UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

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| MICHAEL E. WEAVER,<br><br>Plaintiff,<br><br>v.<br><br>MADISON CITY BOARD OF EDUCATION, *et al.*,<br><br>Defendants. | ) | Civil Action No. 5:11-cv-03558-TMP |

# UNITED STATES' BRIEF AS INTERVENOR


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**LEGISLATIVE HISTORY:**



**MISCELLANEOUS**

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**UNITED STATES' BRIEF AS INTERVENOR**

The United States, by and through its undersigned counsel, respectfully submits the following brief as intervenor pursuant to 28 U.S.C. § 2403(a).

## INTRODUCTION AND SUMMARY

The United States submits this brief as intervenor to defend the constitutionality of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq*. But this Court need not, and should not, rule on USERRA's constitutionality in order to decide the motion before it. Instead, this Court should reject the Madison City Board of Education's contention that it is an "arm of the State" for Eleventh Amendment purposes and, on that basis, deny the motion to dismiss.

The Board argues that it should be considered an arm of the State for Eleventh Amendment purposes principally because it is considered an arm of the State for purposes of state-law sovereign immunity. It is certainly true that the legal relationship between this local board of education and the State of Alabama is highly relevant to the question whether the Board is an arm of the State for purposes of the Eleventh Amendment. But the Board's argument conflates state-law sovereign immunity, that is, immunity from suit on certain state-law causes of action, and Eleventh Amendment immunity. If the Board's position were accepted, state legislatures and courts would be vested with the power to clothe entities with Eleventh Amendment immunity simply by granting them state-law sovereign immunity. In any event, the Board's argument is foreclosed by a precisely-on-point Eleventh Circuit case. This Court should accordingly reject the Board's argument and exercise jurisdiction over this case.

If this Court accepts the Board's contention that it is an arm of the State for Eleventh Amendment purposes, the plaintiff will, under the correct reading of the statute, be unable to pursue his claim. There are two reasons for this. First, the language of the relevant statutory provision, and its history and purpose, make clear that Congress provided for only state-court jurisdiction over private USERRA suits

against States. Second, while the statute itself 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 we believe it is clear that this Court should not reach the constitutional issue discussed in the parties' briefs, 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 to the national government exclusively 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.

## QUESTIONS PRESENTED

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

2. Whether the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, purports to subject States to private suit in federal court.

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

## STATEMENT

### *1. Factual And Procedural History*

Plaintiff Michael Weaver is the Executive Director of Finance and Business and Chief Financial Officer for the Madison City School System. Compl. 5 ¶ 14.[1] He is also a member of the United States Army Reserve. Compl. 5 ¶ 14. Since September 2005, Weaver has been deployed, on several different occasions, to Iraq and Afghanistan. Compl. 5-8 ¶¶ 16, 18-20. He alleges that, after he returned from being deployed, the Madison City Board of Education significantly reduced his authority and level of responsibility. Compl. 6-8 ¶¶ 17. The Board also removed him from the salary schedule so that he no longer received the scheduled annual raises that other employees receive, moved him from a corner office on an upper floor to a small office in the basement, and no longer provided him secretarial assistance. Compl. 7-8 ¶¶ 17f, 18b, 21. In March 2011, the Board advertised the job of chief operational officer. Compl. 9 ¶ 22. That position appeared to be very similar, if not identical, to the job Weaver did before he was deployed – and even

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

included some of Weaver's present responsibilities. Compl. 9 ¶ 22. Weaver applied for that job but was told that the Board has decided not to fill it due to budgetary considerations. Compl. 9 ¶ 22.

On October 4, 2011, Weaver filed suit against the Madison City Board of Education and Dr. Dee Fowler, the Superintendent of Education for Madison City Schools (who is sued only in his official capacity). Compl. 2 ¶ 6. Defendants moved to dismiss, arguing that USERRA's enforcement provision and the Board's Eleventh Amendment sovereign immunity bar the suit. Doc. 17. The United States intervened pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of a federal statute. Doc. 37.

*2. Legal Framework*

USERRA generally prohibits employment discrimination against members of the armed forces (on the basis of such membership) and provides them 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 or by the Attorney General (or, in the case of a suit against a State, by the United States) on behalf of an aggrieved employee. Specifically, the enforcement provision authorizes 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, accordingly, makes clear that a private suit against a political subdivision of a State may be brought in federal court.

## ARGUMENT

### I

### THE MADISON CITY BOARD OF EDUCATION IS NOT AN ARM OF THE STATE FOR ELEVENTH AMENDMENT PURPOSES

The defendant argues that Alabama local boards of education are arms of the State for Eleventh Amendment purposes and, accordingly, that this Court lacks jurisdiction over this suit. But the argument is foreclosed by binding Eleventh Circuit precedent. In *Stewart* v. *Baldwin County Board of Education*, the court of appeals held that an Alabama county board of education is *not* an arm of the State for

Eleventh Amendment immunity purposes. 908 F.2d 1499, 1511 (11th Cir. 1990) ("We conclude * * * that the Baldwin County Board of Education is not an 'arm of the State' for purposes of Eleventh Amendment immunity."). The Eleventh Circuit reached its decision by applying *Mount Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which held that a local board of education in Ohio was not an arm of the State for Eleventh Amendment immunity purposes.[2] The court of appeals first noted that it had already "rejected claims by local boards of education in Florida, Mississippi, and Louisiana that they are entitled to Eleventh Amendment protection." *Stewart*, 908 F.2d at 1510 (citing cases). The court then examined the relationship between Alabama's county boards of education and the State itself. It concluded that the boards: "have a degree of fiscal autonomy comparable to that of the school boards at issue in *Mt. Healthy*"; "have the power to establish general education policy for the schools"; and "are subject to a significant amount of local control." *Id.* at 1510-1511. The court recognized that "Alabama state courts provide county boards of education with sovereign immunity in state tort law actions," *id.* at 1510 n.6, but it noted that the same was true of local school boards in

[2] See also *Missouri* v. *Jenkins*, 495 U.S. 33, 56 n.20 (1990) (stating that the Eleventh Amendment "does not afford local school boards * * * immunity from suit") (citing *Mt. Healthy*).

Ohio when the Supreme Court decided *Mt. Healthy*. The 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.*[3]

[3] *Stewart* has been applied in subsequent Eleventh Circuit decisions and in federal district courts in Alabama. See *Kendrick* v. *Jefferson Cnty. Bd. of Educ.*, 932 F.2d 910, 914 (11th Cir. 1991) (explaining that "we held in *Stewart* that county boards of education in Alabama are not entitled to eleventh amendment immunity" and concluding, therefore, that the board of education in Jefferson County Alabama was also not entitled to federal constitutional sovereign immunity); *Hardy* v. *Birmingham Bd. of Educ.*, 954 F.2d 1546, 1549 (11th Cir. 1992) ("In *Stewart* * * *, this Court, applying *Mt. Healthy*, held that under Alabama law the county school board therein involved was not an arm of the state."); see also, *e.g.*, *Does 1, 2, 3, 4* v. *Covington Cnty. Sch. Bd.*, 969 F. Supp. 1264, 1273 (M.D. Ala. 1997) ("[T]he defendants' argument [that federal constitutional sovereign immunity bars plaintiff's claim] is foreclosed by *Stewart* * * *, in which the Court of Appeals for the Eleventh Circuit held that under Alabama law, a county board of education is 'not an 'arm of the state' for purposes of Eleventh Amendment immunity.'") (citation omitted). Other federal courts of appeals have also typically concluded that local boards of education are not arms of the State for purposes of the Eleventh Amendment. See *Black* v. *North Panola Sch. Dist.*, 461 F.3d 584, 596 (5th Cir. 2006) ("Generally, school boards and districts are not arms of the state shielded by Eleventh Amendment immunity."); see also, *e.g.*, *Woods* v. *Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 239 (2d Cir. 2006) (a local board of education in New York is not an arm of the State); *Cash* v. *Granville Cnty. Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) (same for North Carolina); *Duke* v. *Grady Mun. Schs.*, 127 F.3d 972 (10th Cir. 1997) (same for New Mexico); *Ambus* v. *Granite Bd. of Educ.*, 995 F.2d 992 (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 (5th Cir. 1986) (same for Louisiana); *Travelers Indem. Co.* v. *School Bd. of Dade Cnty.*, 666 F.2d 505 (11th Cir.) (same for Florida), (continued…)

As in *Stewart*, the Board of Education's argument in this case depends on conflating state-law sovereign immunity and Eleventh Amendment immunity. Specifically, the Board argues that the Alabama Supreme Court's recent decision in *Ex parte Hale County Board of Education*, 14 So. 3d 844 (Ala. 2009), which recognizes state-law sovereign immunity for county boards of education, changes the federal law analysis so that this Court is no longer bound by *Stewart*. Quite obviously *Stewart* forecloses this argument. 908 F.2d at 1510 n.6 ("That Alabama state courts provide county boards of education with sovereign immunity in state tort law actions does not require a similar treatment under the Eleventh Amendment."); see also, *e.g.*, *Black* v. *North Panola Sch. Dist.*, 461 F.3d 584, 595 (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 specifically concluding that an assertion by a State's legislature or courts "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) ("Although Utah courts have consistently held that

(…continued)
cert. denied, 459 U.S. 834 (1982); *Adams* v. *Rankin Cnty. Bd. of Educ.*, 524 F.2d 928 (5th Cir. 1975) (same for Mississippi), cert. denied, 438 U.S. 904 (1978).

school districts are entitled to share in the state's sovereign immunity, the extent of Eleventh Amendment immunity is a question of federal law. Even though state sovereign immunity protects Utah school districts from state-law suits, they may still be subject to federal causes of action, such as § 1983 suits.") (citation omitted); *id*. at 997 (holding that Utah school districts "are not arms of the state for purposes of the Eleventh Amendment").

Moreover, the Alabama Supreme Court recently endorsed and applied *Stewart* to conclude that a county board of education is *not* an arm of the State for purposes of Eleventh Amendment immunity. *Ex parte Madison Cnty. Bd. of Educ.*, 1 So. 3d 980, 989 (Ala. 2008). The court correctly focused on the Board's role as employer[4] and determined that the Board had significant control over employment of teachers, including authority to suspend or dismiss superintendents, principals, teachers and other employees of the Board. *Id.* at 988. The court noted that, in some areas, the State has the authority to oversee the Board, but concluded that this was not true with respect to the Board's employment decisions. *Ibid.* The court

[4] *Abusaid* v. *Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1303 (11th Cir. 2005) (explaining that the question whether the entity sued is an arm of the State "must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise") (quoting *Manders* v. *Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003)).

accordingly held that "the facts before [it] do[] not support a finding that the Board has established a right to Eleventh Amendment immunity." *Id.* at 989. The Alabama Supreme Court explicitly rejected the County Board's argument that it "should not find *Stewart* persuasive" given subsequent developments in the "arm of the state" test. *Ibid.* And indeed, the court expressly recognized the distinction between state-law sovereign immunity and Eleventh Amendment immunity. *Ibid.*; see also *Ex parte Ala. Dep't of Youth Servs.*, 880 So. 2d 393, 404 (Ala. 2003) ("State law sovereign immunity is relevant [in the Eleventh Amendment context] only as it indicates whether the state considers the entity to be part of the state. It is at best only a rough, overly inclusive gauge of arm-of-the-state status under the Eleventh Amendment.") (citation omitted).

The same analysis applies to the Madison City Board of Education. Alabama law provides that a "city board of education is hereby vested with all the powers necessary or proper for the administration and management of the free public schools within such city." Ala. Code § 16-11-9 (2012). With respect to employment, the law states that "[t]he city board of education shall fix the salaries of all employees and may suspend or dismiss any principal or teacher or supervisor or attendance officer or other regular employee so appointed 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 (2012).

Because *Stewart* is controlling here, this Court should not be sidetracked by the Board's heavy reliance on *Versiglio* v. *Board of Dental Examiners of Alabama*, 686 F.3d 1290 (11th Cir. 2012). In any event, *Versiglio* is readily distinguishable and should not be read as an abdication of the Eleventh Circuit's prior Eleventh Amendment jurisprudence. In *Versiglio*, the Eleventh Circuit appeared to defer – in a Eleventh Amendment sovereign immunity case – to an Alabama court's determinations about whether an entity is an arm of the State for state-law sovereign immunity purposes. An Eleventh Circuit panel initially deferred to an intermediate Alabama appeals court's ruling that the Board of Dental Examiners is not an arm of the State for state-law sovereign immunity purposes. *Versiglio* v. *Board of Dental Exam'rs of Ala.*, 651 F.3d 1272, 1277 (11th Cir. 2011) (citing *Wilkinson* v. *Board of Dental Exam'rs*, No. 2100175, 2011 WL 1205669 (Ala. Civ. App. Apr. 1, 2011)). Then, the Alabama Supreme Court reversed the intermediate appellate court's ruling, *i.e.*, concluded that the Board of Dental Examiners is an arm of the State for state-law sovereign immunity purposes. *Ex parte Bd. of Dental Exam'rs of Ala.*,

No. 1100993, 2012 WL 1890677 (Ala. May 25, 2012). The Eleventh Circuit panel then vacated its previous decision and issued an opinion deferring to the Alabama Supreme Court and holding that the Board of Dental Examiners is, after all, an arm of the State for Eleventh Amendment purposes. *Versiglio* v. *Board of Dental Exam'rs of Ala.*, 686 F.3d 1290 (11th Cir. 2012).

As an initial matter, *Versiglio* does not alter the controlling nature of *Stewart*. The panel opinion in that case cannot, and does not purport to, overrule *Stewart* and, as explained above, *Stewart* is on all fours with this case. Moreover, *Versiglio* is a very different case and – even in the absence of a binding, on-point precedent – would not control the outcome here. The court in *Versiglio* recognized, as the Eleventh Circuit has 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. The court also affirmed that "whether that standard is met will be determined by carefully reviewing how the agency is defined by state law." *Ibid.*

Alabama law reveals plainly that the Alabama Board of Dental Examiners, unlike a city board of education, is a state agency and an arm of the State for purposes of the Eleventh Amendment. Alabama law makes clear that it is the State of Alabama itself that licenses dentists. See, *e.g.*, Ala. Code § 34-9-2(c) (2012)

(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 extensively regulates 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 and enforce [those laws]." Ala. Code § 34-9-40(a) (2012). The Alabama Board of Dental Examiners is comparable to a state department of education, not a local board of education. A city board of education is not a state agency that exists simply to enforce state law. Instead, as Alabama law makes plain, it is a local entity with general authority over the public schools in a city. See Ala. Code § 16-11-9 (2012) (providing that city boards of education have "all the powers necessary or proper for the administration and management of the free public schools within such city").

Moreover, the Board's interpretation of *Versiglio* – *i.e.*, as indicating that whether an entity is an arm of the State for Eleventh Amendment immunity purposes depends largely on whether it is an arm of the State for state-law sovereign immunity purposes – is unwarranted. In its very brief *Versiglio* opinion, the court of appeals did not give a detailed explanation of its reasoning. Thus, even in the absence of

binding precedent, this Court would not be required to adopt an interpretation of *Versiglio* that is at odds with previous Eleventh Circuit jurisprudence and the jurisprudence of other federal courts. *Versiglio* does not enshrine the principle that state-court decisions interpreting state-law sovereign immunity provisions require a high degree of deference from federal courts interpreting the Eleventh Amendment. That principle is wrong, as well as inconsistent with other authorities. It would make the meaning of the United States Constitution dependent upon the jurisprudence of 50 different state supreme courts interpreting 50 different state-law sovereign immunity provisions. Thus, entities with precisely the same characteristics would be treated differently under the United States Constitution based on the happenstance of whether they enjoy state-law sovereign immunity.

An entity's relationship to the State is what determines whether it is an arm of the State for Eleventh Amendment purposes. See *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 (1997) ("When deciding whether a state instrumentality may invoke the State's immunity, our cases have inquired into the relationship between the State and the entity in question."); *id.* at 429-430 (explaining that the Court has "sometimes focused on the 'nature of the entity created by state law' to determine whether it should 'be treated as an arm of the State.'") (citation omitted). Whether

that relationship qualifies the entity as an "arm of the State" for Eleventh Amendment purposes is a question of federal law. See *id.* at 429 n.5. But while Eleventh Amendment immunity *does* depend on the legal relationship between an entity and the State, as defined by state law, it *does not* depend on a State's decision about whether to grant an entity state-law sovereign immunity. See *Black*, 461 F.3d at 595; *Ambus*, 995 F.2d at 995-997; *Stewart*, 908 F.2d at 1510 n.6.

Accordingly, the Madison City School Board is not an arm of the State for purposes of the Eleventh Amendment. That means it 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). This Court therefore has jurisdiction over this case pursuant to Section 4323(b)(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."

## 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 conclude that the Board is not an arm of the State and 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, it should follow the three courts of appeals that have addressed this issue and conclude that USERRA's current language[5] 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), cert. denied, 129 S. Ct. 1907 (2009); *Velasquez* v. *Frapwell*, 165 F.3d 593, 593-594 (7th Cir. 1999). It should accordingly dismiss the case. Ideally, the plaintiff would then be able to sue in state court, but Alabama's Supreme Court has 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. Therefore, an additional reason

[5] We note that there are Bills pending before Congress that would alter the statute so that it would give servicemembers the right to sue state employers in federal court as well as in state court. These Bills would replace the current Section 4323(b)(2) with a provision that reads: "In the case of an action against a State (as an employer) by a person, the action may be brought in the appropriate district court of the United States or State court of competent jurisdiction." See S. 3233, 112th Cong. §2(a)(2) (2012); H.R. 6015, 112th Cong. § 2(a)(2) (2012).

for rejecting the Board's expansive arm-of-the-State argument is that accepting it would leave the plaintiff without a forum in which to seek redress.

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 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, only provides for state court jurisdiction. 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) & (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 (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 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 pursuant to Article I of the Constitution. See 517 U.S. at 72-73. 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 on an aggrieved 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) & (b); see also H.R. Rep. No. 448, 105th Cong., 2d Sess. (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 (2004) (citation omitted); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 635 (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 it is an arm of the State for Eleventh Amendment purposes, this Court lacks jurisdiction as a statutory matter over plaintiff's USERRA claim (Issue II) and, accordingly, does not have jurisdiction to reach 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 repeatedly admonished 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." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (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 (1981). Accordingly, a "fundamental and longstanding principle of judicial

restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

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

a. As an initial matter, it is clear that USERRA was enacted pursuant to Congress's 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, its 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 (1974) (legislation providing educational benefits to

veterans "is plainly within Congress's Art. I, § 8, powers 'to raise and support Armies'").

Courts have uniformly held that Congress enacted USERRA, and its predecessor laws, pursuant to 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 (1991); *Peel* v. *Florida Dep't of Transp.*, 600 F.2d 1070, 1080-1081 (5th Cir. 1979); *Jennings* v. *Illinois Office of Educ.*, 589 F.2d 935, 937-938 (7th Cir.), cert. denied, 441 U.S. 967 (1979). Moreover, Congress viewed States' assertions of sovereign immunity in the wake of *Seminole Tribe* as a particular threat to national security. The House Report accompanying the passage of the 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).

b. After the Supreme Court's decision in *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006), regarding the Bankruptcy Clause, it is clear

that some Article I powers can, in principle, provide authority for Congress to validly subject States to private suit. In *Katz*, the Court rejected the assumption, articulated *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), that no Article I power, including the Bankruptcy Clause, could provide authority for Congress to subject States to private suit. *Katz*, 546 U.S. at 363. The Court concluded that, even though the Bankruptcy Clause is in Article I, Congress can, at least in some instances, subject States to private suit when it legislates pursuant to that Clause. *Id.* at 379.

The Court reached this conclusion based on a historical analysis. 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. 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. 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 (citation and footnote omitted).

c. A historical analysis of the origin of Congress's War Powers leads to the same conclusion. The Founding Fathers plainly did not want the nation to be limited in its ability to wage war. For that reason, 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 with regard to such matters.

1. The Founding Fathers recognized the unique importance of the 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 government's effectiveness and vitality, but Congress's War Powers are qualitatively different. The very survival of the nation depends directly on Congress's ability to exercise its War Powers. Having just fought a bitter war for independence, the Founding Fathers were painfully 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, is 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 explicitly forbids any State, 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 regarding war 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, 18-20 (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 (1999). Thus, in view of the Founders, immunity to private suit is a fundamental aspect of States' sovereignty.

But, Hamilton also clearly stated 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. See *Katz*, 546 U.S. 377 n.13; see also *Seminole Tribe*, 517 U.S. at 145-146 (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 plainly 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." *Id.* at 194. 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.

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 repeatedly declared that later amendments should not be construed to limit those powers. In *Lichter* v. *United States*, 334 U.S. 742, 781 (1948), the Court asserted that:

> [T]he power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is 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 (1946), the Court concluded that Congress's War Powers are not limited by the Tenth Amendment, in spite of the fact that 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.*[6]; see also *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981) ("[T]he tests and limitations [of the constitution] to be applied may differ because of the military context."). The Court has also

[6] Even when the Court later reinvigorated the Tenth Amendment in *National League of Cities* v. *Usery*, 426 U.S. 833, 855 n.18 (1976), rev'd on other grounds, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (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."

repeatedly noted that it "give[s] Congress the highest deference in ordering military affairs." *Loving* v. *United States*, 517 U.S. 748, 768 (1996); accord *Weiss* v. *United States*, 510 U.S. 163, 177 (1994); *Rostker*, 453 U.S. at 64-65, 70. See also *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."); *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U.S. 135, 149 (1919) ("The complete and undivided character of the war power of the United States is not disputable.").

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. 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 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. Similarly, the Founders' clear recognition of the need for uniformity and singular national authority in area of war reveals their intent that Congress not be hampered in the exercise of its War Powers by States' sovereign immunity claims.

2. 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 (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. 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 power 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. 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 prior to 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. As the opinions in *Curtiss-Wright* and *Penhallow*

make clear, whether war powers were transmitted directly from the Crown to the colonies collectively or from the Crown to the people and then to the Continental Congress, war powers never belonged to the States. Because the States never possessed any war powers, they cannot have expected to retain any such authority 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.

## CONCLUSION

This Court should deny the Madison City Board of Education's motion to dismiss and exercise jurisdiction under 38 U.S.C. § 4323(b)(3), because the Board is not an "arm of the State" under the relevant federal test. Alternatively, if it concludes the Board is an arm of the State for purposes of the Eleventh Amendment, this Court should dismiss the complaint 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.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on October 4, 2012, the foregoing "United States' Brief As Intervenor" was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

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