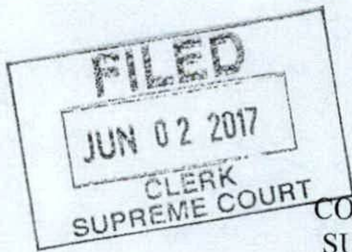

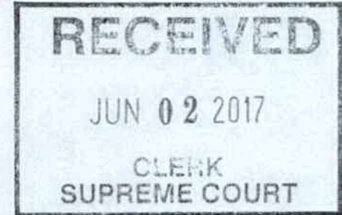

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2016-SC-000642

MATTHEW G. BEVIN, in his official capacity as
Governor of the Commonwealth of Kentucky, APPELLANT

v. On Appeal from Franklin Circuit Court, Division II
Civil Action No. 16-CI-00738

ANDY BESHEAR, in his official capacity as
Attorney General of the Commonwealth of Kentucky, APPELLEE

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served this 2nd day of June, 2017, by hand delivery and electronic mail, upon the following: M. Stephen Pitt, S. Chad Meredith, Michael T. Alexander, Office of the Governor, 700 Capital Avenue, Suite 101, Frankfort, Kentucky 40601, and by U.S. Mail to Judge Phillip J. Shepherd, Franklin Circuit Court, 222 St. Clair St., Frankfort, Kentucky 40601. I further certify that the record has not been removed from the Clerk's Office.

Andy Beshear
Attorney General

STATEMENT CONCERNING ORAL ARGUMENT

By granting the Attorney General's motion to transfer, the Court has recognized that this case is of great and immediate public importance. *See* CR 74.02(2). The Attorney General believes oral argument will assist the Court in resolving the questions of law raised in the appeal, and therefore requests oral argument.

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COUNTERSTATEMENT OF THE CASE

Governor Matthew G. Bevin continues to claim "absolute authority" to dissolve the statutory governing boards of Kentucky's public universities under the reorganization statute, KRS 12.028. In June of 2016, Governor Bevin exercised this "authority," abolishing, re-creating, and restructuring the University of Louisville Board of Trustees ("UofL Board") through a series of executive orders. These actions violated the numerous statutes enacted by the General Assembly that protect Kentucky's public universities from undue political influence by the Governor and the executive branch. The Governor's actions caused the University's accreditation to be placed on probation, threatening federal financial student aid and research dollars, and severely harming the University's reputation.

After extensive briefing, an evidentiary hearing, and numerous arguments, the Franklin Circuit Court (the "Trial Court") declared Governor Bevin's actions unlawful. Specifically, it held that "the Governor's reorganization power under KRS 12.028 does not extend to public universities, which the legislature has placed outside the scope of the organizational structure of the executive branch of government." Final Judgment at 1 (Sept. 28, 2016) (R. at 1505). The Trial Court further held the Governor cannot use KRS 12.028 to circumvent the procedural and substantive statutory requirements for removing public university board members. *Id.* at 1-2 (R. at1505-06). For the sake of our public universities and their students, this Court should affirm.

I. <u>The Legislature Removed Public Universities And Their Governing Boards From Direct Executive Branch Control.</u>

The legislative history of Kentucky statutes governing public universities and their boards shows an intentional and continued movement toward ever-increasing board

independence and autonomy, and away from executive dominance and political influence.

In 1952, the General Assembly took a first, critical step toward institutional autonomy by removing public universities from the Department of Education. *See* Trial Br. Ex. A (1952 Ky. Acts ch. 41, sec. 1) (R. at 1211-12); Public Higher Education in Kentucky, 118, Research Publication 25, Legislative Research Commission (1951) (quoting KRS 156.010 (1948)). This removal reflected the consensus that the Department of Education has no supervisory authority over universities. *See* Public Higher Education in Kentucky, 118, Research Publication 25, Legislative Research Commission (1951). Public universities were never subsequently listed in the statutory framework of the Department of Education, or any other executive department or division.

In 1982, the legislature made another stride towards autonomy by enacting KRS 164A.560 and related statutes. *See* Trial Br. Ex. B (1982 Ky. Acts ch. 391, sec. 3) (R. at 1214-15). These statutes enabled university governing boards to manage university finances themselves.[1] Unlike other executive branch agencies, public universities now bypass normal financial management processes involving the Finance and Administration Cabinet. Universities hold and manage their own money, make their own investments, and hold their own property. The Governor, the Secretary of the Finance and Administration Cabinet, and the Secretary of the Personnel Cabinet acknowledged as much in signing the Agreed Order dismissing Finance and Personnel from this lawsuit. *See* Agreed Order of Dismissal (July 14, 2016) (R. at 200-05).

[1] The University of Louisville has so elected. *See* 740 KAR 1:030(1).

In 1990, the General Assembly continued its push towards operational and governing independence, passing Senate Bill 86. That legislation implemented six-year staggered terms for university regents and trustees. 1990 Ky. Acts ch. 504, sec. 2-4. In passing the legislation, members of the General Assembly publicly acknowledged that their aim was to limit gubernatorial power.

According to then-House Majority Whip Kenny Rapier, the law was designed to prevent "the domination of boards by any one governor."[2] Representative Ernesto Scorsone, who sponsored similar legislation, explained that "the bill would prevent 'wholesale replacement of boards from taking place' by one governor, as can happen now during a four-year term."[3] The General Assembly considered the measure so important it overrode Governor Wallace Wilkinson's veto of the law.[4] *See* 1990 Ky. Act. Ch. 504.

The General Assembly further passed specific protections for UofL Trustees to insulate them from political influence. In particular, the General Assembly applied KRS 63.080(2) to the UofL Board, which explicitly requires "cause" for the removal of any trustee. 1990 Ky. Acts ch. 504, sec. 4. No longer could the Governor remove a trustee because he disagreed with a board decision or wanted a different appointee.

The movement towards autonomy intensified when Governor Wilkinson appointed himself to the University of Kentucky Board of Trustees in 1991. This ushered in a new wave of legislation targeted at further limiting gubernatorial authority. That

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[2] *See* Mot. for Temp. Inj. Ex. D (Joseph Stroud, "Bill OK'd to Limit Governor's Control of University Boards," LEXINGTON HERALD-LEADER (Feb. 6, 1990)) (R. at 152). Rapier's quote refers to a House Bill substantially similar to SB 86, the measure ultimately passed by the entire General Assembly.

[3] *See id.*

[4] *See* Mot. for Temp. Inj. Ex. F (John Winn Miller and Jack Brammer, "Legislature Overrides 13 Vetoes Chambers Avoid Debate, Set Modern-Day Record," LEXINGTON HERALD-LEADER (Apr. 14, 1990)) (R. at 154).

year, the General Assembly passed HB 149, establishing the Governor's Higher Education Nominating Committee and charging it with the duty to submit nominations from which the Governor must select appointees to university boards. 1992 Ky. Acts ch. 10, sec. 3; *see* KRS 164.005(5)(a). The law also prohibited an appointing authority from appointing "himself or his spouse, or the Governor or his spouse" to a university board. 1992 Ky. Acts ch. 10, sec. 8; *see* KRS 164.0053. House Bill 149 illustrated how university boards lawfully must be restructured – by statute. *See* 1992 Ky. Acts ch. 10, sec. 22.

Subsequent reforms under the 1997 Postsecondary Education Improvement Act further solidified university autonomy and protections from the executive branch. 1997 Ky. Acts 1st Ex. Sess. ch. 1, sec. 4; *see* KRS 164.004(4). The Act not only repeated that a trustee could only be removed for cause, but added a further protection, requiring a due process hearing with counsel before the Council on Postsecondary Education prior to any removal. 1997 Ky. Acts 1st Ex. Sess. ch. 1, sec. 86, 97, 125; *see* KRS 164.131(1)(d), 164.321(10), 164.821(1)(b). This evidentiary hearing requires a "finding of fact" to justify any removal. 1997 Ky. Acts 1st Ex. Sess. ch. 1, sec. 86, 97, 125; *see* KRS 164.131(1)(d), 164.321(10), 164.821(1)(b).

Recent actions by the General Assembly only confirm that altering the structure of a university board or changing the removal procedures must be done directly through statute. The bills passed during the 2017 Regular Session did not address the Governor's reorganization power under KRS 12.028, nor did they confirm the executive orders. Instead, they explicitly altered the UofL Board's structure and added new procedures for removing university board members. Indeed, Senate Bills 12 and 107 directly amended

KRS 164.821 and KRS 63.080, the very statutes the Governor suspended in his executive orders. This uncontested fact shows the importance of this case. If the Governor has already ignored the previous versions of these statutes, he can and will ignore the new versions as well.

In sum, not only does the legislative history of public universities and their boards demonstrate a constant movement toward independence and autonomy, but specific laws were passed to prevent the wholesale removal of entire boards. A ruling on the limitations of KRS 12.028 is necessary to uphold this clear legislative intent.

II. The Statutes Creating And Structuring UofL's Board Protect It From Executive Branch Control.

In harmony with this legislative history, KRS 164.821 (2016) vested UofL's governance in a Board of Trustees. The statute (as it existed at the time Governor Bevin issued his orders)[5] declared that the Board would consist of twenty (20) members, including seventeen (17) members appointed by the Governor and three (3) members representing the faculty, staff, and students of the University. KRS 164.821(1) (2016). The statute declared that gubernatorial appointees to the Board serve staggered six-year terms. With respect to removals, KRS 164.821 provided that although Board members were appointed by the Governor, they did not serve at his pleasure. The statute provided:

> Board members may be removed by the Governor for cause, which shall include neglect of duty or malfeasance in office, after being afforded a hearing with counsel before the Council on Postsecondary Education and a finding of fact by the council.

KRS 164.821(1)(b).

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[5] Unless otherwise indicated, all future references and citations to KRS 164.821 and KRS 63.080 are to the versions of the statutes in effect at the time Governor Bevin issued his executive orders "reorganizing" the UofL Board. A copy of those versions of the statutes are attached as Exhibits A and B.

Another statute, KRS 63.080(2) (2016), similarly mandated that "[m]embers of the board of trustees . . . of the University of Louisville . . . shall not be removed except for cause." Thus, pursuant to KRS 164.821 and KRS 63.080, a governor could not unilaterally remove a trustee, but must identify specific reasons that can be contested in an evidentiary hearing.

III. Governor Bevin Issued Executive Orders Abolishing, Re-creating, And Restructuring The UofL Board In Violation Of Kentucky Law.

Despite this legislative history, Governor Bevin took the unprecedented step of dissolving the UofL Board. Specifically, by Executive Order 2016-338 dated June 17, 2016, the Governor purported to abolish the UofL Board, causing the terms of its members to "expire immediately." Complaint Ex. A (Executive Order ("EO") 2016-338 at 3) (R. at 28). As explanation, the executive order made only conclusory allegations of operational dysfunction. *Id.* at 2 (R. at 27). The order did not provide specific cause for the removal of any individual trustee. *See* KRS 164.821(1)(b); KRS 63.080(2). Nor did the order provide any trustee his or her mandated pre-removal hearing before the Council on Postsecondary Education. *See* KRS 164.821(1)(b).

The executive order then created a "new" Board for the University (the "Re-created Board") consisting of fewer than the then-statutorily-required number of members. Complaint Ex. A (EO 2016-338 at 3-4) (R. at 28-29). Under the order, the UofL Board would have ten (10) members appointed by the Governor, *see id.*, instead of the seventeen (17) required by KRS 164.821. The order further directed the Council on Postsecondary Education (the "Council") to meet and provide the Governor with a list of candidates for the Re-created Board. *Id.* at 4 (R. at 29).

On the same day he issued Executive Order 2016-338, Governor Bevin issued Executive Order 2016-339. Complaint Ex. B (EO 2016-339) (R. at 33-34). Without any statutory authorization, this second order purported to establish an "interim" UofL Board consisting of three (3) members. *Id.* Without following the statutory requirement for nominations from the Council, the order named interim board members. *Id.*

The Postsecondary Education Nominating Committee held a closed-door meeting on June 28, 2016, nominating thirty (30) individuals for appointment to the Governor's Re-created Board. The next day, the Governor issued Executive Order 2016-391, appointing ten (10) individuals from the Nominating Committee's list to serve on the Board established by Executive Order 2016-338. *See* Complaint Ex. C (EO 2016-391) (R. at 36). Again, these actions ignored, violated, and suspended the legislative mandates of KRS 164.821 and 63.080.

During a press conference announcing Executive Orders 2016-338 and 2016-339, Governor Bevin stated that the resignation of UofL President James Ramsey had also been secured.[6] The Governor produced a letter dated June 16, 2016 – one day before his executive order abolishing the UofL Board – wherein Ramsey indicated that "[a]s a result of their 'recent conversation,'" he would offer his resignation to the "newly appointed board" upon its "legal restructure." *See* Temp. Inj. Hrg. Ex. 11 (Letter to Governor, June 16, 2016) (R. at 570). This letter is concerning, as the removal of a university president is solely a Board – and not a gubernatorial – function. *See* KRS 164.830(1)(b). Thus, without clarity from this Court on the application of KRS 12.028, a university president

[6]Jack Brammer and Linda Blackford, "University of Louisville Board, President Out; Bevin Seeks 'Fresh Start,'" LEXINGTON HERALD-LEADER, June 17, 2016, available at http://www.kentucky.com/news/politics-government/article84362072.html (last visited May 30, 2017).

can work with a governor to fire his entire board without any transparency or due process.

IV. Governor Bevin's Actions Caused Serious Sanctions To UofL's Accreditation.

The University of Louisville is accredited by the Southern Association of Colleges and Schools, Commission on Colleges ("SACS").[7] Accreditation signifies that the University has "a purpose appropriate to higher education and has resources, programs, and services sufficient to accomplish and sustain that purpose."[8] Accreditation allows the University to award accredited degrees and ensures that the school is eligible for student financial aid funds under Title IV of the Higher Education Act.[9]

In order to secure and maintain SACS accreditation, UofL must satisfy certain SACS standards, including "Comprehensive Standards." Every ten (10) years, UofL completes a reaccreditation process with SACS. *See* Complaint Ex. G (Oct. 27, 2010 Accreditation Letter) (R. at 74). As part of that process, UofL must explain how it meets Comprehensive Standards related to board governance and board dismissal.

One such Comprehensive Standard ("CS"), CS 3.2.4, requires a university's governing board to be "free from undue influence from political, religious, or other external bodies and [to] protect[] the institution from such influence." *See* Complaint Ex. H (SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS, "Principles of

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[7] *See* University of Louisville, About UofL: Accreditation, http://louisville.edu/accreditation (last visited May 30, 2017).

[8] *See* Southern Association of Colleges and Schools, Commission on Colleges, Welcome from the President, http://www.sacscoc.org/president.asp (last visited May 30, 2017).

[9] *See id.*

Accreditation" (5th ed. 2011), p. 26) (R. at 106).[10] A second standard, CS 3.2.5, requires a university board to have "a policy whereby members can be dismissed only for appropriate reasons and by a fair process." *Id.*

In past accreditations, the University has specifically listed KRS 164.821 as the manner in which it meets SACS standards regarding political influence and fair removal processes. In its 2007 compliance report, the University used KRS 164.821 to satisfy CS 3.2.4, stating: "KRS 164.821 outlines the makeup of the members of the Board of Trustees appointed by the governor …." *See* Reply in Supp. of Mot. for Temp. Inj. Ex. 7 (UofL 2007 CS 3.2.4 Compliance Report) (R. at 447). The University's response to CS 3.2.5 also referenced KRS 164.821, noting that the statute requires cause and a due process hearing prior to the removal of board members. *See id.* at Ex. 8 (UofL 2007 CS 3.2.5 Compliance Report) (R. at 449).

In light of Comprehensive Standards 3.2.4 and 3.2.5, and as a direct result of Governor Bevin's unlawful executive orders, SACS launched an investigation into UofL's compliance. *See id.* at Ex. 4 (June 28, 2016 SACS Letter) (R. at 432-33). That investigation led to a December 4, 2016 decision by SACS to place UofL on probation for a term of twelve (12) months.[11] In its official letter to the University, SACS explained that the Governor's executive orders were inconsistent with the accrediting agency's "expectations that institutions be able to operate without undue political

[10] Also available at http://www.sacscoc.org/pdf/2012PrinciplesOfAcreditation.pdf) (last visited May 30, 2017).

[11] *See* Jan. 11, 2017 SACS Probation Letter, available at http://louisville.edu/accreditation/official-probation-letter (last visited May 30, 2017).

influence in institutional governance."[12] According to SACS, "There appears to be an inconsistency between the institution's policies regarding board dismissal and the Governor's actions, which follow his assertion that dismissal procedures and protections do not apply under board reorganization."[13] SACS further advised that UofL must demonstrate compliance with all standards within two (2) years or answer "as to why the institution should not be removed from membership."[14] As discussed in the argument below, a ruling that KRS 12.028 does not apply to public universities should satisfy a majority of SACS's concerns about accreditation that the executives orders created.

V. The Attorney General Successfully Sought Declaratory and Injunctive Relief.

On behalf of the citizens of the Commonwealth, the Attorney General filed suit challenging the Governor's executive orders. In his July 5, 2016 Verified Complaint for Declaration of Rights and for Injunctive Relief, the Attorney General claimed that Governor Bevin's executive orders exceeded his authority under KRS Chapter 12. Complaint, ¶¶ 89-94 (R. at 19-20). The Attorney General further alleged that the Governor's executive orders violated the Kentucky Constitution, namely §§ 15 and 81, as well as the separation of powers provisions found in §§ 27-29. *Id.* at ¶¶ 56-81 (R. at 15-18). The Attorney General sought a declaration that the orders were unlawful along with temporary and permanent injunctive relief. *See id.* at "Prayer for Relief" (R. at 23).

On July 29, 2016, the Trial Court issued an Order temporarily enjoining the provisions of EO 2016-338. Temp. Inj. Order (July 29, 2016) (R. at 586). Moving swiftly to the merits, the parties submitted simultaneous trial briefs on September 13,

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[12] *Id.* at 2.

[13] *Id.*

[14] *Id.* at 3.

2016. Two days later, the Trial Court conducted an evidentiary hearing. The parties then filed post-hearing briefs. One week later, the Trial Court entered its Final Judgment.

The Final Judgment held that KRS 12.028 does not apply to the Commonwealth's public universities. It further held that the Governor cannot remove university board members without complying with the statutory requirements for removal. Final Judgment at 1-2 (Sept. 28, 2016) (R. at 1505-06). The next month the Trial Court rejected, in its entirety, the Governor's motion to alter, amend, or vacate the Final Judgment. Ord. on Mot. to Alter, Amend, or Vacate (Oct. 21, 2016) (R. at 1570).

VI. The Governor Appealed.

On November 18, 2016, the Governor timely filed a Notice of Appeal. Three days later, the Attorney General filed a Motion for Transfer. While that Motion was pending, the General Assembly passed Senate Bill 12, legislation amending KRS 164.821. Notably, SB 12 did not reference, amend, clarify, or otherwise impact KRS 12.028, the statute at issue in this appeal. Two days after SB 12's passage, on January 9, 2017, this Court granted the Attorney General's request to transfer the case.

STANDARD OF REVIEW

The September 15, 2016 evidentiary hearing before the Trial Court was akin to a bench trial. The parties filed "Trial Briefs" in advance of the hearing. Accordingly, the Trial Court's factual findings should be set aside only if "clearly erroneous." CR 52.01. The Trial Court's conclusions of law are reviewed *de novo*. *Ladd v. Ladd*, 323 S.W.3d 772, 775 (Ky. App. 2010) (citing *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006)).

ARGUMENT

The Trial Court correctly held that KRS 12.028 does not allow a governor to abolish a governing board of a public university and remove all of its members. This

ruling is not moot, as recent legislative changes did not alter, affect, or clarify KRS 12.028 in any way, nor did they confirm the executive orders. Without a decision from this Court, the Governor can ignore the new legislation – just as he ignored previous legislation – and use KRS 12.028 to dissolve and reorganize any university board.

Further, the Governor forfeited his opportunity to argue for disqualification of the Attorney General when he failed to fully pursue that claim before the Trial Court. Even if the Governor preserved the issue for review, no conflict exists. The Attorney General respectfully asks the Court to affirm the Trial Court.

I. <u>This Court Should Affirm The Trial Court's Declaration That The Executive Orders Were Unlawful.</u>

The Trial Court ruled that Governor Bevin's executive orders abolishing and re-creating the UofL Board were unlawful because the Governor's authority under KRS 12.028 does not extend to universities. The Trial Court further ruled that the Governor cannot use KRS 12.028 to circumvent the statutory requirements for board member removals found in KRS 63.080(2) and KRS 164.821(1)(b). This ruling equally applies to the now amended versions of the statutes. This Court should affirm.

A. The Trial Court Correctly Found that KRS 12.028 Does Not Apply to Public Universities and the Governor Cannot Avoid the Statutory Requirements for Trustee Removals.

In *Commonwealth ex rel. Beshear v. Bevin*, this Court ruled that "[t]he Governor's authority with respect to the [university] boards differs fundamentally from his authority with respect to those state entities and employees that answer to him." 498 S.W.3d 355, 381 (Ky. 2016). The same analysis that led to this Court's holding should also lead to a ruling that KRS 12.028 does not apply to public universities.

1. KRS 12.028 does not apply to public universities.

The Trial Court correctly held that KRS 12.028 does not extend to Kentucky's public universities and their boards, including UofL. Kentucky Revised Statute 12.020 enumerates the departments, program cabinets, and administrative bodies within the executive branch of state government. Although the statute indicates that its list of administrative bodies "is not intended . . . [to] be all-inclusive," it is significant that neither UofL nor its Board are included in the enumeration. *See id.* Indeed, no public university or university board is included, despite the fact that KRS 12.020 contains a comprehensive list of executive branch entities, from the Justice and Public Safety Cabinet to the Kentucky Boxing and Wrestling Authority. In fact, the legislature has intentionally omitted the UofL Board and all other public university governing boards from this statute and similar statutes enumerating executive branch agencies.

Under KRS 12.015, "each administrative body established by statute or statutorily authorized executive action shall be included for administrative purposes in an existing department or program cabinet." As the Trial Court pointed out in its Order granting the Commonwealth's motion for temporary injunctive relief,[15] public universities were previously listed in the organizational structure of the executive branch of state government as divisions of the Department of Education. *See* Temp. Inj. Order at 11 (citing 1952 Ky. Acts, ch. 41, Section 1; KRS 156.010(3) (Carroll's Ky. Statutes, 1934-52)) (R. at 596). With the passage of Senate Bill 113 in 1952, however, public universities were removed from the Department of Education and were not listed as part of any other executive department or division.

[15] The Trial Court incorporated its Temporary Injunction Order into the Final Judgment. *See* Final Judgment at 16, ¶ 2 (R. at 1520).

The Legislative Research Commission explained the removal:

> Currently, the only practical consequence of higher education being in the Department of Education is to limit the salary that can be paid from Commonwealth funds to officers and employees of the colleges and the University. The Salary Act of 1950 in effect limits the payment from Commonwealth funds of the salaries of all persons in the Department of Education to $500 less than the salary of the Superintendent of Public Instruction, who receives $8,500 a year. Other drastic consequences are possible, but have never been put into effect. *There is general expectation on all sides that this statute will be amended at the next session of the legislature to make it clear that the Department of Education has no supervisory authority over the institutions of higher education.*

See id. at 12 (citing Public Higher Education in Kentucky, 117, Research Publication 25, Legislative Research Commission (1951) (emphasis added)[16]) (R. at 597). Thus, the General Assembly removed public universities from the umbrella of the Department of Education in recognition of their independence and autonomy from the executive branch, signifying that they are not covered by KRS Chapter 12, and particularly KRS 12.028.

In *Beshear*, 498 S.W.3d at 381, this Court recognized the "fundamental independence" of public university boards, noting that they are corporations expressly excluded from the Department of Education by KRS 164.825. *Id.* The Court ruled that while "Universities are state agencies and are attached to the executive branch for budgetary purposes, they are not part of the executive branch in the same sense as the program cabinets and boards directly under the Governor's control." *Id.* Instead,

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[16] Significantly, in light of the legislative history discussed herein, the LRC research publication also provides:

> Authorities on higher education are in general agreement that the turnover in membership of a board of control of a college or university should be relatively slow. It is distressing to a program of an educational institution to have sudden and drastic changes in policy. Investigations have shown that in general a term of at least six years for board members is desirable, with provisions for overlapping terms such that at least two-thirds of the board members will always have had one or two years of experience in that position.

Public Higher Education in Kentucky, 121, Research Publication 25, Legislative Research Commission (1951).

university boards "are separate 'bod [ies] corporate, with the usual corporate powers.'" *Id.* (quoting KRS 164.350). According to the Court, university boards are "[i]n some ways . . . akin to municipal or public corporations, having a separate existence from the main body of government, although retaining many of the government's characteristics, such as immunity from suit." *Id.* The Court noted that university boards "have close to plenary power over the operation of their respective institutions." *Id.* at 380.

Most significantly, this Court also determined that "[t]he Governor's authority with respect to the [university] boards differs fundamentally from his authority with respect to those state entities and employees that answer to him." *Id.* at 381. This holding is the underpinning of the Trial Court's Final Judgment, which states: "public universities, as quasi-independent corporate bodies, are not directly subject to the Governor's executive power in matters of budget and organization, in the same manner as program cabinets, departments, and agencies of state government." Final Judgment at 1 n. 2 (R. at 1505). The *Beshear* decision only reinforces the Trial Court's "prior ruling in issuing injunctive relief that the Governor's re-organization power in KRS 12.028 does not extend to public universities." *Id.*

Other factors also support the view that UofL and the UofL Board's omission from KRS 12.020 was by design. Public universities are not part of the Governor's executive cabinet under KRS 11.065. Nor do public universities and their boards "exercise executive and administrative functions on a state-at-large level." *Hogan v. Glasscock*, 324 S.W.2d 815, 816 (Ky. 1959).

Moreover, the extensive legislative history discussed herein shows that the General Assembly has taken numerous steps to remove universities from the Governor's

control – not grant him "absolute authority" over them. The General Assembly enacted staggered six-year terms for university board members in order to prevent the Governor from having the power to replace an entire board at once. (*See supra*, pp. 2-3.) It established the Governor's Higher Education Nominating Committee to provide the Governor with nominees. (*See supra*, pp. 3-4.) The General Assembly also made it unlawful to appoint the Governor or his spouse to a university board. (*See id.*, p. 4.) And it added provisions to university board statutes requiring cause and a due process hearing prior to the removal of any board member. (*See id.*)

Additionally, the UofL Board functions as a corporation. *See* KRS 164.830. It is given autonomy and independence in the operation and management of the University. *See id.* Under KRS Chapter 164A, it is given independence in terms of financial management. Specifically, KRS 164A.560 permits university governing boards to elect to be independent regarding the acquisition of funds, accounting, purchasing, and capital construction. The UofL Board of Trustees has so elected. *See* 740 KAR 1:030(1). In short, UofL's structure and operations demonstrate that it is outside the ambit of KRS Chapter 12 generally and KRS 12.028 specifically.

2. *Galloway* does not apply KRS 12.028 to university boards.

The Governor relies heavily on *Galloway v. Fletcher*, 241 S.W.3d 819 (Ky. App. 2007), in support of his position that *all* of KRS Chapter 12, including KRS 12.028, extends to public universities. But, as the Trial Court explained more than three times, *Galloway* does not compel a finding that university boards are within the scope of KRS 12.028. *See* Temp. Inj. Order at 18 n. 7 (R. at 603); Final Judgment at 7-9 (R. at 1511-13); Ord. on Mot. to Alter, Amend, or Vacate (R. at 1571-75).

In *Galloway*, the Court of Appeals applied KRS 12.070 to university board appointments. *Id.* at 823. In doing so, the Court was neither asked nor provided with any authority to decide the broader issue of whether KRS Chapter 12 *in toto* applies to universities. *See id.* Indeed, "a careful reading of *Galloway* demonstrates that it was decided on the *assumption* that the application of KRS 12.070 was 'immediately obvious' without any consideration of the statutory history that demonstrates the separation of state universities from the organizational structure of the executive branch in 1952." Final Judgment at 8 (emphasis in original) (citing *Galloway*, 241 S.W.3d at 822-23) (R. at 1512).

As noted by the Trial Court, KRS 12.015 provides that "each administrative body established by statute or statutorily authorized executive action shall be included for administrative purposes in an existing department or program cabinet." *See* Ord. on Mot. to Alter, Amend, or Vacate at 4 (quoting KRS 12.015) (R. at 1573). The UofL Board, however, "is manifestly **not** 'included for administrative purposes in an existing department or program cabinet.'" *Id.* at 4-5 (emphasis in original) (quoting KRS 12.015) (R. at 1573-74). The UofL Board is thus "outside the scope of the organizational structure of the executive branch, as defined in KRS Chapter 12, and thus it is beyond the scope of [the] reorganization power of the Governor in KRS 12.028." *Id.* at 5 (R. at 1574).

The specific issue in *Galloway* was whether KRS 12.070(3), allowing the Governor to reject lists of potential appointments, applied to university boards in light of KRS 164.005(5)(a), which provides that the Governor "shall" select each gubernatorial appointment to a university board from a list of three names submitted by the

Postsecondary Education Nominating Committee. *Galloway*, 241 S.W.3d at 822. Ultimately, the Court determined it could harmonize the statutes, giving effect to both.

Galloway's holding, however, is and should be limited to KRS 12.070. *See* Ord. on Mot. to Alter, Amend, or Vacate at 3 (R. at 1572). This is particularly the case since *Galloway* merely confirms the common law. It has been the common law in Kentucky for seventy years that "when the legislature requires the Governor to make appointments from a list submitted by a nominating group, the Governor can reject a list that fails to include names suitable to the Governor." Final Judgment at 8-9 (citing *Elrod v. Willis*, 203 S.W.2d 18 (Ky. 1947); *Kentucky Ass'n of Realtors, Inc. v. Musselman*, 817 S.W.2d 213 (Ky. 1991)) (R. at 1512-13).

In contrast to *Galloway*, the issue here is not board appointments, but board removals. These are different actions that are governed by different statutes. *See Votteler v. Fields*, 23 S.W.2d 588, 589 (Ky. 1926) (noting that the power to remove is not incidental to the power to appoint). As the Trial Court found, under Governor Bevin's expansive reading of his reorganization authority, KRS 12.028 is in direct conflict with the statutes – as they existed at the time and as they exist today – governing the removal of board members, because it allows the Governor to remove university board members without any cause, findings, hearing, or process.

3. The Trial Court's ruling properly harmonized statutes and satisfied rules of statutory construction.

Incredibly, Governor Bevin argues that no trustee was "removed." Instead, the entire Board was abolished. This argument ignores reality. It is undeniable that, immediately following issuance of Executive Order 2016-338, fifteen (15) board

members were no longer trustees,[17] despite the fact that their statutory terms had not expired. They were not reappointed to the Governor's Re-created Board, even though the Re-created Board had the same duties and responsibilities as the one it replaced. Governor Bevin maintained the general structure, but terminated the people. In short, the trustees serving on the Board on June 16, 2016, were removed via KRS 12.028. This removal conflicted with limitations on removals under KRS 164.821(1)(b) and KRS 63.080(2).

If statutes conflict "it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both . . . statutes if possible." *Galloway*, 241 S.W.3d at 823 (citing *Commonwealth v. Halsell*, 934 S.W.2d 552, 555 (Ky. 1996)). The Trial Court determined that there is no conflict between KRS 12.028 and the actual board member removal statutes because the Governor's reorganization authority does not extend to the UofL Board. Ord. On Mot. to Alter, Amend, or Vacate at 5 (R. at 1574). The Trial Court thus harmonized the statutes.

The Trial Court's ruling further satisfied the "primary rule of statutory construction that [if] two statutes are in conflict, the more specific statute controls the general." *E.g., Light v. City of Louisville*, 248 S.W.3d 559, 561, 563 (Ky. 2008). Kentucky Revised Statute 12.028 never mentions public universities or UofL specifically, nor does it discuss removal of board members. Yet the Governor is using the statute to remove board members without cause and without a due process hearing. Meanwhile, KRS 164.821(1)(b) and KRS 63.080(2) specifically discuss public universities and – for

[17]Although the UofL Board consisted of seventeen (17) gubernatorial appointees under former KRS 164.821(1), there were two (2) vacancies on the Board, designated for minority appointments, at the time Governor Bevin issued Executive Order 2016-338. *See* Mot. for Temp. Inj. Ex. A (KJRC Settlement Agreement) (R. at 129-32).

KRS 164.821 – UofL specifically. Both statutes directly address board member removal and enumerate the limitations on removal. Thus, where public universities are concerned, KRS 164.821 and KRS 63.080 are more specific. Given that they directly conflict with the Governor's use of KRS 12.028, KRS 164.821 and KRS 63.080 must control. *See, e.g. Light*, 248 S.W.3d at 563 (holding that KRS 132.285, which applies specifically to cities that have elected to adopt the county assessment for purposes of levying their ad valorem tax rates, controls over KRS 132.0225, which applies generally to all taxing units).

4. The entirety of KRS Chapter 12 does not and cannot apply to public universities.

The Governor argues that because KRS 12.070 has been found to apply to universities, the rest of Chapter 12 must apply as well. A brief review of KRS Chapter 12 readily disproves this contention. The Chapter includes numerous statutes that do not and cannot apply to public universities. Under KRS 12.040, for example, the Governor appoints the heads of executive departments. Yet it is undisputed that the UofL Board – not the Governor – selects and appoints its own University President. KRS 164.830(1)(a). KRS 12.040 is just one of many statutes in Chapter 12 that show the entire chapter does not and cannot apply to public universities.[18]

In practice, even Governor Bevin agrees that not all of Chapter 12 applies to state universities. Under the section of Chapter 12 discussed in *Galloway*, KRS 12.070(1), the term "minority" includes Hispanics. But in *Kentucky Justice Resource Center v. Bevin*, Franklin Circuit No. 15-CI-1146, Governor Bevin publicly disputed the application of

[18] *See also, e.g.*, KRS 12.050 (Governor's prior written approval required for deputy department heads and directors of divisions); KRS 12.060 (Relating to statutory department heads establishing staff positions); KRS 12.270 (Authority and powers of cabinet secretaries).

this definition, instead claiming the definition of "racial minority" for university appointments is found in the 1997 Office of Management and Budget Standards, which excludes Hispanics. *See* Mot. for Temp. Inj. Ex. A (KJRC Settlement Agreement) (R. at 130-31). Thus, even Governor Bevin agrees that statutes in KRS Chapter 12 do not apply to university boards.

5. KRS Chapter 12 has no bearing on sovereign immunity.

The Governor finally suggests, for the first time in this case, that public universities must fall within the purview of KRS Chapter 12 because universities are entitled to sovereign immunity. But sovereign immunity does not depend upon an entity's position as part of the organizational structure of the executive branch. Instead, sovereign immunity largely turns on whether the entity exercises a function integral to state government. *See Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 99 (Ky. 2009). Thus, KRS Chapter 12 has no bearing on sovereign immunity.

The Trial Court correctly determined that public universities and their boards are outside the scope of KRS 12.028. This Court should affirm.

B. Even if KRS 12.028 Does Apply to Public Universities, This Court Should Affirm the Trial Court for Alternative Reasons.

Because the Trial Court ruled that the reorganization authority of KRS 12.028 does not extend to university boards, it did not address the Attorney General's constitutional and statutory challenges. These challenges provide alternative grounds for affirming.[19]

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[19] This Court is not bound by the Trial Court's analysis and "may affirm on any grounds supported by the record." *Southern Financial Life Ins. Co. v. Combs*, 413 S.W.3d 921, 926 (Ky. 2013).

1. The Governor's executive orders suspended laws in violation of Section 15 of the Kentucky Constitution.

Governor Bevin's executive orders simply ignored the provisions of KRS 164.821 and KRS 63.080. By refusing to follow these statutes, the orders unlawfully suspended them. Under the Kentucky Constitution, the power to suspend laws belongs solely to the General Assembly. Section 15 of the state constitution, entitled "***Laws to be suspended only by the General Assembly,***" provides: "No power to suspend laws shall be exercised unless by the General Assembly or its authority." KY. CONST. § 15. Because Section 15 "is a part of the Bill of Rights, the Governor could not suspend statutes even if he possessed 'emergency' or 'inherent' powers under Sections 69 and 81." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 872 (Ky. 2005) (citing KY. CONST. § 26 ("To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government... .")).

Here, the executive orders suspended provisions of KRS 164.821 establishing the number of members who served on the UofL Board, the number of members appointed by the Governor, and the mandatory terms of office they served. The executive orders also suspended provisions of KRS 164.821 and KRS 63.080 specifying the mandatory process for trustee removal, which require cause and a hearing before the Council on Postsecondary Education. Additionally, as discussed more fully herein, the orders suspended provisions of KRS Chapter 273 relating to corporate dissolution.

Moreover, as discussed below, if KRS 12.028 allows the Governor to suspend statutes, it violates the non-delegation doctrine. The Governor's executive orders

violated Kentucky Constitution Section 15. This Court should affirm the Trial Court's ruling that the orders were unlawful on this ground.

2. Governor Bevin's executive orders offended the separation of powers protected by our state constitution.

The Governor's executive orders not only ignored and suspended Kentucky law, they entirely rewrote it thereby creating new laws. By doing so, Governor Bevin invaded the legislative power of the General Assembly, violating the Kentucky Constitution's separation of powers – a separation that is among the strictest in the nation.

Section 27 of the Kentucky Constitution divides the legislative, executive, and judicial powers of the Commonwealth into three distinct branches. Section 28 then enforces the separation, directing that no branch "shall exercise any power properly belonging to either of the others, except in the instances . . . expressly directed or permitted." KY. CONST. § 28. Section 29 of the constitution vests the power to make laws solely in the General Assembly.

As recognized by this Court, "the separation of powers doctrine is fundamental to Kentucky's tripartite system of government . . . ." *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 422 (Ky. 2005). "'[P]erhaps no state forming part of the . . . United States has a constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does . . . [the Kentucky] Constitution.'" *Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280, 295 (Ky. 2013) (quoting *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922)).

With Sections 27 and 28, Kentucky's Constitution "*mandate[s]* separation among the three branches of government," and "specifically *prohibit[s]* incursion of one branch of government into the powers and function of the others. Thus, our constitution has a

double-barreled, positive-negative approach." *Id.* (quoting *Legislative Research Comm'n by and through Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984) (emphasis in original) ("*L.R.C. v. Brown*")). In short, the Commonwealth "'is a strict adherent to the separation of powers doctrine,'" *id.* (quoting *Diemer v. Commonwealth of Ky., Transp. Cab.*, 786 S.W.2d 861, 864 (Ky. 1990)), which "must be strictly construed." *Elk Horn Coal Corp.*, 163 S.W.3d at 422 (footnote and internal quotation marks omitted).

By ignoring the legislative mandates of KRS 164.821 and KRS 63.080(2) and creating an altogether different UofL Board, of a different size and with different rules than the one prescribed by statute, the Governor's executive orders usurped the power to legislate from the General Assembly. The orders further evaded the checks and balances that inhere in the tripartite system. *See United States v. Green*, 654 F.3d 637, 649 (6th Cir. 2011). Accordingly, the Governor violated Sections 27 and 28 of our Constitution.

Relying on *L.R.C. v. Brown*, 664 S.W.2d at 930, Governor Bevin argues that reorganizing administrative bodies is an executive function. However, *L.R.C. v. Brown* actually confirms that, "ultimately[,] reorganization is *legislative* in nature." *Id.* (emphasis added). The Governor has temporary reorganization authority between sessions of the General Assembly only if (1) the legislature has delegated it to him, (2) only to the extent of that delegation, and (3) only if the delegation is constitutional.

The General Assembly has never delegated reorganization authority related to universities through KRS 12.028. (*See supra*, pp. 12-16.) Indeed, the General Assembly has delegated to the Governor only restricted authority to reorganize state administrative organizations and for certain limited purposes. As described below, if KRS 12.028 were

applicable to universities, the statute violates the non-delegation doctrine and the Governor has exceeded any authority provided.

3. The Governor's interpretation of KRS 12.028 would create an unconstitutional delegation of legislative power.

The Governor claims that KRS 12.028 provides him "absolute authority" to suspend duly enacted statutes relating to any state board, and to re-write those statutes as he sees fit. The Kentucky Constitution prohibits such action. As noted above, Section 15 states: "[n]o power to suspend laws shall be exercised unless by the General Assembly or its authority." Pursuant to the non-delegation doctrine, "the General Assembly [also] cannot delegate its power to make a law." *L.R.C. v. Brown*, 664 S.W.2d at 915.

The General Assembly "can, however, establish standards for administration and delegate authority to implement a law." *Id.* To be lawful, however, such delegation cannot provide "absolute authority." To the contrary, it "must not include the exercise of discretion as to what the law shall be . . . [and] must have standards controlling the exercise of administrative discretion." *Id.*; *see also Fletcher*, 163 S.W.3d at 862.

In *Diemer,* this Court exemplified the strength of the non-delegation doctrine when it ruled that the General Assembly unlawfully abdicated its legislative power when it allowed certain decisions to be made in the "sound discretion" of the Secretary of Transportation. 786 S.W.2d at 866. Specifically, the General Assembly attempted to give the Transportation Secretary the discretion to determine whether an area was "urban" in the context of granting or denying billboard advertising permits under the Kentucky Billboard Act. *Id.* at 862. Noting the strength of Kentucky's non-delegation doctrine, the Court held that the statute was an unconstitutional delegation of legislative

power because it granted discretion without sufficiently controlling standards. *Id.* at 865-66.

Unlike the *Diemer* case, KRS 12.028 does not contain any statement by the General Assembly delegating to the Governor the broad authority to suspend active statutes, much less create new law. Moreover, Governor Bevin's use of KRS 12.028 exhibits unlimited discretion – as shown by his claim of "absolute authority" – and does not involve any standards, much less standards sufficient to satisfy the non-delegation doctrine.

While the Governor may claim that the three purposes outlined in KRS 12.028 – economy, efficiency, and improved administration – constitute such standards, they cannot be said to "control the exercise of administrative discretion" or limit the "exercise of discretion as to what the law should be." *See L.R.C. v. Brown*, 664 S.W.2d at 915. Indeed, if *Diemer* does not allow a cabinet secretary to define "urban," a governor cannot be left with the discretion to define "economy," "efficiency," and "improved administration." That delegation would provide unlimited discretion.[20]

The authority claimed by Governor Bevin is further inconsistent with legislative history, which suggests no intentional or implied delegation. The General Assembly enacted staggered six-year terms for university board members specifically to prevent any governor from being able to appoint all members and gain control over a university board. (*See supra*, pp. 2-3.) It is inconceivable that the legislature would then allow the governor to remove all board members at once, thereby nullifying their statutory terms.

[20] In interpreting a law, the Court has a duty to adopt "that construction which will save the statute from constitutional infirmity." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909).

Under Governor Bevin's view of KRS 12.028, his power to reorganize and abolish universities has no limits. He could determine university curricula, and eliminate programs such as French, English Literature, or History. He could rewrite the academic mission of a university through an executive order. These are functions of Kentucky's colleges and universities, as specifically set forth by statute. *See* KRS 165.125 (University programs (University of Kentucky)); KRS 164.295 (Programs of State and Comprehensive Universities; Advanced Practical Doctoral Programs that May be Offered); KRS 164.815 (University of Louisville; programs); KRS 164.580 (Kentucky Community and Technical College System; curricula, goals; degree programs).

Ultimately, the Governor could compromise a university's academic freedom. The Governor could even combine the University of Kentucky and UofL Boards. All this despite the plain language of statutes providing for autonomy in university governance.[21]

Thus, if the Governor is correct that KRS 12.028 authorizes his executive orders, the statute violates the non-delegation doctrine and is unconstitutional. As such, the Court should affirm the Trial Court.

4. The Governor's executive orders violated constitutional and statutory provisions that apply to the UofL Board as a result of its corporate status.

The University of Louisville is a body politic and corporate in law, created by the Kentucky legislature of 1846. *See* Complaint Ex. D ("Articles of Amendment to Charter and Articles of Incorporation of the University of Louisville A Body Politic and

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[21] *See* KRS 164.131 (Board of Trustees of University of Kentucky); KRS 164.321 (Boards of Regents of Eastern Kentucky, Morehead State, Murray State, Western Kentucky, Kentucky State, and Northern Kentucky Universities); KRS 164.600 (Boards of directors for community colleges and community and technical colleges); KRS 164.821 (Board of Trustees of University of Louisville; Membership; Terms).

Corporate," July 1, 1970) (hereinafter referred to as "Amended Charter") (R. at 37); *City of Louisville v. President & Trustees of Univ. of Louisville*, 54 Ky. 642, 15 B. Mon. 642 (Ky. 1855); *Martin v. Univ. of Louisville*, 541 F.2d 1171, 1174 (6th Cir. 1976). Likewise, this Court has recognized that university boards, including the UofL Board, are separate "bod[ies] corporate, with the usual corporate powers." *See Beshear*, 498 S.W.3d at 380 (citing KRS 164.350, KRS 164.460, KRS 164.830). UofL's Amended Charter pronounces that the Board has corporate powers and further "shall possess all the authorities, immunities, rights, privileges, and franchises usually attaching to the governing bodies of Kentucky public higher education institutions, together with those granted such corporations by Kentucky Revised Statutes, Sections 273.161 to 273.990 ... ."[22] *See* Amended Charter, Art. III, § 3 (R. at 44); *Martin*, 541 F.2d at 1174. In addition, KRS 164.830 makes the UofL Board a body corporate.

Pursuant to Section 190 of the Kentucky Constitution, the General Assembly alone "shall, by general laws only, provide for the formation, organization, and regulation of corporations." Further, under KRS Chapter 273, only the UofL Board may remove its officers, such as the university president, KRS 273.231. The Board may be involuntarily dissolved only by a decree of the Circuit Court under set criteria found in KRS 273.320.

By issuing Executive Orders 2016-338, 2016-339, and 2016-391, Governor Bevin reformed and reorganized UofL's corporate governing board in violation of Kentucky

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[22]UofL's bylaws require the membership and terms of the UofL Board to comply with the Kentucky Revised Statutes, including KRS 164.821. Specifically, the bylaws mandate:

> The government of the University shall be vested in a Board of Trustees, which shall consist of such number of persons having such voting rights, serving such terms and appointed by such means as provided in the Kentucky Revised Statutes.

Complaint Ex. E (UofL Bylaws, Article 2, Section 2.1, p. 1.) (R. at 65). Thus, in violating KRS 164.821, Governor Bevin's executive orders cause the University to violate its own bylaws.

Constitution Section 190 and KRS Chapter 273. The Court should affirm on these grounds.

5. Governor Bevin breached his constitutional duty to faithfully execute the laws.

Section 81 of Kentucky's Constitution requires the Governor to faithfully execute laws passed by the General Assembly. As set forth above, the Governor's executive orders clearly disregarded, defied, and suspended KRS 164.821, KRS 63.080(2), and provisions of KRS Chapter 273.

In *Fletcher v. Commonwealth*, this Court found that, in addition to violating Kentucky Constitution Section 15, a governor's suspension of statutes violates his duty to faithfully execute the law. 163 S.W.3d 852. The *Fletcher* Court reviewed the legality of then-Governor Ernie Fletcher's executive spending plan, the "Public Services Continuation Plan," promulgated by executive order after the General Assembly failed to enact an executive department budget bill for the 2004-06 biennium during the 2004 regular session. *Id.* at 857-58. As part of that review, the Court considered the constitutionality of the plan's suspension of 153 existing statutes. *See id.* at 858.

The Court found that Governor Fletcher's spending plan violated Section 15, as the power to suspend laws belongs to the General Assembly. *Id.* at 872. The Court also found that ***"[t]he suspension of statutes by a Governor is . . . antithetical to the constitutional duty to take care that the laws be faithfully executed[]."*** *Id.* (Emphasis added.) Accordingly, the Court held that "the suspension of any statutes by the Governor's Public Services Continuation Plan was unconstitutional and invalid *ab initio*." *Id.*

By suspending KRS 164.821 and KRS 63.080(2), the executive orders here represented a breach of Governor Bevin's duty under Section 81. The executive orders were thus unconstitutional, and this Court should affirm.

6. Governor Bevin's executive orders exceeded any authority KRS 12.028 grants him.

Even if this Court determines that the provisions of KRS 12.028 apply to UofL and do not constitute an unconstitutional delegation of legislative power, the Governor's executive orders still exceeded the authority granted to him by the statute. Under KRS 12.028, the Governor has only limited authority to reorganize government bodies for the expressly identified purposes of "economy, efficiency, and improved administration." KRS 12.028(1). These purposes are repeatedly emphasized throughout the statute. *See* KRS 12.028(1), (2), (4), and (6). Further, changes to the state organizational structure made by the Governor pursuant to KRS 12.028 are temporary. KRS 12.028(2).

Here, the Governor's actions cannot be justified in terms of the promotion of economy, efficiency, and improved administration. The record is devoid of any substantive explanation for his removal of all gubernatorial appointees from the UofL Board, his failure to provide "cause" for each member's removal, his failure provide an member a hearing,. and his changes to the Board's structure. His actions are unprecedented and violate KRS 12.028. The Court should affirm.

II. <u>This Case Is Not Moot.</u>

The Governor next contends that this case is moot as a result of the General Assembly's actions during the 2017 Regular Session. *See* Appellant's Br. at 6-16. Specifically, the Governor points to the passage of Senate Bills 12 and 107. Neither bill

mentions, much less addresses or clarifies, KRS 12.028. Therefore, neither can moot the controversy at issue. If the Court disagrees, three exceptions apply.

A. This Case is Not Moot for the Reasons Set Forth in the Attorney General's Response to the Governor's Motion to Dismiss.

The Governor's mootness arguments are identical to those made in his pending Motion to Dismiss. The Attorney General addressed each of these arguments in his Response to that motion. The Attorney General incorporates his Response by reference as if fully stated herein.

To summarize, this case is not moot because the reorganization statute at issue – KRS 12.028 – remains unchanged. Although SB 12 alters the governing statutes of the UofL Board, and SB 107 creates new removal procedures, neither bill amends, clarifies, or modifies KRS 12.028. Moreover, they do not reference, ratify, or adopt the executive orders under KRS 12.028 that created this litigation. Without a decision, the Governor could therefore issue new executive orders tomorrow reorganizing a public university board, or even a university's academic or administrative departments under KRS 12.028.

Further, even if this Court were to find that despite the failure of SB 12 and SB 107 to address KRS 12.028 the legislation somehow mooted this controversy, the recognized exceptions to the mootness doctrine apply. First, this case is capable of repetition, yet evading review. *See Commonwealth v. Terrell*, 464 S.W.3d 495, 499 (Ky. 2015). Because the General Assembly meets annually, there will never be more than nine months between a governor's reorganization and the next legislative session. *See* KRS 12.028(5). Given the time it takes to litigate a case through appeal, a governor's actions under KRS 12.028 are too short in duration to be litigated before expiration. Additionally, given that Governor Bevin has claimed "absolute authority" to abolish,

recreate, and restructure university governing boards, there is a reasonable expectation that he will repeat his actions.

Second, the merits of the instant dispute present "questions of substantial public interest." *See Morgan v. Getter*, 441 S.W.3d 94, 102 (Ky. 2014). These questions relate to the Governor's authority – or lack thereof – over all of the Commonwealth's public universities. Additionally, "[i]t is certainly in the interest of all the people that there be *no* unconstitutional or illegal governmental conduct." *Beshear*, 498 S.W.3d at 363 (internal quotation marks omitted) (emphasis in original). A determination of the issues here is necessary to provide guidance to public officials ranging from the Governor to university officials, especially given the Governor's extensive use of KRS 12.028 during his term of office showing a high likelihood of recurrence.

Finally, the "collateral consequences" exception to the mootness doctrine applies. *See Morgan*, 441 S.W.3d at 99. As noted, SACS placed UofL's accreditation on probation for a period of twelve (12) months. Given that Governor Bevin's use of KRS 12.028 caused these accreditation concerns, a ruling that the reorganization statute does not apply to public universities is necessary. Such a ruling would satisfy the majority of SACS's concerns that the executive orders created and restore UofL's compliance with accreditation standards.

As long as KRS 12.028 remains in question, the risk to UofL's accreditation – and the accreditation of all of the Commonwealth's public universities – remains. It is, in essence, a collateral consequence of the executive orders.

B. Senate Bill 107 Did Not Displace KRS 12.028.

While the Attorney General incorporates his Response, it did not fully address SB 107, which General Assembly had not yet passed. With SB 107, the General Assembly amended KRS 63.080 to add new procedures for the removal of university board members in a variety of circumstances. Most relevant to the instant litigation, SB 107 provides a process for the Governor to remove ***for cause*** and replace all appointed members of a university board. *See* SB 107, § 1(4).

Governor Bevin argues that, "[i]n the future, any governor who desires to remedy a dysfunctional university board will *most likely* use the provisions of Senate Bill 107 because it provides a simple mechanism for the removal [of] an entire board," rather than using KRS 12.028, which "requires the more complex action of abolishing and re-creating a board with a new structure." Appellant's Br. at 8 (emphasis added). The Governor concedes, however, that he or a future governor could still attempt to reorganize a university board, given that SB 107 does not alter or clarify KRS 12.028. *Id.* at 8-9.

The Governor's argument must fail, because he has already proven he will use KRS 12.028 to circumvent any process he does not want to follow. At the time of his executive orders, a process existed under KRS 63.080 and KRS 164.821 whereby a governor could remove board members for cause. Those statutes required the Governor to provide specific reasons or cause for removal, which the board member could contest at an evidentiary hearing. KRS 164.821(1)(b); KRS 63.080(2). The Governor ignored those procedures, issuing executive orders citing KRS 12.028.

Senate Bill 107 attempts to replace the older process with a new one. Under SB 107, in order to remove for cause all appointed members of a university board: (1) the

Governor must notify the board and the Council on Postsecondary Education that the entire appointed board membership should be removed for specified conduct; (2) the board then has seven (7) days to resign or provide evidence to the Council that its conduct does not warrant removal; (3) within thirty (30) days of receipt of the Governor's notice, the Council must review, investigate, and make a nonbinding recommendation to the Governor in writing regarding whether the appointed board membership should be removed; (4) the Governor must then determine, in writing, whether he will remove all appointed board members; and (5) if the Governor determines to remove all appointed board members, he must do so by executive order and replace the members with new appointments under the procedures outlined in the applicable board statutes. SB 107, § 1(4). But given that the Governor used KRS 12.028 to avoid the old process – *i.e.*, providing cause or any hearings under KRS 63.080 and 164.821 – he can and will use KRS 12.028 to avoid the new process, which arguably requires more work than the process it replaced. Nothing prohibits future governors from doing the same.

Moreover, the process under SB 107 is not "simpler" than the alleged reorganization power of KRS 12.028. As noted above, SB 107 creates a new process for removing board members. On the other hand, KRS 12.028 does not require any process whatsoever. It does not require a finding of "dysfunction," nor does it require findings to be reviewed by any other board. In other words, it provides the simplest method that any governor can use to remove an entire university board, without explanation. Indeed, on the date this brief was filed, the Governor, citing KRS 12.028, has abolished or altered

several education-related boards.[23] The statutorily-mandated structure for each board has been suspended, and the status of serving members is uncertain.

Senate Bill 107 also concerns the *removal* of board members. But in this case, Governor Bevin repeatedly has stressed that he did not "remove" members, but rather "abolished" the entire Board. *See, e.g.,* Gov.'s Trial Br. at 10 n. 3, 12 n. 4, and 14-15 (R. at 1197, 1199, 1201-02); Resp. to Mot. for Temp. Inj. at 15-16 (R. at 220-21); Appellant's Br. at 33. By his own logic, SB 107 does not address the question of whether there is an entirely separate power under KRS 12.028 to abolish and recreate a university board.

Finally, the Governor's executive orders in this case not only removed and replaced all members, they also changed the very structure of the board. Senate Bill 107 does not allow such a restructuring. Thus, it is reasonable to believe that this or a future governor will use KRS 12.028 if he or she wants to alter the structure of a university board, adding or subtracting members in contravention of legislative intent.

C. Remand for Dismissal is Not Appropriate.

This Court should look with particular skepticism at the Governor's representation that neither he nor a future governor is "likely" to use KRS 12.028 to reorganize a public university board in the future. The Governor makes this representation at the same time he requests that the Court not only dismiss this appeal as moot, but also remand to the Trial Court with instructions to dismiss without prejudice.

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[23] *See* EO 2017-334. Additionally, as set forth in the Affidavit of La Tasha Buckner attached to the Attorney General's response to a motion to dismiss in the matter of *Elliott v. Bevin*, Franklin Circuit No. 16-CI-656, documents distributed to staff and/or members of various independent regulatory boards indicate that Governor Bevin intends to use KRS 12.028 to "reorganize" thirty-nine (39) boards in the near future. *See* Affidavit ¶ 6, Ex. A to Response to Motion to Dismiss (attached hereto as Exhibit C). The Attorney General asks the Court to take judicial notice of the Affidavit.

To read the Governor's brief, one would assume it is the Court's usual practice to remand for dismissal without prejudice whenever it deems a case moot. In truth, this relief is the exception, not the rule.

This Court professed as much in *Kentucky Board of Nursing v. Sullivan University System, Inc.,* 433 S.W.3d 341 (Ky. 2014). Specifically, the Court stated, "At the outset, we acknowledge that our decision to vacate the rulings of the lower courts is unusual. Typically, upon a finding that a civil case has become moot on its way to this Court or while pending our decision on the merits, our approach has been to simply dismiss the case with no consideration of the judgment pronounced by the circuit court below." *Id.* at 344, n. 1 (internal citations omitted). The *Sullivan* Court explained that it deviated from its typical practice and vacated the lower courts' rulings "to prevent them from spawning any undesired legal consequences." *Id.* at 344. Here, however, if the Governor is correct that SB 107 "effectively displaces" KRS 12.028, then there is little concern about any undesired legal consequences flowing from allowing the Trial Court's Final Judgment to stand.[24]

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[24] Like *Sullivan,* other Kentucky cases the Governor cites in support of his argument for remand are fact-specific. In *Jones v. Conner,* 915 S.W.2d 756, 757 (Ky. App. 1996), the parties settled after the Court of Appeals issued its opinion, later asking the appellate court to withdraw its opinion, dismiss the appeal, and remand the case to the trial court for entry of an order consistent with the parties' agreed settlement. The Court of Appeals found the request appropriate because the case did not "establish or further refine precedents of importance to the body of the law." *See id.* The same cannot be said here.

Board of Education of Berea v. Muncy, 239 S.W.2d 471 (Ky. 1951), also involved a case that resolved itself on appeal. In *Muncy,* two teachers sued after their contracts were suspended, and the trial court declared that the school board was justified in reducing its teaching staff, but the board could not dispense with the services of the particular teachers it terminated; the trial court ordered the teachers reinstated and declared the order of seniority of all members of the school faculty. *Id.* at 472-73. While the appeal was pending, the board reinstated both teachers and otherwise resolved the dispute. *Id.* at 473. The Court of Appeals found it "necessary or proper under the circumstances" to direct the dismissal of the case in the trial court, namely because the trial court's declaration affected the rights of teachers not directly implicated by the school board's actions. *Id.* at 473-74. Here, the parties have not resolved their dispute, and there are no such facts counseling in favor of remand.

In sum, SB 107 does not alter the mootness analysis. The recent legislation does not affect the reorganization statute at issue. Further, even if the appeal is moot, the "capable of repetition, yet evading review," "public interest," and "collateral consequences" exceptions apply. This Court should therefore reach the merits of KRS 12.028's application to the Commonwealth's universities.

III. <u>The Attorney General Does Not Have A Conflict of Interest.</u>

Finally, the Governor claims that the Attorney General has a conflict of interest. He bases this argument on a ***footnote*** from an opinion from a prior Attorney General. The footnote addresses a hypothetical and what it terms as a "novel" approach. The Governor argues this footnote somehow disqualifies the new Attorney General from challenging the Governor's unlawful executive orders. The Governor has forfeited this argument, failing to fully pursue the claim below. The claim further fails on the merits.

A. Governor Bevin Abandoned His Disqualification Claim.

On July 7, 2016, Governor Bevin filed a motion to disqualify the Attorney General and his Office from suing the Governor in the instant lawsuit. (R. at 179-188). The Trial Court conducted a hearing on the motion and other matters on July 21, 2016, denying the motion four (4) days later. *See* Ord. Denying Mot. to Disqualify (July 25, 2016) (R. at 580). At that hearing, the Trial Court asked whether the Governor sought an evidentiary hearing pursuant to *Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015). *See* Ord. Denying Mot. to Disqualify at 1 (R. at 580). The Governor – through counsel – responded "no." *See id.* As such, he did not build an evidentiary record establishing either his reliance or any other element necessary for disqualification.

In *Marcum*, this Court set forth the standard for reviewing motions for disqualification. According to the Court, "in deciding disqualification questions, trial

courts should apply the standard that is currently in the Rules of Professional Conduct, which at this time requires a showing of an actual conflict of interest." 457 S.W.3d at 718. "To resolve that question, the trial court ***must*** hold an evidentiary hearing." *Id.* (emphasis added). Where a party abandons its motion by refusing to participate in the required evidentiary hearing, it cannot revive the matter on appeal. *See Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998).

By failing to seek the requisite evidentiary hearing, the Governor waived his claim.

B. The Disqualification Claim Fails on the Merits.

The Governor's claim also fails on its merits. The Governor contends – without any factual evidence – that the current Attorney General should be disqualified because the Governor allegedly followed the advice of Attorney General Jack Conway in reorganizing the UofL Board. Specifically, counsel for the Governor argues that he relied on a footnote in *In re Rev. Clay Calloway, et al.*, OAG 15-015 (Sept. 29, 2015). The Trial Court swiftly rejected this argument. It is uncontested that, in reality, the Governor disagreed with and refused to abide by OAG 15-015, and nothing in the record shows he relied on it.

1. There was no attorney-client relationship.

There is no conflict of interest because there was no attorney-client relationship. OAG 15-015 was not written to this Governor, nor was it addressed to the governor in office at that time. Instead, it was issued upon the request of and directed specifically to Rev. Clay Calloway, West Louisville Ministers Coalition, and Rev. Milton Seymore, Justice Resource Center. The opinion was rendered on September 29, 2015, before

Governor Bevin's election. Given that the opinion was not provided to any governor – much less this one – there is no attorney-client relationship.

Further, there has been no prior representation of the Governor concerning this matter. As the Trial Court recognized, Governor Bevin never asked the Attorney General to represent, advise, or counsel him regarding his decision to issue three (3) illegal executive orders purporting to reorganize the UofL Board. *See* Ord. Denying Mot. to Disqualify at 2 (R. at 581).

2. Because of the Attorney General's duty to the people, he is not barred from challenging the Governor's executive orders.

Even if there had been prior representation, numerous decisions hold that the Attorney General is not comparable to a private attorney and has an unwaivable duty to defend the public interest.

In *Beshear*, the Court recognized that "[t]he source of authority of the Attorney General is the people who establish the government, and his primary obligation is to the people." 498 S.W.3d at 363 (quoting *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1974)). As such, "the Attorney General was empowered under the common law to bring any action thought 'necessary to protect the public interest.'" *Id.* at 362 (quoting *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009)). Accordingly, "the Attorney General has not only the power to bring suit when he believes the public's legal or constitutional interests are under threat, but appears to have even the duty to do so." *Id.* (citation omitted).

In *Beshear*, this Court explained that the Attorney General must represent the public interest even when doing so appears to conflict with his duties to state agencies:

> Our predecessor court made clear that KRS § 15.020, "in stating at the outset that the Attorney General is 'the chief law officer of the Commonwealth,' intends that in case of a conflict of duties the Attorney General's primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies."

Id. at 363 (quoting *Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974)). In fact, *Paxton* holds that a suit by the Attorney General seeking to enforce the Constitution against a state officer poses no conflict.[25] 516 S.W.2d at 868 ("We do not conceive that a suit brought by the Attorney General against a state officer, department, or agency, seeking to uphold the Constitution, is a suit against the Commonwealth in the sense of being a breach of the Attorney General's duty to represent the Commonwealth.").

In *Paxton*, "the Court held that the Attorney General's 'constitutional, statutory and common law powers include the power to initiate a suit questioning the constitutionality of a statute[.]'" *Beshear*, 498 S.W.3d at 363 (quoting *Paxton*, 516 S.W.2d at 868). *Beshear* extended *Paxton*'s holding, finding that "[i]f the Attorney General has the power to initiate a suit questioning the constitutionality of a statute, he must also have the power to initiate a suit questioning the constitutionality or legality of an executive action," including actions by the Governor. *Id.* at 366 ("[T]he Attorney General, as chief law officer of Kentucky, has broad authority to sue for declaratory and injunctive relief against state actors, including the Governor, whose actions the Attorney General believes lack legal authority or are unconstitutional.").

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[25] More recent cases from outside the jurisdiction are in line with *Paxton*. *See South Carolina ex rel. Condon v. Hodges*, 562 S.E.2d 623, 626-28 (S.C. 2002) (finding no conflict of interest where the Attorney General sued the Governor for diverting funds appropriated to public universities while simultaneously representing the Governor in other matters); *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1204 (Me. 1989) (holding that the Attorney General was not disqualified from representing the public interest in a suit against a state agency, even where the Attorney General's staff had provided representation to that agency during related administrative proceedings).

Significantly, *Beshear* also found a duty for "the Attorney General to protect 'the interest of all the people' when unconstitutional or unlawful conduct is claimed *either by or toward ... [public] universities*." *Id.* at 364 (internal quotation omitted) (emphasis added). Thus, under *Beshear* and its predecessors, the Attorney General's primary obligation is to the people. As such, he has the power and the duty to bring suit against illegal executive actions and specifically, actions directed at public universities.

In support of his argument for disqualification, the Governor cites *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981). In *Deukmejian*, the California Attorney General provided advice to his Governor in 1977. *Id.* at 1207. In 1979, a different Attorney General sued the same Governor for actions taken in reliance on that advice. *See id.*

Here, we have two different Governors. More importantly, no attorney-client relationship was established. Further, *Deukmejian* turns ultimately on peculiarities present in California law that are not present in the Commonwealth. *See Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1203-04 (Me. 1989). In fact, *Deukmejian* directly recognizes and acknowledges differences with Kentucky law, distinguishing itself from *Paxton*. *Deukmejian*, 624 P.2d at 1209-1210.

The Governor also claims that the Kentucky Rules of Professional Conduct bar the Attorney General from suing. But an attorney currently serving as a public officer or employee is governed by different conflict of interest rules than those governing private attorneys. *See Superintendent of Insurance*, 558 A.2d 1197 (holding that the Attorney General and his staff are not the equivalent of a private law firm under the ABA); *Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977) (noting that the relationship of the

Attorney General to state officers he may represent is not constrained by the usual parameters of the attorney-client relationship). As stated by the Trial Court, "The Attorney General owes a duty of loyalty to the citizens of Kentucky, and he does not serve in the same capacity as private legal counsel to the Governor or any other state official." Ord. Denying Mot. to Disqualify at 5 (R. at 584). Thus, even if prosecuting the instant lawsuit *might* present a conflict of interest for a private attorney, it presents no conflict here.

Indeed, comments to the Kentucky Rules of Professional Conduct demonstrate that no conflict not exists. Paragraph XIX of the Preamble and Scope provides, in relevant part, "[L]awyers under the supervision of [the state] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple clients. These rules do not abrogate any such authority." SCR 3.130, Preamble and Scope, ¶ XIX. Likewise, Comment 9 to Rule 1.13 recognizes: "Defining precisely the identity of the client and prescribing the resulting obligations of [public] lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules." SCR 3.130 (1.13, cmt. 9). The same comment also explicitly states that it does not limit duties of government attorneys as defined by statute. *Id.* One such statute is KRS 15.020, which grants the Attorney General and his designees various authorities, including the authority to file the instant action.

In short, the Rules of Professional Conduct recognize that the conflict provisions applicable to private attorneys do not necessarily translate in the government realm. This is particularly the case for the Attorney General and the lawyers he oversees, as they are

tasked with representing state officers, state agencies, *and* the public interest. Accordingly, the rules do not prohibit the Attorney General from pursuing this case.

3. The Governor did not rely on OAG 15-015 in reorganizing the UofL Board.

Further, no conflict of interest exists because the Governor did not actually rely on OAG 15-015. OAG 15-015 provided advice to Rev. Calloway on whether the UofL Board's minority presence was in balance. And Governor Bevin refused to follow OAG 15-015.

The case and controversy in OAG 15-015 resulted in litigation in the *Kentucky Justice Resource Center* case, in which Governor Bevin directly participated. In his court filings in that case, the Governor disagreed with both of OAG 15-015's major holdings. Specifically, he stated that (1) the opinion incorrectly calculated the required number of minorities on the Board, and (2) it wrongly found that a Hispanic person meets the definition of a racial minority. *See* Resp. to Mot. to Disqualify Ex. A (KJRC Answer to Amended Complaint at ¶ 39) (R. at 397). The Governor openly – and through official positions in court documents – argued that OAG 15-015 was wrong. He cannot now claim he was relying on advice from one of its footnotes.

Furthermore, Governor Bevin did not abolish the UofL Board to correct any deficiencies in its make-up – despite representations to that effect made *after* his action. Indeed, the racial make-up of the board had been resolved in a settlement agreement in the *Kentucky Justice Resource Center* litigation. (*See* Mot. for Temp. Inj. Ex. A) (KJRC Settlement Agreement) (R. at 129-32). Instead, Governor Bevin's orders made only general allegations of Board "dysfunction." Complaint Ex. A (EO 2016-338) at 2 (R. at

27). Nowhere in the record is any evidence that the Governor relied upon the advice given to Rev. Calloway in OAG 15-015.

4. Even if the Governor did rely on a footnote, his reliance was not reasonable.

Even if the Governor had (1) originally followed – and not openly opposed – OAG 15-015, and then (2) had cited to OAG 15-015 in his executive orders, he still could not reasonably have relied on the footnote. The footnote is dicta that refers to "novel corrective action" the Governor "could possibly take." The Trial Court simply refused to accept the Governor's argument that an "attorney-client relationship was created by a footnote in an opinion of a different Attorney General, who in *dicta* contained in a non-binding opinion letter to a third party, observed that a 'novel corrective action' to racial imbalance on the Board 'could possibly' be addressed by 'an executive reorganization.'" *See also* Ord. Denying Mot. to Disqualify at 3-4 (R. at 582-83).

Finally, the Trial Court correctly ruled that one Attorney General is not bound for conflict purposes by an opinion of a predecessor:

> Even if OAG 15-015 had definitively stated that the Governor could use the reorganization power of KRS 12.028 to reorganize the University of Louisville Board, the current Attorney General would not be bound by that opinion. OAG 15-015 was written by the previous Attorney General's Office. For that reason, the current Attorney General is not bound by it. In *Commonwealth v. Chestnut*, ... the Kentucky Supreme Court stated that "[t]he Attorney General was permitted to reexamine – and even reject – its former interpretation of the law." *Id.* at 663. It has long been recognized in the field of public administration that "the failure of a public officer to correctly administer the law does not prevent a more diligent and efficient public administrator" from changing a prior policy. *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet,* 689 S.W.2d 14, 20 (Ky. 1985). ... Under these well-established principles, if the incumbent Attorney General believes in good faith that the prior Attorney General's opinion is erroneous, or has been misapplied, he has both the right, and the duty, to challenge the action of the Governor, even when the Governor claims reliance on the prior opinion.

Id. at 4-5 (R. at 583-84).

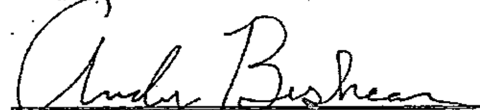
For all of these reasons, the Governor's argument is without merit. This Court should affirm the Trial Court's denial of Governor Bevin's motion to disqualify.

CONCLUSION

The Trial Court correctly held that Governor Bevin's executive orders were unlawful. Affirming that decision is necessary. This case is not moot, as the Governor's conduct can be and indeed is being repeated. A ruling on the limits of KRS 12.028 is necessary to restore confidence for UofL, its accrediting agency, and the public at large. Without such a ruling, the Governor will have direct control over each of Kentucky's public universities, with the power to simply ignore controlling statutes and threaten reorganization to establish dominance. The Attorney General respectfully asks the Court to affirm the Franklin Circuit Court's September 28, 2016 Final Judgment.

Respectfully submitted,

Dated: June 2, 2017



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