IN THE SUPREME COURT OF ALABAMA
NO. 1200230

EX PARTE: JEFFERSON COUNTY BOARD OF EDUCATION, et al.

Petitioner,

RE: *ALABAMA LOCKERS, LLC V. JEFFERSON COUNTY BOARD OF EDUCATION*
Jefferson County Circuit Court
01-CV-2020-902676

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

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I.
SUMMARY OF THE ARGUMENT

A lot is asked of this Court in the answer to the mandamus petition. Alabama Lockers wants this Court to dust off *Kimmons v. Jefferson Cnty Bd. of Edu.,* 85 So. 774 (1920), and to overturn a unanimous decision in *Ex Parte Hale Cnty Bd. of Edu.,* 14 So.3d 844 (Ala. 2009). One might question why this abrupt sea change in settled sovereign immunity law is appropriate now, and one would certainly be justified in doing that. The answer offered here though is a bit too simplistic and convenient—Alabama Lockers "disagrees" with *Hale.* (Am. Ans., p. 18.)

The type of change that Alabama Lockers seeks here will only revive the "significant confusion" that *Kimmons* wrought and that *Hale* corrected. And, more fundamentally, Alabama Lockers has failed to meet its burden of convincing this Court to depart from *stare decisis.* Indeed, the answer here largely parroted the arguments that the losing respondent made in *Ex parte Jackson Cnty Bd. of Edu.*—a decision that applied the black-letter axiom of *Hale* in a straight-forward way. 164 So.3d 532 (Ala. 2014); *see also* Br. of *Jackson* Resp., No. 1130738, 2014

WL 3690505 (June 18, 2014).[1] And, while no mention of *Jackson* was made in the answer, *Jackson* controls. It confirms, in certain terms, that immunity is an "absolute" jurisdictional bar to the breach-of-contract and Bid Law claims that were pled against the Board as an entity.

II.
ARGUMENT

A. The Board's reply to the request for oral argument.

Oral argument is not needed here. This Court should reject Alabama Lockers' arguments, grant the petition, and issue the writ.

B. The Board's reply to the Statement of the Case and Statement of Facts.

Two points merit reply here. First, the trial court did not indicate if it agreed with the argument that *Hale* was wrongly decided. (*Cf.* Ans., p. 1 *with* App. F.) Indeed, it did not address *Hale,* immunity, or whether immunity divested the trial court of jurisdiction over what claims were pled. (*See* App. F.) That was part of the problem.

Second, it suffices to say here that the parties disagree on the merits of the underlying claims and the facts that give rise to those claims. And, while Alabama Lockers relied on a lot of materials outside

[1] The respondent's brief in *Jackson* is referenced as "*Jackson* Resp. Br."

of the pleadings to oppose the Board's motion to dismiss and to craft the Statement of Facts in its answer, it is the complaint that matters. *See Jackson,* 164 So.3d at 534 (applying the traditional standard of review when reviewing a denial of a motion to dismiss via a mandamus petition). So, this Court's analysis should be confined to any well-pleaded complaint allegations; it should not consider what added materials were inserted, below. (*See* App. D, pp. 67-162.)

C. The Board's reply to the Standard of Review.

1. *Hale* reasserted the absolute immunity of county school boards.

While the wisdom of *Hale* is challenged in the answer, the substance of the case is not discussed in a cogent way. In *Hale,* this Court issued a writ of mandamus directing the trial court to enter summary judgment in favor of a county school board on the plaintiff's implied contract claim. 14 So.3d at 849. The Board, the Court found, proved that it had a "clear legal right" to a dismissal of the claims that were pled and that the writ was otherwise appropriate. Id.

In reaching that result and granting the mandamus petition, this Court discussed *Kimmons*—a warrant case decided some 90 years earlier. Id. at 848, citing 204 Ala. 384. In *Kimmons,* a taxpayer sued the

county school board to stop the board from issuing warrants to raise money to build a school. Id. at 385. The trial court halted the sale, and the county school board appealed. Id. This Court affirmed in *Kimmons,* reasoning that since the state law at issue gave the power to sue, the reciprocal exposure of being sued also existed by implication. Id. at 387.

Kimmons did not mention Ala. Const. Art. I, §14. And, in *Hale,* this Court emphasized that: *Kimmons* "failed to consider that county boards of education are 'local agencies of the state' " for purposes of immunity. Id. at 848. That omission was more than material; it caused "significant confusion." Id. So, this Court, in *Hale,* acted. It first expressly overruled *Kimmons* "to the extent [it] impose[d] an implied 'right to be sued' on county boards of education." Id. at 848-49. Then, it "reassert[ed]" a bedrock principle: "Because county boards of education are local agencies of the State, they are clothed in constitutional immunity from suit …." Id. That immunity, the Court said, is "absolute." Id. at 849.

2. Alabama Lockers demands this Court overrule *Hale.*

The Court's decision in *Hale* was clean and clear though. And, in fact, Alabama Lockers has not quibbled with the conclusion that as it exists, *Hale* bars the breach-of-contract and Bid Law claims that were

pled. (Am. Ans., p. 1) ("[T]he current precedential case law … forms the basis for the Petitioner's 'clear legal right to a dismissal order' ….") Nor has Alabama Lockers challenged that *Hale,* as it exists, grants the Board a "clear legal right" to have those claims dismissed. (Id.) Instead, and in lieu of conceding or re-pleading, Alabama Lockers has opted for a more arduous path—it asks this Court to overturn *Hale,* to upend the body of precedent flowing from *Hale* since 2009, and to harken back to what Alabama Lockers says was the law in 1920 in *Kimmons.* (Id.) Per Alabama Lockers, *Hale* suffers from a glaring analytical error that no one has picked up on—it "misinterpreted" *Kimmons.* (Id., pp. 18, 28.)

3. Alabama Lockers bears the burden of convincing this Court, beyond doubt, that this Court was wrong when it decided *Hale.*

The argument to overturn *Hale* alters the burdens that apply here. It is true, no doubt, that a petitioner seeking a writ of mandamus bears the burden relative to that request. *Jackson,* 164 So.3d at 533-34. But it is equally true that Alabama Lockers has effectively—if not actually—conceded that the Board met that burden. To be sure, Alabama Lockers admitted "the current precedential case law … forms the basis for the [Board's] 'clear legal right to a dismissal order ….' " (Am. Ans., p. 1.)

Plus, Alabama Lockers did not respond to any of the additional elements addressed in the petition. (Ans.; Pet., pp. 17-18.)

In contrast, a party asking this Court to depart from *stare decisis* bears the burden of convincing this Court, beyond doubt, that this Court was wrong when it decided the precedent that is challenged. *Ex parte State Farm Fire & Cas. Co.,* 764 S.2d 543, 545-46 (Ala. 2000), citing *Beasley v. Bozeman,* 294 Ala. 288, 291 (1975) (Jones, J. concurring).[2] Alabama Lockers has not offered a good reason why this Court should depart from *stare decisis*—let alone anything convincing enough to enable one to conclude, beyond doubt, that *Hale* was wrongly decided.

D. This Court rejected Alabama Lockers' operating premise in *Jackson*.

A slew of reasons are offered in the answer why *Hale* was supposedly wrong. And, while Alabama Lockers suggests that the purported error in *Hale* has been glossed over by others, its arguments are neither new nor novel. In fact, Alabama Lockers employed an approach that is as unique as it is brow-raising—it ignored *Jackson* and

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[2] Alabama Lockers did not argue in its answer that the passage of time necessitates a departure from *Hale*. *See State Farm,* 764 So.2d at 545-46. It thus limited its argument for opposing the mandamus petition.

parroted the arguments that the losing respondent made in that case. (*Cf.* Am. Ans., pp. 20-28, *with Jackson* Resp. Br.)

This shines through when the two briefs are put side-by-side. Id. Alabama Lockers' operating premise here, for instance, is that allowing a county school board to raise immunity as a defense to a breach-of-contract claim violates—or, at a minimum, is inconsistent with—Alabama constitutional provisions prohibiting laws impairing contractual rights and remedies. (Am. Ans., pp. 20-21.) Per Alabama Lockers, this Court, in *Hale,* "made no effort to analyze the specific language or intentions of the Constitutional drafters" *before* the drafters added immunity to the Alabama Constitution. (Id., p. 23.)

The *Jackson* respondent made the same Contract Clause argument in responding to the county school board's mandamus petition. 164 So.3d at 534-35, citing U.S. Const. Art. I, §10; *Jackson* Resp. Br., pp. 14 ("A second constitutional barrier to the Board's assertion of sovereign immunity under Ala. Const. Art. I §14 arises from the Contracts Clause of U.S. Const. Art. I §10.") True, the *Jackson* respondent relied on the *federal* Contract Clause. But that distinction is inconsequential—"the Alabama Contracts Clause and the federal Contracts Clause have the

same purpose." *Blalock v. Sutphin,* 275 So.3d 519, 524 (Ala. 2018), citing *Opinion of the Justices No. 333,* 598 So.2d 1362, 1365 (Ala. 1992).

In short, this Court rejected the *Jackson* respondent's Contract Clause argument, found immunity barred the plaintiff's breach-of-contract claims under *Hale* despite the Contract Clause, and issued a writ compelling dismissal. 164 So.3d at 535. There is no reason to reach a different result here. *Hale* and *Jackson* not only warrant rejection of Alabama Lockers' operating premise; they also warrant a writ compelling dismissal of the breach-of-contract and Bid Law claims that were pled.

E. This Court rejected Alabama Lockers' *Kimmons* arguments in *Jackson.*

Other arguments were gleaned from the *Jackson* respondent. For one, *Kimmons* "failed to consider that county boards of education are 'local agencies of the state' " for purposes of the immunity analysis. *Hale,* 14 So.3d at 848. Yet Alabama Lockers says that *Kimmons* actually *addressed* that question. (*See* Am. Ans., pp. 18, 25-28.) And, what is more, Alabama Lockers says that *Kimmons* actually *answered* that question; *Kimmons* said a county school board *is not* a "local agency." (Id.) Thus, Alabama Lockers does not just say that this Court got it wrong in *Hale*—it says that this Court got it *really* wrong. (Id.)

That argument falters though. First, a plain reading of *Kimmons* does not support it. And, second, the *Jackson* respondent also made the argument.[3] This Court found the argument unpersuasive, there, insofar as the writ was issued. This Court should reject the argument, here, too.

Additionally, Alabama Lockers argues not just that *Hale* was wrong—it also argues that *Kimmons* was right. This, Alabama Lockers says, is because "[i]t can be inferred that the 1920 *Kimmons* Court had a better understanding of the mindset of the drafters of the Constitution of Alabama 1875 than did the *Hale* Court …." (Id., p. 22.) So, as the argument goes, the Court in *Kimmons* must have known that "the drafters" did not intend for the addition of immunity to the Alabama Constitution in 1875 to bar a breach-of-contract claim against a county school board. (Id., p. 21.)

That temporal argument is largely speculation. But, even if it were not, another side-by-side comparison of briefing is telling:

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[3] "[T]o the extent it opined on the issue of whether county boards of education are 'state agencies' *vel non,* the *Kimmons* Court came down squarely on the side of 'no,' stating that county boards of education … do not enjoy immunity under Ala. Const., Art. I, §14." *Jackson* Resp. Br., p. 22 (italics added).

Alabama Lockers' Am. Ans.	*Jackson* Resp. Br.
It can be inferred that the 1920 *Kimmons* Court had a better understanding of the mindset of the drafters of the Constitution of Alabama 1875 than did the *Hale* Court, interpreting the language almost a century later. (Am. Ans., p. 22.) Again, *Kimmons* was decided in 1920—much closer to 1875 when the Constitutional language was added and *Askew* was decided—which means that the Courts that interpreted *Askew* and *Kimmons* clearly had a better understanding of the drafters' intentions than did the *Hale* Court .... (Am. Ans., pp. 24-25.)	It is respectfully submitted that the *Ex Parte Hale Co. Bd. of Edu.* Court should have paused a moment longer before overruling *Kimmons*. That case was decided in 1920, not yet nineteen years after the ratification of our Constitution. Most, if not all, of the members of the *Kimmons* Court would have been practicing law at the time of the Convention and ratification. They doubtless followed the Convention Closely, and carefully studied it before voting in the ratification referendum. Most were probably intimate familiars of members of the Convention, and would have certainly been more attuned to the intention of the Convention than a modern lawyer. *Jackson* Resp. Br., p. 24.

Thus, this Court also considered the same temporal argument in *Jackson* that Alabama Lockers makes here. This Court did not find the argument persuasive in *Jackson;* the writ issued. This Court should find it equally unpersuasive here.

In sum, Alabama Lockers has failed to meet its burden of providing a convincing reason to depart from *stare decisis*. The effort to undercut the Board's "clear legal right to a dismissal order," thus, fails.

F. The merits-based arguments are irrelevant and wrong.

Finally, Alabama Lockers offers arguments aimed at the merits. (Am. Ans., pp. 28-30.) This Court need not consider those points—they are all irrelevant to the issue that underlies the mandamus petition.

Still, those points are flawed. For example, Alabama Lockers alleges in one breath that the Board violated the Bid Law and, thus, owes tens of thousands of dollars as a result. (Am. Ans., p. 16; App. A, p. 10, ¶¶85-86.) In the same breath, though, it says that the Bid Law did not apply. (*See* Am. Ans., pp. 29.) Not doubt, Alabama Lockers pled Bid Law claims and sought money damages for them—that is indisputable. (App. A, p. 10, ¶85-86.) But the Board did not violate the Bid Law. (App. G, p. 187, ¶¶85-86.) Immunity bars any Bid Law claims. (App. B, p. 49; E, pp. 165-67; G, p. 11, ¶90.) And, even if immunity did not apply, this Court cemented long ago that an unsuccessful bidder cannot recoup money damages under the Bid Law. (App. B, p. 50-51; E, pp. 169-170).

Alabama Lockers also argues the Board's own policies grant building-level principals the power to contract on the Board's behalf—without the necessity of a Board vote—if the building principal uses "local funds" to pay for the contracted work. (Am. Ans., pp. 28-30.)[4] But that is contrary to Ala. Code §16-8-4, which requires a "concurrence of the majority of the whole [county school] board" to act and, thus, contract. And, further still, Alabama Lockers plucks parts of the local school finance manual to the exclusion of other parts and labels them "policies." But the manual plainly provides: "The Principal ... at a school [is] prohibited from entering into any contract ... without first obtaining Board approval." (App. D, p. 155.) The Board's current Policy 3.14 says the same thing, too. (App. E, p. 168, fn.4.)

Finally, Alabama Lockers posits that Ala. Code §16-13B-2(b)(2) means a service contract is "not subject to" the Bid Law if a building principal will use "local funds" to pay for work performed pursuant to the

[4] Again, Alabama Lockers relied on a lot of materials outside of the pleadings to oppose the Board's motion to dismiss. (App. D, pp. 67-162.) This Court's analysis should be confined to any well-pleaded allegations in the complaint. *Jackson,* 164 So.3d at 534.

contract. (Am. Ans., pp. 28-29.)[5] The problem there, though, is that the statute only exempts service contracts from *mandatory* bidding—it does not bar an autonomous school board from deciding to solicit bids for a job where bidding may yield a cost savings to the board and taxpayers. Ala. Code §§16-8-8; 16-8-9 (a county school board is responsible for the "administration," "supervision," and "control" of its schools). A contrary reading of §16-13B-2(b)(2) would be antithetical to competition; it would also mean school boards could be forced into paying markedly higher rates than what might otherwise be available via the free market.

Here, service providers, including Alabama Lockers, provided locker maintenance services in the Board's schools for a time. But when it was realized in the spring of 2014 that that practice was inefficient and that a substantial cost savings could be yielded by getting a single-source provider for the Board's locker service work, it solicited bids. (*See* App. B, pp. 44-45.) That decision was reflected in the solicitation of bids, the receipt of bids, and the award of contracts for the system-wide service

[5] §16-13B-2(B)(2) provides: "This chapter shall not apply to ... [p]urchases made by individual schools of the county or municipal public school systems from moneys other than those raised by taxation or received through appropriations from state or county sources."

work in 2014 and 2017, respectively, to the lowest responsible, responsive bidder. (*See* App. G, pp. 179-80, ¶¶12, 15; 185, ¶63.) It just happened that the winner each time was one of Alabama Lockers' competitors. (Id.)

In short, Alabama Lockers' merits-based claims are meritless. Immunity bars them, and they are also flawed.

III.
CONCLUSION

In *Hale,* this Court overruled *Kimmons,* eliminated "significant confusion," and "reassert[ed] the absolute constitutional immunity of county boards of education." 14 So.3d at 848. It did so with purpose. Alabama Lockers pitches reasons why this Court should overrule *Hale,* but they are all unpersuasive. Indeed, they were rejected in *Jackson*.

The Board has met the requirements that must be met to obtain the extraordinary relief of mandamus. Alabama Lockers' really concedes that in the answer, and the ability to survive immunity *here* is limited to overturning *Hale*. Alabama Lockers has not explained why—beyond doubt—a unanimous body of this Court was wrong when it decided *Hale*. Accordingly, this Court should issue the writ directing dismissal of the suit pursuant to Rule 12(b)(1).

Dated: March 2, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Reply complies with the word limit of Alabama Rule of Appellate Procedure 21 and 32(b)(3) because this reply contains 2,978 words.

This Reply complies with the typeface and style requirements of Alabama Rule of Appellate Procedure 32(a)(7) because it has been prepared in a justified spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that I have on March 2, 2021, electronically filed the foregoing Petition for Writ of Mandamus and Appendices with the Clerk of Court using the Court's electronic filing system and that I have served a copy of the foregoing by U.S. Mail, properly addressed to the following:

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