

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

<p>Dan McCaleb, Executive Editor of THE CENTER SQUARE,</p> <p>Plaintiff,</p> <p>v.</p> <p>Michelle Long, in her official capacity as DIRECTOR OF TENNESSEE ADMINISTRATIVE OFFICE OF THE COURTS,</p> <p>Defendant.</p>	<p>Case No. 3:22-cv-00439</p> <p>District Judge Richardson Magistrate Judge Frensley</p>
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PLAINTIFF'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff Dan McCaleb, a member of the press and Executive Editor of The Center Square, respectfully submits this Second Notice of Supplemental Authority that includes three new orders issued this month by the Tennessee Supreme Court. This Second Notice of Supplemental Authority is filed in support of McCaleb's motion for preliminary injunction (ECF No. 20) and in further support of his response to Defendant's motion to dismiss for lack of subject matter jurisdiction (ECF No. 24). Briefing closed for these two pending motions on July 21, 2022, and August 4, 2022. *See* ECF No. 26 and ECF No. 28.

On November 14, 2022, after briefing for the two motions had closed, McCaleb filed a notice of supplemental authority because the Tennessee Supreme Court issued a highly relevant order in docket No. ADM2022-01198, *In Re Amendments*

To Tenn. Rules Of Appellate Procedure & Civ. Procedure, 2022 LEXIS 307 (Tenn. Aug. 31, 2022). See ECF No. 37 and 37-1.

Since issuing its order on November 14, 2022, the Tennessee Supreme Court issued a relevant order on December 12, 2022, and two other relevant orders on December 19, 2022, as follows: (1) *In Re: Advisory Commission On The Rules Of Practice And Procedure*, Docket No. ADM2002-00001 (Tenn. Dec. 12, 2022), a copy of the order is attached as ECF No. 38-1; (2) *In Re: Proposed Amendment To Tennessee Rules Of Civil Procedure*, Docket No. No. ADM2022-01198 (Tenn. Dec. 19, 2022), a copy of the order is attached as ECF No. 38-2; and (3) *In Re: Proposed Amendment To Tennessee Rules Of Criminal Procedure*, Docket No. ADM2022-01198 (Tenn. Dec. 19, 2022), a copy of the order is attached as ECF No. 38-3.

1. The Tennessee Administrative Office of the Courts (“TAOC”) published and disseminated a public press release on its website of the Tennessee Supreme Court’s December 12, 2022, order and further published and disseminated a copy of the order itself on its website.¹ McCaleb has argued that ordering TAOC Director Michelle Long to provide in-person and virtual access to future Advisory Commission meetings is appropriate under *Ex Parte Young* because Director Long has statutory authority pursuant to Tenn. Code Ann. §16-3-601(d) to approve legal, clerical, and other assistance that may be necessary for the Advisory Commission to carry out its rulemaking duties. McCaleb Memorandum, ECF No. 20-2, Page ID

¹ <https://tncourts.gov/press/2022/12/12/supreme-court-appoints-sarah-keith-donald-capparella-judge-jennifer-smith-advisory>. See ECF No. 38-1.

#176; McCaleb Reply, ECF No. 26, Page ID #242; McCaleb Response, ECF No. 27, Page ID ##273-75. And that Director Long oversees the TAOC which is tasked with providing administrative support to the Advisory Commission and actively administers its meetings, including Michelle Consiglio-Young's administrative support; hosting in-person meetings at its office in Nashville; and publishing and disseminating public meeting notices on its website. McCaleb Reply, ECF No. 26, Page ID ##242-43; McCaleb Response, ECF No. 27, Page ID ##273-75.

2. In the December 12, 2022, order, the Tennessee Supreme Court reappointed some current members of the Advisory Commission to new terms beginning on January 1, 2023. And it further appointed new members to the Advisory Commission to begin their terms on January 1, 2023. ECF No. 38-1. McCaleb has argued that Tennessee's Advisory Commission is comprised of members of the bench and bar and is similar in form and substance to federal bench-bar Advisory Committees under the "experience" prong in *Richmond Newspapers*. McCaleb Memorandum, ECF No. 20-2, Page ID ##172-74; 176-80; 183; 188-90; *see also* Notice Supp. Auth., ECF No. 37, Page ID #1059, ¶1.

3. All three December orders (ECF No. 38-1, 38-2, and 38-3) being filed as supplemental authority are silent as to a precise date in December when the Advisory Commission either previously met or will meet. *Cf. In Re Amendments To Tenn. Rules Of Appellate Procedure & Civ. Procedure*, 2022 LEXIS 307, *1 (Tenn. Aug. 31, 2022) (speaking through its order and declaring the Advisory Commission met "on June 10, 2022"). McCaleb has argued the TAOC does not make the precise

meeting dates public. McCaleb Memorandum, ECF No. 20-2, Page ID #184.

McCaleb has further argued the Advisory Commission would convene meetings in the remaining six months of the 2022 calendar year. McCaleb Memorandum, ECF No. 20-2, Page ID #184. On behalf of Director Long, TAOC Deputy Director Rachel Harmon — a licensed Tennessee attorney and officer of the Court — testified under penalty of perjury that the “Advisory Commission typically meets quarterly.”

Harmon Supp. Decl., ECF No. 23-1, Page ID #220, ¶10. Deputy Director Harmon further testified on July 12, 2022, that the next quarterly Advisory Commission meeting was “tentatively scheduled for September 9, 2022.” Harmon Supp. Decl., ECF No. 23-1, Page ID #220, ¶10. Thus, based on the Tennessee Supreme Court’s order declaring the Advisory Commission met on June 10, 2022, and Deputy Director Harmon’s declaration testimony that the Advisory Commission was tentatively scheduled to meet on September 9, 2022 — three months after it met in June — the Advisory Commission’s next quarterly meeting will be three months from September on a day this month in December 2022.²

² The plain meaning of the word “quarterly” is generally defined as something that is “repeated four times a year. It is done every three months.” *Quarterly*, THE LAW DICTIONARY, <https://thelawdictionary.org/quarterly/> (last visited Dec. 20, 2022).

December 20, 2022

Respectfully submitted,

/s/ M. E. Buck Dougherty III

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2022, a copy of the foregoing Plaintiff's Second Notice of Supplemental Authority was filed electronically via the Court's CM/ECF filing system. Notice of this filing will be sent by operation of the Court to all parties indicated on the electronic filing receipt, including a copy to the Office of Tennessee Attorney General and Reporter, counsel for Defendant Administrative Director Michelle Long, as follows:

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