

No. _____

In the Supreme Court of the United States

LIEUTENANT-COLONEL DAVID R. SMITH,
Petitioner,

v.

THE TENNESSEE NATIONAL GUARD,
Respondent.

*On Petition for Writ of Certiorari
to the Tennessee Supreme Court*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state law that sets a time limit on when an action may be filed under the Uniformed Services Reserve Reemployment Act, Title 38 U.S.C. §§ 4301, *et seq.*, (USERRA Act), frustrate the full effectiveness of the purpose of the Act, and thus violate the supremacy clause of the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioner, is Lieutenant-Colonel David R. Smith.

Respondent, is the Tennessee National Guard, a political entity of the State of Tennessee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, LTC David R. Smith, respectfully petitions this Court for a writ of certiorari to the Tennessee Supreme Court in this case.

OPINIONS BELOW

The decision of the Tennessee Supreme Court is reproduced in the appendix to the petition (Pet. App. p. 1). It is not yet published in the Southwestern Reporter, but is available at 2018 WL 3083749.

JURISDICTION

The Tennessee Supreme Court entered judgment on June 22, 2018. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §§ 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution, provides in pertinent part that:

... this Constitution, and the Laws of the United States, which shall be made in Pursuance thereof... shall be the Supreme Law of the Land...

38 U.S.C. §§ 4301, in pertinent part:

- (a) **The purposes of this chapter are –**
 - (1) 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;

(2) to minimize the disruption to the lives of the persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service;

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) ...

38 U.S.C. §§ 4302, in pertinent part:

(a) ...

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. §§ 4323, in pertinent part:

(a) ...

(b) ...

(1) ...

(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.

38 U.S.C. §§ 4327, in pertinent part:

- (a) ...
- (b) Inapplicability of Statutes of Limitations – If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.

Tenn. Code Annotated Section 29-20-208

Immunity from suit of any governmental entity, or any agency, authority, board, branch, commission, division, entity, subdivision, or department of state government, or any autonomous state agency, authority, board, commission, council, department, office, or institution of higher education, is removed for the purpose of claims against and relief from a governmental entity under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4334.

INTRODUCTION

This case presents the question of whether a state may constitutionally place a time limit on filing a lawsuit pursuant to the USERRA Act. The Tennessee Legislature enacted a rehabilitative statute removing the barrier of sovereign immunity, that before had prohibited state employees from suing the state for USERRA violations. In doing so, the Legislature provided that the public act was to take effect on July 1, 2014 and “apply to all claims against a sovereign entity under [USERRA] accruing on or after such date” (quoting, *2014 Tenn. Pub. Acts, C.574, §§ 2*). Subsequently, the Tennessee Court of Appeals held, that the Tennessee Legislature was aware of the case law defining the word accrual, that existed at the time of the passage of the Act, to mean that an employee’s cause of action accrued when he first *had a right to sue*. *Smith v. Tennessee National Guard*, 2017 WL 1207881, *5, *perm app. granted* (Tenn. Aug. 17, 2017). The Tennessee Supreme Court reversed the Court of Appeals, holding that accrual occurs when a judicial remedy is available, i.e., a plaintiff discovers, or reasonably should have discovered, his injury and the identity of the person who injured him. *Smith v. Tennessee National Guard*, 2018 WL 3083749, *10. In rendering this decision, Tennessee highest court disregarded existing *jurisprudence* that a tort action accrues when a plaintiff *can maintain* a suit. *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487, 490 (Tenn. 1975); *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 891 (Tenn. 2011); *Shelby County Health Care Corp. v. Nationwide Mutual Ins. Co.*, 325 S.W.3d 88, 96 (Tenn. 2010); *Gibson v. Swanson Plating and Mach. of Kentucky, Inc.*, 819 S.W.2d 776, 756-90 (Tenn.

1991). *Tenn. Code Ann.* §§ 29-20-208 is a rehabilitative statute and thus should be construed liberally to accomplish *its end*. *Deweese v. State*, 216 Tenn. 104, 390 S.W.2d 241-42 (1965). The Tennessee Supreme Court's decision negated the rehabilitative effect of *Tenn. Code Ann.* §§ 29-20-208, thus preventing the Petitioner seeking relief pursuant to the USERRA Act. This forced interpretation of the *Tenn. Code Ann.* §§ 29-20-208, by the Tennessee Supreme Court, completely frustrates the full effectiveness of the USERRA Act. This Court should grant the petition and hold that Tennessee's highest Court's interpretation of *Tenn. Code Ann.* §§ 29-20-208 is unconstitutional.

STATEMENT OF THE CASE

A. Petitioner.¹

David R. Smith, is a former Lieutenant-Colonel in the Tennessee National Guard. LTC Smith jointed the National Guard in 1993. In 2002 he was hired as a full-time employee of the State of Tennessee, in the Active Guard Reserve. In 2009, LTC Smith applied for a position in the 2010 Class of the Naval War College and was accepted. In order to attend the War College, he was required to leave his full-time AGR position. He began his War College class on July 6, 2010. On April 24, 2011, LTC Smith wrote the Tennessee National Guard requesting to know his next duty assignment. On April 27, 2011, the Guard informed LTC Smith that no position was available for him, but

¹ There is no factual record present in this case. The facts placed in the Complaint should be construed as true at this stage of the case. *Moore-Pennoyer v. State*, 515 S.W.3d 271, 275-76 (Tenn. 2017).

that he could return to the Guard in a traditional weekend position. LTC Smith was “separated” from his full-time position on July 10, 2011.²

B. Genesis of *Tenn. Code Ann. §§ 29-20-208*.

Prior to July 1, 2014, employees of the State of Tennessee were prohibited from bringing cases against the State for violations of the USERRA Act by the doctrine of sovereign immunity. *Smith v. Tenn. National Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012). *perm app. denied* (Tenn., Nov. 21, 2012). (*Smith I*).

After the *Smith I* decision, the Tennessee Legislature removed sovereign immunity as a bar to state employees suing the state for violations of the USERRA Act, when it passed *Tenn. Code Ann. §§ 29-20-208*. This Act was passed after the Legislature learned of the facts surrounding the dismissal of LTC Smith’s first case.

C. Procedural History

LTC Smith sued the Tennessee National Guard on August 8, 2011, claiming that it had violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994, *Id.* at pp. 572-73. The State of Tennessee moved to dismiss LTC Smith’s case due to lack of subject matter jurisdiction. The

² The Petitioner expects evidence to show, that while he was employed by the Tennessee National Guard, he was given perfect Officer Efficiency Reports; that two, two-star Generals from the Tennessee Guard told the Department of Defense that if it accepted LTC Smith into the War College Class, a full-time position would be waiting for him upon his return; and that upon his return there were full-time positions available to him.

Sixth Circuit Court for Davidson County, Tennessee agreed and dismissed the case. On July 27, 2012 the Court of Appeals affirmed the Trial Court's decision. *Id* at pp. 572-76.

Subsequent to *Smith I*, The Tennessee Legislature enacted *Tenn. Code Ann. §§ 29-20-208*.

Relying on this newly enacted statute, LTC Smith filed a Tenn. R. Civ. Pro. Rule 60 Motion on July 2, 2014, seeking relief from the prior judgement dismissing his case. The Trial Court denied LTC Smith's motion. On May 29, 2014, the Court of Appeals affirmed the Trial Court, dismissing his appeal on the grounds of lack of subject matter jurisdiction based on sovereign immunity. *Smith v. Tennessee National Guard*, 2015 WL 3455448 *5. *perm. app. denied* (Tenn. Sept. 17, 2015) (*Smith II*).

On January 4, 2016, LTC Smith refiled his complaint. The Trial Court granted the state's motion to dismiss on the grounds of lack of subject matter jurisdiction based upon sovereign immunity because LTC Smith's claims accrued before July 1, 2014. LTC Smith appealed the trial court's decision. In a divided decision, the Court of Appeals reversed the trial court, holding that LTC Smith's cause of action accrued only when "he attained the right to sue pursuant to the judicial remedy created by *Tennessee Code Annotated Section 29-20-208*." *Smith v. Tennessee National Guard*, 2017 WL 1207881 * 6-7, (*Smith III*).

The Tennessee Guard filed an application for permission to appeal which was granted by the Tennessee Supreme Court on Aug. 17, 2017.

On June 22, 2018, the Tennessee Supreme Court reversed the judgment of the Court of Appeals and reinstated the judgment of the trial court holding the LTC Smith’s case accrued before the enactment of *Tenn. Code Ann. §§ 29-20-208. Smith*, 2018 WL 3083749 *9-11.

REASONS FOR GRANTING THE WRIT

I. THE TENNESSEE SUPREME COURT’S DECISION FRUSTRATES THE FULL EFFECT OF THE USERRA ACT.

The Tennessee Supreme Court’s decision declaring that *Tenn. Code Ann. §§ 29-20-208*’s accrual language applies only to causes of action that *occur* on or after July 1, 2014 frustrates the full effect of the USERRA Act and warrants certiorari review under this Court’s Rule 10(c).

A. The Tennessee Supreme Court’s Definition of Accrual Prior to *Smith III*.

Prior to the Tennessee Supreme Court’s decision, a cause accrued when a plaintiff suffered legally cognizable injury, *Shell v. State*, 893 S.W.2d 416, 423 (Tenn. 1995). A legally cognizable injury is one that is, “capable of being judicially tried or examined before a designated tribunal; within the Court’s jurisdiction.” *Black’s Law Dictionary* (10th Ed. 2014). A cause of action does not accrue until a statute gives a plaintiff the right to sue. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 900-01 (Tenn. 2011). An action accrues when a plaintiff can “bring a suit.” *Gibson v. Swanson Plating and Machine of Kentucky, Inc.*, 819 S.W.2d 796-799 (Tenn. 1991). “A cause of action in tort is non-existent until a judicial remedy is available to the

plaintiff.” *Compozit Construction Corp. v. J. B. Gibbs & Sons Construction Co.*, 2006 WL 3071242, *2 (Tenn. Ct. App. Oct. 27, 2006).

B. The Tennessee Legislature’s Action Was Governed by Its Understanding of the State of Tennessee Law Regarding Accrual.

The Tennessee Legislature is presumed to know “the state of the law.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010). Accordingly, the Legislature knew the Tennessee Supreme Court’s definition of accrual when it enacted *Tenn. Code Ann.* §§ 29-20-208. Being that LTC Smith’s predicament was the catalyst for enacting the statute, and being that the statute was remedial in nature, it is clear that the Legislature intended that LTC Smith, and all other possible plaintiffs, have a legal remedy, with an accrual date of July 1, 2014. Had the Legislature intended any other scheme for redress, it would have included language such as “cases filed after July 1, 2014.”

Clearly, what the Tennessee Legislature was hoping to accomplish, was righting a wrong.

C. The Tennessee Supreme Court’s Decision Conflicts With the Supremacy Clause of the United States Constitution.

Congress expressed a clear intent to protect the reemployment rights of reservists who serve in the uniformed services, when it passed the USERRA Act, 38 U.S.C. §§ 4301. Pertinent passages of the Act, limits a state’s power to limit the scope and effect of the Act. 38 U.S.C. §§ 4302(b). While the Act does allow

states to adopt the USERRA statute in accordance with its laws, 38 U.S.C. §§ 4323(b)(2), where those laws conflict with the USERRA Act, the Act supercedes. Congress specifically forbade any state or federal time limit or enforcement of a violation of the Act, 38 U.S.C. §§ 4327(b).

This Court in *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704, 29 L.Ed. 2d 233 (1974), held that determining whether a state statute is in conflict with a federal statute, thus invalid under the Supremacy Clause, a two step process should be employed, *Perez*, at p. 640. First, both statutes' construction should be examined. The USERRA statute was passed to protect the employment rights of reserve members of the uniformed services. Thus it was remedial in nature.

Similarly, *Tenn. Code Ann. §§ 29-20-208* was designed as a remedial statute passed to protect state employees from violations of the USERRA Act by the state. Therefore, the two statutes compliment and aid each other in the enforcement of rights granted by Congress. However, the Tennessee Supreme Court's decision changing the meaning of the Tennessee statute in terms of accrual, denied LTC Smith and possibly other state employees, from the relief afforded them under the USERRA Act.

The second stage in the process is to determine if the state statute, as interpreted by the Tennessee Supreme Court, conflicts with the intent and purpose of the USERRA Act, and thus, in effect, stands as an obstacle to the accomplishment and execution of the full purposes of Congress. *Perez*, at p. 641, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed. 2d 581 (1941). Respectfully, it does. The

purpose of the USERRA Act is to protect the employment rights of reservists in the uniformed services. The purpose of *Tenn. Code Ann. §§ 29-20-208*, is to do the same. If left to stand, the Tennessee Supreme Court's decision would frustrate the full purpose of the USERRA Act.

II. THE QUESTION PRESENTED IS OF OVERRIDING PUBLIC IMPORTANCE

The case presents an overwhelmingly important question of national significance “that has not been but should be, settled by this Court” at this time. S. Ct. Rule 10(c); *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650, 123 S. Ct. 1855, 155 L.Ed. 2d 889 (2003), (granting *certiorari* “because the questions are of national importance”); *Olmstead v. Zimring*, 527 U.S. 581, 596, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999). The USERRA Act not only affects a certain class of American citizens, reservists who are members of the uniformed services, but by extension, their families, and by significance, the United States as a whole. In enacting USERRA, Congress understood the expanded role that reservists play in national defense. The Tennessee Legislature also understood this when it passed *Tenn. Code Ann. §§ 29-20-208*. Any state statute which affects the uniformed reserve (or National Guard) adversely, eventually has an adverse impact on the defense posture of the United States as a whole.

Review by this Court is necessary at this time because of the persistent harm that such limitation on actions have on the reserve uniformed services. In Tennessee alone, there may be many soldiers affected by The Tennessee Supreme Court's decision. And,

nationally, it may be used to limit the rights of similarly situated reserve or guard soldiers.

The Court should grant *certiorari* because this issue is highly unlikely to be resolved among the various states without this Court's intervention.

III. PETITIONER'S CASE PRESENTS AN APPROPRIATE VEHICLE FOR REVIEW

Because the Tennessee Supreme Court's decision may affect similarly situated members of the uniformed services in other states, this Court's review would settle the question of any limitations of USERRA actions against a state.

CONCLUSION

Tenn. Code Ann. §§ 29-20-208 was passed to remedy a repugnant situation in Tennessee. *See* Senate and House deliberations on *2014 Tenn. Pub. Act, c. 574, §§ 2*. For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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