

INTRODUCTION

In responding (ECF No. 23) to Plaintiff Dan McCaleb’s motion for preliminary injunction (ECF No. 20), Administrative Director Michelle Long—who is TAOC’s top official, charged with overseeing the orderly operation of the State court system—does not argue that McCaleb’s First Amendment right of access claim fails on the merits. Instead, she claims no connection to State court rulemaking meetings created by the enabling statute, Tenn. Code Ann. § 16-3-601.¹ She argues she has no authority over the advisory commission and no authority to open or close meetings; that she is not a member of the commission; that the commission is not part of the TAOC; and that the commission is not subject to TAOC’s policies.

But the State Defendant’s jurisdictional arguments are without merit because (1) Director Long has a special relation and connection to the advisory commission statute and is expressly directed to enforce it; (2) her office is actively involved with administering meetings; (3) there is a realistic possibility she will close the next scheduled quarterly meeting on **September 9, 2022**; and (4) McCaleb has Article III standing to confer jurisdiction on this Court.

¹ The State Defendant conflates McCaleb’s requested relief in his motion (ECF No. 20) with all requested relief in his Compl. (ECF No. 19), by discussing the Tennessee Judicial Conference (TJC) committees established to recommend rules. While McCaleb is also seeking access to meetings of TJC committees as set forth in his Compl., his present motion *only* seeks access to meetings of the Tennessee bench-bar advisory commission established to recommend rules, created by the enabling statute, Tenn. Code Ann. § 16-3-601.

STATEMENT OF SUPPLEMENTAL FACTS

A. Some past meetings were open to the public and press.

Some meetings of the Advisory Commission on the Rules of Practice and Procedure have been open to the public and press.² For example, members of the public were invited to attend the meeting held on May 20, 2016, at the Tennessee Administrative Office of the Courts in Nashville. *See* attached as ECF No. 26-1, Supplemental Declaration of Dan McCaleb (“McCaleb Supp. Decl.”) at ¶¶ 5-6. TAOC published a notice of the meeting on its website beforehand; a copy is attached as ECF No. 26-2.³ McCaleb Supp. Decl. at ¶ 6. For additional information on attending the meeting, the notice directed members of the public to contact Jeana Hendrix, TAOC Assistant General Counsel, and provided her State telephone number and email address. *Id.* at ¶ 7.⁴ Current TAOC Deputy Director Rachel Harmon provided a supplemental declaration on behalf of Director Long in this matter (ECF No. 23-1). Harmon was TAOC General Counsel on May 20, 2016, when TAOC Assistant General Counsel Jeana Hendrix notified the public of the open meeting convening at TAOC’s office in Nashville. Harmon Supp. Decl. at ¶ 1.

² The parties have used different names to refer to the “Advisory Commission on the Rules of Practice and Procedure.” McCaleb has referred to it as the “Tennessee bench-bar advisory commission established to recommend rules,” and Director Long has referred to it as the “Rules Advisory Commission.” All the various names used by the parties refer to the same body created by the enabling statute, Tenn. Code Ann. § 16-3-601.

³ It is also available at <https://www.tncourts.gov/calendar/public-meeting-notices/2016/05/20/advisory-commission-rules-practice-and-procedure>.

⁴ TAOC named Hendrix the Assistant General Counsel in 2014, *available at* <https://www.tncourts.gov/news/2014/10/24/aoc-names-assistant-general-counsel>.

The current advisory commission created by Tenn. Code Ann. § 16-3-601, meets again on September 9, 2022, and a list of members is attached as ECF No. 26-3. Harmon Supp. Decl. at ¶ 10; McCaleb Supp. Decl. at ¶ 8. This meeting on September 9, 2022, is closed to the public and press. McCaleb Supp. Decl. at ¶ 13.

ARGUMENT

I. *Ex Parte Young* applies, and Plaintiff has Article III standing.

A. The Eleventh Amendment does not bar Plaintiff's claim.

The *Ex Parte Young* exception applies when a state official has a “special relation to the particular statute” and is “expressly directed to see to its enforcement.” *Russell v. Lundergan-Grimes*, 784 F. 3d 1037, 1047 (6th Cir. 2015).

The Sixth Circuit analyzed the office of Administrative Director and the broad statutory powers and duties the General Assembly conferred upon Director Long's position and concluded that “the relationship between the [Administrative Director] and the state courts demonstrates that there [is] an identity of interests or privity between the two.” *Blackard v. Memphis Area Med. Ctr. for Women, Inc.*, 262 F.3d 568, 576 (6th Cir. 2001). In *Blackard*, the TAOC Director was bound by an injunction pursuant to Fed. R. Civ. P. 65. The Director submitted an affidavit claiming she had no authority over State court judges, and thus the injunction could not reach other judges. But the *Blackard* Court reasoned that the injunction could reach and bind other State court judges because Tennessee's Administrative Director was legally responsible “for the orderly operation of the court system.” 262 F. 3d at 575-76.

Here, in his Memorandum McCaleb noted Director Long's special relation and connection to the advisory commission enabling statute, which expressly directs her to see to its enforcement. ECF No. 20-2, Page ID #176. The statute states:

The advisory commission has the authority to employ, subject to the approval of the *administrative director of the courts* and commissioner of finance and administration, legal, clerical and other assistance that may be necessary to the efficient discharge of its duties.

Tenn. Code Ann. § 16-3-601(d) (emphasis added); *see also* ECF No. 20-2, Page ID #176. It is clear from the text that Director Long has a special relation to the enabling statute and connection with its enforcement because the advisory commission must seek her approval to employ legal, clerical, and other assistance necessary to discharge its rulemaking duties. *See Ex Parte Young*, 209 U.S. 123, 157 (1908). Moreover, it logically follows that under *Blackard*, Director Long's legal responsibility "for the orderly operation of the court system" further establishes her special relation and connection with the advisory commission, whose duty is to advise on "rules of practice and procedure" in State courts. 262 F.3d at 575-76; Tenn. Code Ann. § 16-3-601(a); *Ex Parte Young*, 209 U.S. at 157. Thus, the Court should reject Director Long's claim that she lacks "authority" over the advisory commission and its State court rulemaking meetings.

Additionally, the TAOC is "actively involved with administering" meetings of the advisory commission, established by Tenn. Code Ann. § 16-3-601. Harmon Supp. Decl. at ¶ 4; *See Doe v. Dewine*, 910 F. 3d 842, 849 (6th Cir. 2018) (quoting *Russell*, 784 F. 3d at 1048)). This includes Director Long's statutory authority to approve legal, clerical, and other necessary assistance; Michelle Consiglio-Young's

administrative support; hosting in-person public meetings at TAOC's office in Nashville; and publishing and disseminating public meeting notices on TAOC's website. It is appropriate to enjoin Director Long because there is a "realistic possibility" she will take administrative action against McCaleb's First Amendment interests by closing future meetings. *Russell*, 784 F.3d at 1048; ECF No. 20-1, Page ID #164, McCaleb Decl. at ¶ 34; McCaleb Supp. Decl. at ¶¶ 9-13. In fact, the next quarterly meeting on September 9, 2022, is closed to the public and press. McCaleb Supp. Decl. at ¶ 13.

B. Plaintiff has Article III standing.

McCaleb's injury is fairly traceable to Director Long and may be redressed by this Court. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988).

II. Plaintiff is likely to succeed on the merits and will suffer irreparable harm absent an injunction.

The State failed to contest the merits of Plaintiff's First Amendment claim. *Russell*, 784 F.3d at 1046 (determining sovereign immunity "before the merits").

III. Enforcing the U.S. Constitution is a vindication of State autonomy.

"[E]nforcing the United States Constitution against a state government is a vindication, not a derogation, of the enduring importance of state autonomy." *Bongo Prods., LLC v. Lawrence*, 548 F. Supp. 3d 666, 687 (M.D. Tenn. Jul. 9, 2021) (Trauger, J.) (analyzing tension of merged third and fourth factors under *Nken*).

CONCLUSION

McCaleb requests preliminary injunctive relief before September 9, 2022.

July 21, 2022

Respectfully submitted,

/s/ M. E. Buck Dougherty III

M. E. Buck Dougherty III, TN BPR #022474

James McQuaid, Admitted *pro hac vice*

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Attorneys for Plaintiff, Dan McCaleb,
Executive Editor of The Center Square

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2022, a copy of the foregoing Reply to State Defendant's Response to Plaintiff's Motion for Preliminary Injunction 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 TAOC Administrative Director Michelle Long, via electronic mail as follows:

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Steven A. Hart
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P.O. Box 20207
Nashville, Tennessee 37202-0207
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/s/ M. E. Buck Dougherty III
M. E. Buck Dougherty III, TN BPR #022474

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

DAN McCALEB, Executive Editor)
of THE CENTER SQUARE,)

Plaintiff,)

v.)

MICHELLE LONG, in her)
official capacity as DIRECTOR of)
TENNESSEE ADMINISTRATIVE)
OFFICE OF THE COURTS,)

Defendant.)

Case No. 3:22-cv-00439

**District Judge Richardson
Magistrate Judge Frensley**

SUPPLEMENTAL DECLARATION OF DAN McCALEB

Pursuant to 28 U.S.C. § 1746, I, Dan McCaleb, declare:

1. I am over eighteen years of age. I have personal knowledge of the statements herein. If called to testify at deposition or trial, I would testify as follows:

2. I reside in Crystal Lake, Illinois, and I am a citizen of the United States.

3. I am the Executive Editor of The Center Square.¹

¹ <https://www.thecentersquare.com/users/profile/dan%20mccaleb/>.

4. I have reviewed the Reply to State Defendant's Response to Plaintiff's Motion for Preliminary Injunction ("Reply") being filed with the Court in this case and based on my personal knowledge, information, and belief, it is true and accurate. This supplemental declaration is submitted in support of the Reply.

5. Some meetings of the Advisory Commission on the Rules of Practice and Procedure have been open to the public and press.² For example, members of the public were invited to attend the meeting held on May 20, 2016, at the Tennessee Administrative Office of the Courts ("TAOC") in Nashville.

6. The TOAC published a notice of the meeting on its website beforehand; a copy is attached to the Reply as ECF No. 26-2.³

7. For additional information on attending the meeting, the notice directed members of the public to contact Jeana Hendrix, TAOC Assistant General Counsel, and provided her State telephone number and email address.⁴

8. A list of current members of the Advisory Commission on the Rules of Practice and Procedure is attached to the Reply as ECF No. 26-3.

² The parties have used different names to refer to the "Advisory Commission on the Rules of Practice and Procedure." I have referred to it as the "Tennessee bench-bar advisory commission established to recommend rules," and Director Long has referred to it as the "Rules Advisory Commission." All the various names used by the parties refer to the same body created by the enabling statute, Tenn. Code Ann. § 16-3-601.

³ It is also available at <https://www.tncourts.gov/calendar/public-meeting-notices/2016/05/20/advisory-commission-rules-practice-and-procedure> (last visited July 21, 2022).

⁴ TAOC named Hendrix the Assistant General Counsel in 2014, *available at* <https://www.tncourts.gov/news/2014/10/24/aoc-names-assistant-general-counsel> (last visited July 21, 2022).

9. As indicated on its website, the TAOC provides administrative support to approximately 15 Boards and Commissions, including the Advisory Commission on the Rules of Practice and Procedure.⁵

10. TAOC also provides administrative support to the ADR Commission, and it is having its quarterly meeting on October 18, 2022, via virtual livestreamed for public viewing on the Tennessee court's YouTube channel.⁶

11. Because the TAOC provides administrative support to the ADR Commission, it has posted notice to the public of the ADR Commission's upcoming quarterly meeting in October, at least 89 days (from July 21, 2022) in advance of this virtual public meeting.

12. According to TAOC Deputy Director Harmon (ECF No. 23-1), there is a scheduled quarterly meeting of the Advisory Commission on the Rules of Practice and Procedure (Tenn. Code Ann. § 16-3-601) on September 9, 2022. This is 50 days from today, July 21, 2022. I have reviewed the TAOC website's September calendar for public meeting notices, and there is no public notice posted for September 9, 2022. *See* September calendar from TAOC website on the following page.

13. Therefore, the meeting of the Advisory Commission on the Rules of Practice and Procedure on September 9, 2022, is closed to the public and press.

⁵ <https://tncourts.gov/boards-commissions/boards-commissions> (last visited July 21, 2022).

⁶ <https://tncourts.gov/calendar/adr-commission/2022/10/18/adr-commission-quarterly-meeting> (last visited July 21, 2022).

EVENT TYPE

Public Meeting Notices

Apply

- [Month](#)
- [Week](#)
- [Day](#)

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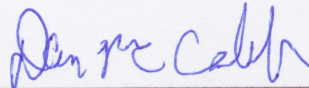
September 2022

Next »

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS
TRUE AND CORRECT.

Executed on July 21, 2022
Crystal Lake, Illinois



DAN McCALEB,
Executive Editor of The Center Square

May 20, 2016
Public Meeting Notice:
Advisory Commission
on the Rules of Practice and Procedure

ADVISORY COMMISSION ON THE RULES OF PRACTICE AND PROCEDURE

Date / Time: May 20, 2016 - 9:00am - 11:00am

Event Type:

Public Meeting Notices

A meeting of the Advisory Commission on the Rules of Practice and Procedure will be held on Friday, May 20, 2016, at 9:00 a.m. (CDT) at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, Tennessee. Members of the public are invited to attend.

For additional information on attending the meeting, or if you require an accommodation and/or have special needs because of a qualified disability, please contact:

Jeana Hendrix
Assistant General Counsel
(615) 741-2687
jeana.hendrix@tncourts.gov

Administrative Office of the Courts
511 Union Street Suite 600
Nashville, TN 37219
See map: [Google Maps](#)

[Calendar](#)

Tenn. Code Ann § 16-3-601
Current Members of Advisory Commission
on the Rules of Practice and Procedure

ADVISORY COMMISSION ON THE RULES OF PRACTICE & PROCEDURE

Tenn. Code Ann. § 16-3-601 -- The Advisory Commission on the Rules of Practice and Procedure meets periodically to study and make recommendations as to court rules on practice and procedure. The commission members are appointed by the Supreme Court.

MEMBERS

Chair Eugene (Gino) Bulso, Esq. Nashville, TN	Wayne A. Ritchie II, Esq. Knoxville, TN
Vice Chair Catherine Clayton Jackson, TN	W. Scott Sims, Esq. Nashville, TN.
Kathryn Barnett, Esq. Nashville, TN	Steven Strain, Esq. Jasper, TN
Brandon E. Bass, Esq. Brentwood, TN	F. Braxton Terry, Esq. Morristown, TN
Andree Blumstein, Esq. Nashville, TN	Allan Wade, Esq. Memphis, TN
James Bowman, Esq. Johnson City, TN	Judicial Liaisons: Chancellor William C. Cole Atoka, TN
Bo Burk, Esq. Somerville, TN	James M. Hivner, Esq. Nashville, TN
Michael Carter, Esq. Milan, TN	Judge Carma Dennis McGee Savannah, TN
Catherine Clayton, Esq. Jackson, TN	Judge Camille McMullen Memphis, TN
Mark Fulks, Esq. Johnson City, TN	Judge Mark W. Ward Memphis, TN
Doug Halijan, Esq. Memphis, TN	
W. Aaron Hall, Esq. Memphis, TN	Supreme Court Liaison: Justice Sharon G. Lee P.O. Box 444 Knoxville, TN 37901
Stephen P. Jones, Esq. Memphis, TN	
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Representative William Lamberth Nashville, TN	
Alex Little, Esq. Nashville, TN	Appointed by: Supreme Court Liaison
Timothy L. Mickel, Esq. Chattanooga, TN	Assigned Staff Attorney (Civil): Jeff Zager, Supreme Court Staff Attorney Supreme Court Building 401 7th Avenue North Nashville, TN 37219-1407 Phone: (615) 532-7996 Fax: (615) 253-2002 Email: Jeff.Zager@tncourts.gov Appointed by: Supreme Court
	Reporter: Jeffrey Usman Associate Professor of Law Belmont University College of Law 900 Belmont Boulevard, Nashville, TN 37203

