federalist No. 23: "The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." The Federalist No. 23, at 149 (Clinton Rossiter ed., 1961). He also wrote: "[I]t must be admitted * * * that there can be no limitation of that authority[,] which is to provide for the defense and protection of the community[,] in any matter essential to its efficacy – that is, in any matter essential to the *formation*, *direction*, or *support* of the NATIONAL FORCES." *Id.* at 149-150. Similarly, in Federalist No. 41, James Madison stated: "Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils. * * * It is in vain to oppose constitutional barriers to the impulse of self-preservation." The Federalist No. 41, at 252-253 (Clinton Rossiter ed., 1961).

The Constitution's framework evidences the Founders' intent to give the War Powers exclusively to the national government and to prevent interference by the States with those powers. The Constitution gives Congress the authority to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "[r]egulat[e] * * * the land and naval Forces." U.S. Const. Art. I, § 8, C1. 11-14. The Constitution also forbids States, except when invaded or in imminent danger, from engaging in war without the consent of Congress: "No State shall, without the Consent of Congress, * * * engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. Art. I, § 10, Cl. 3.

This exclusive national authority over war (except in cases of invasion or imminent danger) supersedes state sovereignty, including a State's sovereign immunity to individual lawsuits. The clearest evidence of this is found in the Federalist Papers. In Federalist No. 81, Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States[.] * * * The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here.

The Federalist No. 81, at 486-487 (Clinton Rossiter ed., 1961). The Supreme Court has adopted Hamilton's view. In *Hans* v. *Louisiana*, 134 U.S. 1, 12-15, 10 S. Ct. 504, 506-507 (1890), it cited this passage in full, and concluded that it was in accord with the views of James Madison and John Marshall. Indeed, this passage from Federalist No. 81 has become central to the Supreme Court's Eleventh Amendment jurisprudence, and the court has cited it dozens of times. See, *e.g.*, *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1657 (2011); *Alden* v. *Maine*, 527 U.S. 706, 716-717, 119 S. Ct. 2240, 2248-2249 (1999). Thus, in the view of the Founders, immunity to private suit is a fundamental aspect of States' sovereignty.

But Hamilton also said that that immunity is not absolute and he allowed that it may, in certain respects, have been surrendered "in the plan of the convention." The Federalist No. 81, at 486-487 (Clinton Rossiter ed., 1961). Hamilton did not explain in Federalist No. 81 what is necessary to effect such a surrender, but instead referred to a previous discussion of "[t]he circumstances which are necessary to produce an alienation of State sovereignty," which is found in Federalist No. 32. The Federalist No. 81, at 486-487 (Clinton Rossiter ed., 1961); see also *Katz*, 546 U.S. at 376 n.13, 126 S. Ct. at 1004 n.13; *Seminole Tribe*, 517 U.S. at 145-146, 116 S. Ct. at 1167 (Souter J., dissenting). In Federalist No. 32, Hamilton discussed the three circumstances in which the Constitution gives

exclusive authority to the national government and effects a corresponding "alienation of State sovereignty":

> [A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

The Federalist No. 32, at 194 (Clinton Rossiter ed., 1961). The War Powers fall into the second category: In Article I, Section 8, the Constitution delegates the War Powers to Congress and in Article I, Section 10, it prohibits the States from "exercising the like authority." *Ibid*. And Federalist No. 81 tells us that this "alienation of State sovereignty" includes a "surrender" of immunity "to the suit of an individual." The Federalist No. 81, at 486-487 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Under the design of the Constitution as understood by the Founders, States' sovereign immunity gives way in the face of the national government's exclusive authority in the War Powers area. Thus, as in the area of bankruptcy, "Congress' determination that States should be amenable to such proceedings [that is, to private suit] is within the scope of its" War Powers. See *Katz*, 546 U.S. at 379, 126 S. Ct. at 1005.

In keeping with the Founders' intent and the Constitution's design, the Supreme Court has long recognized the unique importance of Congress's War Powers and has declared that later amendments should not be construed to limit those powers. In *Lichter* v. *United States*, 334 U.S. 742, 781, 68 S. Ct. 1294, 1315 (1948), the Court explained that the War Powers are "not destroyed or impaired by any later provision of the constitution or by any one of the amendments." Moreover, in *Case* v. *Bowles*, 327 U.S. 92, 102, 66 S. Ct. 438, 443 (1946), the Court concluded that Congress's War Powers are not limited by the Tenth Amendment, even though the Tenth Amendment was enacted after Article I. To hold otherwise, the Court reasoned, would render "the Constitutional grant of the power to make war * * * inadequate to accomplish its full purpose." *Ibid.*[13]; see also *Rostker*, 453 U.S. at 67, 101 S. Ct. at 2653 ("[T]he tests and limitations [of the constitution] to be applied may differ because of the military context."). The Court has also often noted that it "give[s] Congress the highest deference in ordering military affairs." *Loving* v. *United States*, 517 U.S. 748, 768, 116 S. Ct. 1737, 1748 (1996); accord *Weiss* v. *United States*, 510 U.S. 163, 177, 114 S. Ct. 752,

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[13] Even when the Court later reinvigorated the Tenth Amendment in *National League of Cities* v. *Usery*, 426 U.S. 833, 855 n.18, 96 S. Ct. 2465, 2475 n.18 (1976), overruled on other grounds by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005 (1985), it explicitly noted that it was not overruling *Case* v. *Bowles*, stating that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war powers."

760-761 (1994); *Rostker*, 453 U.S. at 64-65, 70, 101 S. Ct. at 2651-2652, 2654-2655.

This evidence of the unique importance and exclusivity of the War Powers compares favorably to the evidence the Supreme Court relied on in *Katz*. In *Katz*, the Court relied significantly on the Founders' recognition of the problem of overlapping jurisdiction in the area of bankruptcy and, consequently, of the need to establish uniform law in that area. 546 U.S. at 363-369, 126 S. Ct. at 996-1000. But the Founders' exclusivity concern was even more pronounced in the war powers area. It is important, as the Court in *Katz* pointed out, that persons not be held responsible in one State for a debt that has already been discharged in another. It is far more important to ensure that the States will not interfere with the national government's ability to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "[r]egulat[e] * * * the land and naval Forces." U.S. Const. Art. I, § 8, C1. 11-14. The Court considered the founding generation's concern about the overlapping jurisdiction problem in the area of bankruptcy to be evidence of a recognition, inherent in the plan of the Convention, that state sovereign immunity must take a back seat to the need for uniformity. See *Katz*, 546 U.S. at 372-373, 126 S. Ct. at 1001-1002. Similarly, the Founders' clear recognition of the need for uniformity and singular national authority in the area of

war reveals their intent that Congress not be hampered in the exercise of its War Powers by States' sovereign immunity claims.

2. States Never Possessed War Powers And So Had No Sovereignty To Retain In That Area

Additionally, unlike with most other powers enumerated in Article I, neither the States, nor the colonies before them, ever possessed any war powers. In *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S. Ct. 216 (1936), the Court explained that war powers were at no time an attribute of state sovereignty:

> As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency – namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence.

Id. at 316, 57 S. Ct. at 219. Thus, the Court reasoned that:

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

Id. at 318, 57 S. Ct. at 220. The Court made similar statements in *Penhallow* v. *Doane's Administrators*, 3 U.S. (3 Dall.) 54 (1795). In discussing whether the Continental Congress had the authority to convene a tribunal with appellate

jurisdiction over a state court of admiralty before the ratification of the Articles of Confederation, Justice Patterson declared:

> In Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace. * * * If it be asked, in whom, during our revolution[ary] war, was loged [sic], and by whom was exercised this supreme authority? No one will hesitate for an answer. It was lodged in, and exercised by, Congress; it was there, or no where; the states individually did not, and, with safety, could not exercise it. * * * The truth is, that the States, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now.

Id. at 80-81.

The Supreme Court made clear in *Seminole Tribe* that the Eleventh Amendment is intended to embody "the background principle of state sovereign immunity." 517 U.S. at 72, 116 S. Ct. at 1131. As the opinions in *Curtiss-Wright* and *Penhallow* show, war powers never belonged to the States. Because the States never possessed any war powers, they cannot have expected to retain them as an aspect of their sovereignty when they joined the Union. Indeed, Federalist No. 32 explained that States "retain all the rights of sovereignty *which they before had*, and which were not, by that act, *exclusively* delegated to the United States." The Federalist No. 32, at 194 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). For this reason, even apart from the Constitution's alienation of States' sovereignty in the war powers area, immunity to the exercise of Congress's

authority under the War Powers cannot be part of the "background principle of state sovereign immunity." *Seminole Tribe*, 517 U.S. at 72, 116 S. Ct. at 1131.

CONCLUSION

This Court should affirm. If this Court reverses and concludes that the Madison City Board of Education is entitled to Eleventh Amendment immunity, it should remand to the district court where the case should be dismissed on statutory grounds. If this Court reaches the constitutional issue, it should rule that Congress has authority, under its War Powers, to subject States to private USERRA suits.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a), that this BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE was prepared using Word 2007 and Times New Roman, 14-point font. This brief contains 10,876 words of proportionately spaced text.

I also certify that the copy of this brief that has been electronically filed is an exact copy of what has been submitted to the Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 8.0) and is virus-free.

s/ Nathaniel S. Pollock
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Dated: March 14, 2014

CERTIFICATE OF SERVICE

I certify that on March 14, 2014, an electronic copy of the BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE was transmitted to the Court by means of the appellate CM/ECF system, and that seven paper copies identical to the brief filed electronically were sent to the Clerk of the Court by first class mail.

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