COMMONWEALTH OF KENTUCKY
SUPREME COURT
Case Nos. 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**

BRIEF OF APPELLANT GOVERNOR MATTHEW G. BEVIN

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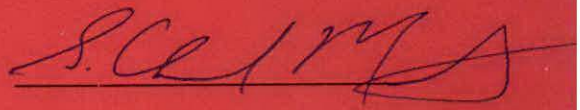
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served via First Class Mail and electronic mail upon the following on April 3, 2017: Andy Beshear, La Tasha Buckner, and S. Travis Mayo, 700 Capitol Ave., Ste. 118, Frankfort, KY 40601. I further certify that the record has not been removed from the Clerk's Office.



INTRODUCTION

This case originally concerned the Governor's authority to reorganize a state university board pursuant to KRS 12.028. However, because the case has become moot, the appeal should be dismissed and the Court should simultaneously vacate the circuit court's injunction and remand the case with instructions to dismiss as moot.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant requests oral argument to the extent the Court believes it might be helpful.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The struggles and setbacks in recent years at the University of Louisville are so well documented and widely known that there is scarcely a need to recount them all here. Among other problems, there have been multiple instances of embezzlement by faculty and staff, there was a widely publicized incident involving prostitution and recruits of the men's basketball team, and—in 2015 and 2016—there were instances of the Trustees openly bickering with each other and the then-president.[1]

On top of all this, the University of Louisville Board of Trustees (the "Board") was illegally constituted, with only one racial minority member and one registered Republican member when the law required that there be at least three racial minority members and seven registered Republicans. Significantly, in the fall of 2015, then-Attorney General Jack Conway issued an official Attorney General's Opinion stating that the Governor could resolve the racial imbalance of the University of Louisville Board of Trustees (and, implicity, the political party imbalance as well) by reorganizing the Board pursuant to KRS 12.028. *See* OAG 15-015.

Against this backdrop, the Governor determined that the Board needed a fresh start. Because the existing Board was failing to provide the leadership that the school so desperately needed, the Governor deemed it dysfunctional and decided to provide it with a fresh start by doing precisely what the Attorney General's Office had suggested a few short months before—*i.e.*, by reorganizing the University of

[1] *See, e.g.*, Deborah Yetter, "U of L Scandals Under James Ramsey: A Timeline," *The Courier-Journal* (June 29, 2016), available at http://www.courier-journal.com/story/news/politics/2016/06/17/u-l-scandals-under-james-ramsey-timeline/86035838/; Joe Sonka, "U of L President James Ramsey Escapes a Blocked No-confidence Vote by Board of Trustees," *Insider Louisville* (Mar. 1, 2016), available at http://insiderlouisville.com/metro/education-community/uofl-president-james-ramsey-escapes-a-blocked-no-confidence-vote-by-board-of-trustees/.

Louisville Board of Trustees pursuant to KRS 12.028. Thus, on June 17, 2016, in reliance on the Attorney General Office's legal advice, as well as KRS 12.028 itself, the Governor issued Executive Order 2016-338 (attached as Appendix 4), which abolished the then-existing University of Louisville Board of Trustees and directed the Postsecondary Education Nominating Commission to provide nominees for a new permanent Board, which would have 13 members (10 gubernatorial appointees and three institutional appointees, *i.e.*, representatives of the University's faculty, staff, and student body) instead of the previous 20 (17 gubernatorial appointees and three institutional appointees).[2]

Several of the reasons for the Governor's decision to reorganize the Board were expressly spelled out in Executive Order 2016-338. To summarize, the Governor believed, *inter alia,* that: the University had recently been involved in several high-profile incidents that had cast it in a negative light; the University's administration and Board had become operationally dysfunctional; the Board had become irreparably fractured and broken; a strained relationship existed between certain trustees and the University administration that was seriously damaging the institution in several specified ways that reflected negatively upon both it and the Commonwealth as a whole; the Board had acted in a manner manifesting a lack of transparency and professionalism; and, absent action, the reputation of the University was at risk.

Shortly after the issuance of this Executive Order, the Attorney General filed this lawsuit seeking to temporarily and permanently enjoin the reorganization. The

[2] As discussed later, KRS 12.028(1) authorizes the Governor to propose to the General Assembly the reorganization of agencies and boards. KRS 12.028(2) authorizes the Governor to put the proposed reorganization into effect immediately, pending subsequent legislative approval.

sole issue in the Attorney General's lawsuit was whether the Governor had authority under KRS 12.028 to cure the dysfunctionality of the Board by reorganizing it. The circuit court answered this question in the negative. [*See* Final Judgment Granting Declaratory and Injunctive Relief (Sept. 28, 2016), Record ("R.") at 1505-21 (attached as Appendix 1); *see also* Order Denying Defendant's Motion to Alter, Amend, or Vacate Judgment (Oct. 21, 2016), 1570-80 (Attached as Appendix 2)]. The Governor appealed that decision, and, on the Attorney General's Motion, this Court accepted transfer of the case on January 9, 2017.

In the meantime, however, the case became moot. On Saturday, January 7, 2017, the General Assembly passed Senate Bill 12, which abolished the former University of Louisville Board of Trustees and created a new Board. *See* SB 12, 2017 Reg. Sess. (Ky. 2017). While Senate Bill 12 is similar to the Governor's executive order in some respects, it is not identical. Among other things, Senate Bill 12 reduced the total size of the Board from 20 to 13, reduced the number of gubernatorial appointees from 17 to 10, required—for the first time—that Board members be confirmed by the Senate, and boosted the proportion of racial minority members on the Board by requiring the proportional share of racial minority members to be rounded up to the next whole number. *See id.* The Governor immediately signed Senate Bill 12 and appointed a new Board shortly thereafter.

Concurrent with the enactment of Senate Bill 12, Senate Bill 107 was introduced by Senate President Robert Stivers essentially as a companion bill. Senate Bill 107 clarifies and delineates with more specificity the circumstances under which a governor can disband and re-constitute a dysfunctional university board. *See* SB

107, 2017 Reg. Sess. (Ky. 2017). Specifically, Senate Bill 107 permits the Governor to disband and re-constitute a university board if it "is no longer functioning according to its statutory mandate as specified in the enabling statutes applicable to the board, or if the board membership's conduct as a whole constitutes malfeasance, misfeasance, incompetence, or gross neglect of duty, such that the conduct cannot be attributed to any single member or members." *Id.* at § 1(4). It further specifies that a university board is not functioning according to its statutory mandate when it "fails to hold regular meetings, to elect a chairperson annually, to establish a quorum, to adopt an annual budget, to set tuition rates, to conduct an annual evaluation of the president of the university, or to carry out its primary function to periodically evaluate the institution's progress in implementing its mission, goals, and objectives to conform to the strategic agenda." *Id.* at § 4(9), § 8(8). It also provides that individual members of a university board can be removed without cause when their appointment was not in compliance with statutory requirements. *See id.* at § 1(3).

Senate Bill 107 passed both chambers of the General Assembly on March 15, 2017, and then was signed into law by the Governor on March 21, 2017. Because Senate Bill 107 contained an emergency clause, it went into effect immediately upon being signed by the Governor. Thus, it is now the law of Kentucky and provides the mechanism by which a governor can disband and reconstitute an entire university board that has become dysfunctional.

In light of the enactment of Senate Bill 12—and in anticipation of the enactment of Senate Bill 107—the Governor moved to dismiss this appeal as moot on January 13, 2017. That Motion has not been ruled upon. Instead, the Court

postponed the deadline for the Governor's brief and ordered that the mootness issue be considered at the same time as the merits.

ARGUMENT

The trials and tribulations of the University of Louisville Board of Trustees provide the backdrop for this case, but the case is not really about the University or its Board. It never really has been. It was initially about whether the Governor has authority under KRS 12.028 to reorganize state university boards. But now it is about whether the circuit court's permanent injunction should be vacated and the case remanded for dismissal due to the fact that the case is moot. There can be no credible dispute of the fact that this case is moot. And there are no applicable exceptions to the mootness doctrine that would permit this case to continue. Given these circumstances, the only thing left to do—if the doctrine of mootness is to continue as a recognized concept under Kentucky law—is to vacate the circuit court's injunction and remand the case for dismissal as moot.

Alternatively, if the Court were to address the merits of this matter—and it should not do so because it would be rendering an impermissible advisory opinion—it should reverse the circuit court's decision for two reasons. First, the Attorney General should not have been permitted to proceed with this case because he has a conflict of interest that should disqualify his office from litigating it. Second, the circuit court's ruling on the merits was incorrect. The Governor had authority under KRS 12.028 to temporarily reorganize the University of Louisville Board of Trustees. These issues were raised and preserved in the Governor's trial court briefs and Motion to Disqualify the Attorney General's Office. [*See* R. 179, 1188, 1487].

I. Because this case is moot, the Court should dismiss the appeal and simultaneously vacate the permanent injunction and remand the case with instructions to dismiss.

This Court lacks jurisdiction over—and therefore must dismiss—moot cases. *See Ky. Bd. of Nursing v. Sullivan Univ. Sys., Inc.*, 433 S.W.3d 341, 344 (Ky. 2014). The doctrine of mootness goes to the very heart of one of the most fundamental concepts of our system of government: the separation of powers among three co-equal branches. Courts are to exercise restraint lest they enter into the realm of policymaking, which is the domain of the legislature. Thus, Courts exist to decide actual, existing controversies, not to issue free-ranging advisory opinions in instances when there are no live cases or controversies. The doctrine of mootness is an important jurisdictional bulwark that assists in the maintenance of the ever-important separation of powers.

A case becomes moot when there is "a change in circumstances 'which vitiates the underlying viability of the action.'" *Commonwealth v. Terrell*, 464 S.W.3d 495, 498 (Ky. 2015) (quoting *Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994)). "In such an action, a judgment . . . cannot have any practical legal effect upon a *then* existing controversy." *Id.* at 498-99 (quoting *Benton v. Clay*, 497 S.W. 1041, 1042 (Ky. 1921)). Instead, a judgment in such a case would amount to nothing more than a purely advisory opinion, which this Court is not authorized to give. *See id.* at 499. This Court exists to determine actual, existing cases and controversies, not to "settle 'arguments or differences of opinion.'" *Id.* Thus, cases must be dismissed once they become moot. *See Terrell*, 464 S.W.3d at 499; *Sullivan Univ. Sys., Inc.*, 433 S.W.3d at 344.

No case fits within the definition of mootness better than this one. With regard to the merits of the case, the issue is whether the Governor's executive order temporarily reorganizing the University of Louisville Board of Trustees was a valid use of his reorganization power under KRS 12.028. Following the enactment of Senate Bill 12, this issue is now purely academic; its resolution would have no practical legal effect and would be nothing more than the settlement of an argument or difference of opinion. Nothing that the Court might say about the legality of the executive order at issue here will make any difference because that order has been superseded by Senate Bill 12. In other words, it makes no practical difference whatsoever whether the Court rules that the Governor's executive order was lawful or unlawful because the enactment of Senate Bill 12 means that there is no longer any possibility that the executive order could be given any legal effect even if its legality were retroactively upheld. Thus, an opinion from the Court on this issue would be nothing more than an advisory opinion that simply settles an argument or difference of opinion rather than an existing case or controversy. As a result, this appeal should be dismissed. "The general rule is, and has long been, that 'where, pending an appeal, an event occurs which makes a determination of the question unnecessary or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed." *Morgan v. Getter*, 441 S.W.3d 94, 99 (Ky. 2014) (quoting *Louisville Transit Co. v. Dep't of Motor Transp.*, 286 S.W.2d 536, 538 (Ky. 1956)).

A. None of the exceptions to the mootness doctrine apply.

It is true that there are exceptions to the mootness doctrine. This Court has allowed cases to proceed when, although moot, they are "capable of repetition, yet

evading review," or when they concern a "question [that] is of public interest." *Id.* at 100 (quotations omitted, alteration in original). Those exceptions, however, do not apply in this case.

1. The exception for cases that are "capable of repetition, yet evading review" does not apply.

The exception for cases that are "capable of repetition, yet evading review" is "to be used sparingly." *Riley v. Gibson*, 338 S.W.3d 230, 233 (Ky. 2011). It can only be applied when: "(1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again." *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992) (quotations omitted). These conditions are not present here.

The most obvious obstacle to applying the "capable of repetition, yet evading review exception" is the enactment of Senate Bill 107. This recently enacted statute now provides the mechanism by which governors can remedy a dysfunctional board by disbanding it and creating a new one. In 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 an entire board, whereas KRS 12.028 requires the more complex action of abolishing and re-creating a board with a new structure. In other words, Senate Bill 107 effectively displaces KRS 12.028 when it comes to remedying a dysfunctional university board.

Of course, it is still metaphysically possibly that a governor could reorganize a university board pursuant to KRS 12.028. Senate Bill 107 does not exempt university boards from KRS 12.028, nor does it conflict with KRS 12.028. By its own terms,

Senate Bill 107 permits the *removal* of all members of a university board, whereas KRS 12.028 permits the abolition and re-creation of a university. As explained below in Part III.B., there is a difference between removing board members and reorganizing a board pursuant to KRS 12.028 by abolishing and re-creating it. But the fact that KRS 12.028 theoretically remains available for use on university boards does not mean that this case fits within the mootness exception for cases that are capable of repetition, yet evading review. The availability of that exception hinges not upon some theoretical possibility that the same situation might arise again, but upon a "reasonable expectation" that it will. *Philpot*, 837 S.W.2d at 493.

In this case, there is—to say the least—no legitimate expectation that this situation will arise again. In other words, there is no reasonable prospect that Governor Bevin, or some future governor, will try to remedy a dysfunctional university board by temporarily reorganizing it pursuant to KRS 12.028. Because Senate Bill 107 now expressly provides a mechanism for removing an entire university board that has become dysfunction, it appears much more likely that a governor will remedy a dysfunctional university board through the provisions of Senate Bill 107 than by reorganizing it under KRS 12.028. Indeed, it appears implausible that a governor in the future would attempt to remedy a dysfunctional university board through a KRS 12.028 reorganization. The mere fact that it remains theoretically possible for a future governor to attempt to reorganize a university board under KRS 12.028 does not provide a basis for applying the "capable of repetition, yet evading review" exception. This point is most clearly illustrated by this Court's decision in *Philpot v. Patton*.

In *Philpot*, two state senators challenged the constitutionality of a Senate Rule. *Philpot*, 837 S.W.2d at 491-92. Before the case could be heard by this Court, the legislative session ended. *See id.* at 492. The threshold issue addressed by this Court, then, was whether the case should be dismissed as moot. *See id.* The plaintiff state senators argued that while the case was indeed moot due to the fact that the Senate Rules ceased to exist at the moment of the legislature's adjournment, it should continue under the exception for cases that are capable of repetition, yet evading review. *See id.* at 493. This Court rejected that argument even though the Senate Rule at issue had been adopted "at every session for many years," *id.*, and there was a "strong probability" that it would be adopted again at the next session, *id.* Indeed the Court even acknowledged that there was a "reasonable certainty" that the situation the plaintiff state senators were complaining of would arise again at the next session and that there would once again be insufficient time to litigate the issue prior to the end of the session. *Id.* The Court also acknowledged that the case involved "important public questions regarding the constitutionality of [the challenged Senate Rule]." *Id.* Nevertheless, the Court refused to consider the case under the "capable of repetition, yet evading review" exception to the mootness doctrine.

If the situation being litigated in *Philpot* was not capable of repetition, yet evading review, then there is little way that the present situation can be either. Whereas the issue in *Philpot* was virtually certain to occur again, and was virtually certain to be rendered moot again prior to being fully litigated, one simply cannot say that about the situation being litigated here. Unlike the situation in *Philpot*, there is no indication whatsoever—much less a strong probability or reasonable certainty—

that Governor Bevin, or any future governor, will again attempt to use KRS 12.028 to reorganize a university board. There is absolutely no evidence whatsoever in the record to lend credence to any belief that this *might* happen again, much less *will* happen. And, again unlike the situation in *Philpot*, the reorganization of university boards by a governor is not something that has happened every year for many years. It has happened exactly one time since KRS 12.028 was enacted, and then only hard on the heels of an Attorney General's Opinion stating that it was legally permissible. *See* OAG 15-015 at 5-6 n.7 (Sept. 29, 2015). *Philpot* presented a much stronger case for application of the "capable of repetition, yet evading review" exception. The fact that this Court refused to apply the exception means that it should not be applied here either.

Finally, if there were ever another temporary reorganization of a university board pursuant to KRS 12.028—which appears implausible—it would not necessarily be the case that the reorganization would be of such short duration as to be incapable of being fully litigated prior to its cessation or expiration. In the unlikely event that a governor were to temporarily reorganize a university board using KRS 12.028, it is entirely possible that the matter could be fully litigated before the expiration of the temporary reorganization. The university allotments case that this Court decided in 2016 illustrates this perfectly. *See Commonwealth ex rel. Beshear v. Commonwealth of Kentucky Office of the Governor ex rel. Bevin*, 498 S.W.3d 355 (Ky. 2016). After the Governor reduced the budgetary allotments for eight of the nine public universities in March 2016, the Attorney General filed suit in April 2016. The Franklin Circuit Court entered a summary judgment the following month, and this

Court accepted transfer of the case in June 2016, heard oral arguments in August 2016, and issued an opinion in September 2016. There is no reason why any future attempted reorganization of a university board under the current statute—if one ever occurs again—could not be litigated at the same pace as the university allotments case. There is no guarantee that such a case could be fully litigated before the next session of the General Assembly, but it is certainly not impossible. Therefore, it simply is not true that a temporary reorganization under the existing KRS 12.028 is too short in duration to be fully litigated prior to its expiration.

2. The public interest exception does not apply either.

The public interest exception to the mootness doctrine also should not be applied. This exception "allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." *Morgan*, 441 S.W.3d at 102 (quoting *In re Alfred H.H.*, 910 N.E.2d 74, 80 (Ill. 2009)). These elements "must be clearly shown." *Id.* But that cannot be done here.

There is no doubt that the first requirement is satisfied in this case. The other two, however, are not. With respect to the second element, the enactment of Senate Bill 107 obviates any need for an authoritative judicial determination as to whether KRS 12.028 permits a governor to reorganize a university board. Senate Bill 107 has established the precise framework by which a governor can remove an entire university board that has become dysfunctional. KRS 12.028 may still theoretically apply to university boards, but there is no reason why governor would try to remedy a

dysfunctional university board by going to the trouble of devising a new structure and organization for the board when the governor could simply remove the members under the process provided by Senate Bill 107. Thus, at this point, to opine as to whether the Governor's reorganization of the University of Louisville Board of Trustees was authorized by KRS 12.028 would do nothing more than answer an abstract academic question; it would not provide a needed authoritative determination for the future guidance of public officers.

The third requirement—*i.e.*, that there be a likelihood of future recurrence of the question—also cannot be shown, much less *clearly* shown. As discussed above, there is no indication that the unusual circumstances that led to this situation will ever occur again. Indeed, Senate Bill 107 makes it implausible to believe that this situation will occur again. Given all of these circumstances, no one can say that the three requirements for the public interest exception are *clearly* present here. *See Morgan*, 441 S.W.3d at 102 (requiring that the three elements "must be clearly shown").

Finally, it should also be noted that it would be inappropriate to apply the public interest exception here because this case questions the propriety of a moot executive order, not the propriety of a court's ruling on a procedural matter. This is a significant difference. As this Court stated in *Morgan*, when the exception is applied to "a question concerning a matter of procedure and procedural rules, the Court's own bailiwick, . . . there is the least danger with respect to the separation of powers from advisory opinions." *Morgan*, 441 S.W.3d at 103. This case does not involve such a question. The question here is addressed to executive action, not judicial action.

Therefore, the separation of powers concerns are heightened here, which further demonstrates that the public interest exception should not be applied.

B. Along with dismissing this appeal, the Court should vacate the circuit court's injunction and remand the case with instructions to dismiss without prejudice.

The United States Supreme Court has held that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.").

This longstanding rule of the federal courts is also followed by Kentucky courts. *See, e.g., Sullivan Univ. Sys., Inc.*, 433 S.W.3d at 344; *Bd. of Educ. of Berea v. Muncy*, 239 S.W.2d 471, 473-74 (Ky. 1951) (vacating lower court judgment in addition to dismissing appeal due to mootness because a simple dismissal would be "the equivalent of an affirmance"); *see also Philpot*, 837 S.W.2d at 494 (ordering the case to be dismissed "without prejudice to a future decision on the merits"); *Jones v. Conner*, 915 S.W.2d 756 (Ky. App. 1996) (withdrawing opinion, dismissing appeal, and remanding with instructions to dismiss after the parties settled the case). Indeed, this rule is essentially universal. The Tennessee Court of Appeals, for example, has acknowledged that "[t]he ordinary practice in disposing of a case that has become

moot on appeal is to vacate the judgment and remand the case with directions that it be dismissed." *McIntyre v. Traughber*, 884 S.W.2d 134, 138 (Tenn. App. 1994).

The point of this rule is to protect parties' constitutional rights to an appeal. *See* Ky. Const. § 115. When a case becomes moot, there is no longer an actual case or controversy, which means that the courts—generally speaking—have no further authority to consider the case. *See, e.g., Sullivan Univ. Sys., Inc.*, 433 S.W.3d at 344. If an appeal were to be simply dismissed for this reason, there would be significant unfairness to the appellant because the appellant would then be stuck with a binding and precedential judgment that he or she never had an opportunity to appeal. Therefore, appellate courts recognize that the appropriate thing to do is to vacate that judgment and remand the case with instructions to dismiss without prejudice. That preserves all of the parties' rights to litigate the matter fully if it should ever arise again. *See, e.g., Munsingwear, Inc.*, 340 U.S. at 40; *Byerly v. South Carolina*, 438 S.E.2d 233 (S.C. 1993); *McIntyre*, 884 S.W.2d at 138.

Kentucky's highest court adopted this rationale in *Board of Education of Berea v. Muncy*, when it ruled that dismissing an appeal for mootness also called for vacating the lower court's judgment. *See Muncy*, 239 S.W.2d at 474. To do otherwise, the Court noted, would be "the equivalent of an affirmance," *id.* at 473, which would be "an improper adjudication," *id.* at 474. Similarly, in dismissing the appeal on mootness grounds in *Sullivan University System, Inc.*, this Court vacated the lower court decisions on the basis that it was "prudent to prevent them from spawning any undesired legal consequences." *Sullivan Univ. Sys., Inc.*, 433 S.W.3d at 344. The same reasoning applies here. There is no indication that the situation at

hand will ever arise again—indeed, it is doubtful that it will—but the prudent and most appropriate thing to do is to vacate the circuit court's permanent injunction and remand the case with instructions to dismiss without prejudice.

II. If the Court does not dismiss this appeal as moot, it should refuse to address the merits because the Attorney General has a conflict of interest and should not have been permitted to go forward with the case.

The Attorney General and his Office should be disqualified from challenging the Governor's reorganization of the University of Louisville Board of Trustees because, in bringing this lawsuit, the Attorney General violated the professional ethics rules regarding conflicts of interest. The Attorney General sued the Governor for following express advice set forth in an official Attorney General's opinion. Specifically, in OAG 2015-015, the Office of the Attorney General stated that the Governor has authority under KRS 12.028 to reorganize the University of Louisville Board of Trustees. The Governor followed that advice and did exactly what the Office of the Attorney General advised and recommended. And what did that get him? A lawsuit from no less than the Attorney General, claiming that he does not in fact have authority to reorganize the Board under KRS 12.028. A clearer conflict of interest would be hard to find. The Attorney General simply cannot sue the Governor for relying upon and following the express advice provided by the Attorney General's own Office. The circuit court erred in concluding otherwise. [*See* Order Denying Motion to Disqualify (July 25, 2016), R. 198-203 (attached as Appendix 3)].

The Attorney General is the "chief law officer of the Commonwealth" and "the legal adviser of all state officers." KRS 15.020. In his role as "the legal adviser of all state officers," he has the duty to "furnish to them his written opinion touching

any of their official duties." *Id.*; *see also* KRS 15.025. Pursuant to this duty, the Office of the Attorney General opined in September of 2015 as to how the Office of the Governor might comply with its obligation to ensure that the University of Louisville Board of Trustees contains the required number of racial minority members. The Attorney General stated:

> **One novel corrective action that the Governor could possibly take is an executive reorganization of the Board. KRS 12.028(2)** provides that "the Governor . . . may, between sessions of the General Assembly, temporarily effect a change in the state government organizational structure as described in subsection (1) of this section if such temporary reorganization plan is first reviewed by the interim joint Legislative committee with appropriate jurisdiction." **KRS 12.028(1) specifies that these reorganizations "may include the creation, alteration or abolition of any organizational unit or administrative body." The Governor thus has the authority to reorganize the Board** in order to bring it into compliance with KRS 164.821(5).

OAG 2015-015 at 5-6 n.7 (Sept. 29, 2015) (emphasis added).

The legal advice from the Office of the Attorney General could not have been clearer. Following this advice, the Governor used KRS 12.028 to reorganize the University of Louisville Board of Trustees on June 17, 2016. Despite the fact that the Office of the Attorney General had very clearly advised, only a few months earlier, that "[t]he Governor thus has the authority to reorganize the [University of Louisville] Board," the Attorney General rushed into court arguing that "the Governor has clearly exceeded his authority" in doing so. [Attorney General's Motion for Injunctive Relief by Temporary Restraining Order and Temporary Injunction at 20, R. 1-24]. Thus, the Attorney General sued the Governor for doing the very thing that the

Attorney General's Office advised the Governor he could do. This is a blatant conflict of interest that is prohibited by the Kentucky Rules of Professional Conduct.

Rule 1.7 of the Kentucky Rules of Professional Conduct provides that a lawyer cannot undertake a representation that is "directly adverse to another client." SCR 3.130(1.7)(a)(1). Likewise, Rule 1.9, which provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . ." SCR 3.130(1.9)(a). These rules apply to prohibit the Attorney General's challenge to the reorganization of the University of Louisville Board of Trustees because the Attorney General, by statute and by his own proclamation, serves as "the legal adviser of all state officers," and has a duty to "furnish to them his written opinion touching any of their official duties." KRS 15.020. In other words, when the Attorney General's Office issued OAG 2015-015, it was furnishing legal advice to the Governor concerning what action the Governor might legally take. And it is axiomatic that under the professional ethics rules a "lawyer may not attack his or her own prior work . . . ." Ky. Bar Ass'n Ethics Op., KBA E-387, at 1 (Nov. 1995). As a result, Rules 1.7 and 1.9 prohibit the Attorney General and his Office from now taking a directly adversarial position to the Governor based on the Governor's reliance on that legal advice.

It is irrelevant that this Attorney General did not personally write OAG 2015-015. It purports to have been written by an assistant attorney general named Matt James, who was, and is still, employed in the Attorney General's Office. Mr. James

clearly is prohibited from suing the Governor over the University of Louisville Board of Trustees reorganization, and his conflict of interest is imputed to the entire Office of the Attorney General. Rule 1.10(a) of the Kentucky Rules of Professional Conduct states that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . . ." And it is abundantly clear that those rules prohibit an attorney from attacking the prior work of another attorney in the same firm. *See* Ky. Bar Ass'n Ethics Op., KBA E-387, at 1 (Nov. 1995).

Consider a situation in which a law firm advised a business entity on how to structure a transaction. If the law firm subsequently acquired a new managing partner and the business entity acquired a new CEO, no one would argue that the law firm would then be permitted to sue the business for structuring the transaction in the manner recommended by the law firm. Everyone would clearly recognize that the law firm has a conflict of interest in that scenario. And yet, that is precisely what the Office of the Attorney General is doing in the present situation. That Office advised the Office of the Governor that it could legally undertake a reorganization of a board, and the Governor, relying on that legal advice, has now done that. The Attorney General and his Office cannot now be permitted to maintain a suit against the Governor for doing precisely what the Office of the Attorney General said the Governor could legally do.

There are not many recorded instances in which an attorney general has sued a governor for doing precisely what the attorney general recommended, but it happened in California, and the California Supreme Court concluded that the Attorney General

acted improperly. *See People ex rel. Deukmejian v. Brown*, 624 P. 2d 1206 (Cal. 1981). In 1977, the California legislature adopted a State Employer-Employee Relations Act. *Id.* at 1207. The then-Attorney General advised the Governor to sign the act into law, and the Governor did so. *Id.* Slightly more than a year later, in January of 1979, a new Attorney General came into office. Shortly thereafter, the Pacific Legal Foundation sued the Governor and various other officials, claiming that the State Employer-Employee Relations Act was unconstitutional. *Id.* A week after the suit was filed, two deputy attorneys general met with the State Personnel Board to discuss the legal posture of the case and the legal options available to the Board. *Id.* Roughly a week later, the Attorney General filed his own lawsuit against the Governor challenging the State Employer-Employee Relations Act. *Id.* The California Supreme Court found that this created an impermissible conflict of interest, and it enjoined the Attorney General from proceeding in the matter. *Id.* at 1210. The court framed the issue as "whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy." *Id.* at 1207. The court resolved this issue by finding that there was "no . . . ethical authority for such conduct by the Attorney General." *Id.* The same is true in the instant case. There simply is no ethical authority for the Attorney General to sue the Governor for relying upon and following the express advice provided by the Attorney General's own Office. The circuit court erred in not dismissing this action on that ground alone.

III. If the Court does reach the merits of this case, it should reverse the circuit court because the Governor had authority under KRS 12.028 to reorganize the University of Louisville Board of Trustees.

KRS 12.028 authorized the Governor to reorganize the UofL Board. No logical analysis of the actual text of the statute can come to any other conclusion. One of the most telling aspects of this case is that the Attorney General never even attempted in the circuit court to analyze the text of the statute to provide an alternative interpretation. Nor did the circuit court.

KRS 12.028 is clear and unambiguous. Subsection (1) of the statute plainly states that the Governor and other elected executive officers:

> **[M]ay propose** to the General Assembly, for its approval, changes in the state government organizational structure which may include the **creation, alteration or abolition of any organizational unit or administrative body** and the transfer of functions, personnel, funds, equipment, facilities, and records from one (1) organization unit or administrative body to another.

KRS 12.028(1) (emphasis added).

There is nothing unclear or complicated about that language. Read, as it must be, giving the words their ordinary, everyday meaning, *see* KRS 446.080(4), the Governor is statutorily empowered to propose to the General Assembly changes in the organization structure of "any" administrative body or unit in state government. And the state university boards fit within the definition of an "administrative body" in state government. An "administrative body" is defined as "any multi-member body in the executive branch of the state government, including but not limited to ***any board***, council, commission, committee, authority or corporation . . . ." KRS 12.010(8) (emphasis added).

Subsection (2) of the statute is equally clear. It states that the Governor (or any other state executive officer) "**may, between sessions of the General Assembly, *temporarily effect* a change in the state government organizational structure as described in subsection (1)** . . . ." KRS 12.028(2) (emphasis added).

In issuing Executive Order 2016-338, the Governor did exactly what is permitted by KRS 12.028(1)-(2), and what was advocated for less than two years ago by the Attorney General's Office: he proposed the abolition of the existing University of Louisville Board of Trustees and the creation of a new Board with an altered structure, and then he temporarily effected that change. There is no credible argument that this is impermissible under KRS 12.028.

Despite the plain language of KRS 12.028, the circuit court held that the Governor was prohibited from reorganizing the Board because the state university boards are not subject to KRS Chapter 12, and because applying KRS 12.028 to the state university boards would put that statute in conflict with KRS 63.080(2) and KRS 164.821(1)(b). Respectfully, the circuit court was wrong on both counts.

A. The state university boards are subject to KRS Chapter 12.

That the state university boards are subject to KRS Chapter 12 is a point that heretofore has been generally accepted. The Court of Appeals' decision in *Galloway v. Fletcher*, 241 S.W.3d 819 (Ky. App. 2007), deftly demonstrates why this is so. *Galloway's* reasoning is powerful and persuasive, and should be adopted.

In *Galloway*, the Court of Appeals was asked to decide whether KRS Chapter 12 applied to the Murray State University Board of Regents. Specifically, the Court was asked to determine whether the Governor had the right under KRS 12.070(3) to

reject the Postsecondary Education Nominating Commission's ("PSENC") nominees for the Murray State Board. The Governor had rejected two lists of nominees made to him by PSENC and finally appointed a nominee from a third list. Three unsuccessful nominees from the first list sued, claiming that KRS 12.070(3)—which gives governors the authority to reject lists of nominees for sate "administrative boards and commissions" and require that other lists be submitted—did not cover university boards. In other words, the Plaintiffs claimed—as does the Attorney General here—that the Murray State Board was not within the category of "administrative boards and commissions" governed by KRS Chapter 12.

The Plaintiffs in *Galloway* argued that KRS 164.005—which establishes the PSENC—*exclusively* governs university board nominations and that KRS 12.070(3), which is more general and does not expressly mention university boards, plays no role. Harmonizing the two statues, as courts are obligated to try to do, the Court of Appeals found that "the most plausible reading of the two statutes is that urged by [the Governor.]" *Id.* at 824. In so holding, the Court concluded that:

> The crucial question is whether or not KRS 12.070(3) applies to the appointment of members to the governing bodies of Universities. We conclude that it does.

Id. at 824.

The obvious import of this conclusion is that KRS Chapter 12 applies to the state university boards. After all, if KRS 12.070(3) applies to the Commonwealth's university boards, then KRS 12.028 must also apply as they are part and parcel of the same KRS Chapter. A state university board either is or is not subject to KRS Chapter 12. It is a binary system; a board cannot be subject to KRS Chapter 12 for some purposes but not for others.

Nevertheless, the circuit court illogically concluded that *Galloway* only answers the narrow question of whether KRS 12.070 applies to the state university boards. This is demonstrably wrong. The following discussion in *Galloway* clearly indicates that the Court of Appeals was not narrowly focused on KRS 12.070:

> By its terms, KRS 12.070(3) applies to situations "[w]here appointments to administrative boards and commissions are made from lists submitted to" the Governor. To the circuit court, the application of this statute to appointments to governing boards of Kentucky's universities was "immediately obvious" because "state-funded and administered universities are an arm of the state." **KRS 12.010, the definitions section for Chapter 12, does not separately define "administrative boards", although "administrative body" is defined at paragraph (8) to include "any multi-member body in the executive branch of the state government, including but not limited to any board, council, commission, committee, authority or corporation,"** but does not include "branch," "section," "unit" or "office." **Given the requirements of KRS 446.080 that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature," and that "[a]ll words and phrases shall be construed according to the common and approved usage of language," we agree with the circuit court that the phrase "administrative boards and commissions" in KRS 12.070(3) includes the governing bodies of the state's universities, including that of Murray State University.** We were cited to no case or statutory provision that would lead us to conclude otherwise, nor could we find any such provision.

Galloway, 241 S.W.3d at 822-23 (emphasis added). The plain meaning of this discussion is that state university boards constitute administrative bodies within the meaning of KRS 12.010, and therefore constitute administrative boards and

commissions within the meaning of KRS 12.070. The broader meaning of this is also clear: the provisions of KRS Chapter 12 apply to the state university boards.

In seeking to avoid this unmistakable point, the circuit court not only attempted to artificially narrow the holding of *Galloway*, but it also essentially attempted to overrule *Galloway*. The circuit court opined that the reasoning in *Galloway* is flawed because the Court of Appeals failed to take into account that state universities were removed from the organizational structure of the executive branch of state government in 1952, thereby rendering KRS Chapter 12 inapplicable to them. This reasoning is flawed.

The circuit court conflated the University of Louisville and the University of Louisville *Board of Trustees*. Even if it were true that the *universities* were removed from the organizational structure of the executive branch of state government in 1952—which the Governor does not accept as being accurate then, or today—that does not mean that the *university boards* are no longer part of the executive branch for purposes of KRS Chapter 12.[3] That Governor Bevin proposed a reorganization of the University of Louisville's *Board of Trustees* and not the University of Louisville *proper*, as an entity, is important in the context of *Galloway*. As stated by the *Galloway* panel, the "threshold inquiry [wa]s whether KRS 12.070(3) applie[d] to the Governor's appointment of members to the Murray State University Board of Regents." *Galloway*, 241 S.W.3d at 822. Pointedly, the Court of Appeals then discussed in some detail whether the term "administrative board" referred to in KRS 12.070(3) included Kentucky university boards. In doing so, it looked at the language

[3] After all, no one disputes that the Governor makes appointments to the university boards and that the taxpayers fund the universities.

of KRS 12.010, the definitions section for KRS Chapter 12, and found that although the term "administrative *board*" was not defined, paragraph (8) of the statute defined "administrative *body*" to mean "'*any multi-member body in the executive branch* of the state government, including but not limited to *any board*, council, commission, committee, authority or corporation.'" *Id.* at 823 (quoting KRS 12.010(8)) (emphasis added). Giving the statute the "liberal construction" commanded by KRS 446.080, the panel took a broad reading of the term "administrative board," ultimately concluding: "[W]e agree with the circuit court that the phrase 'administrative boards and commissions' in KRS 12.070(3) *includes the governing bodies of the state's universities*." *Id.* (emphasis added).

In light of the analysis in *Galloway*, the salient question is: If the term "administrative board" contained within KRS 12.070(3)—a provision within the "Executive Branch" title of the Kentucky Revised Statutes—must be read so broadly to *include* university governing boards for purposes of appointments, as *Galloway* expressly holds, then what basis exists to read the term "administrative bodies" within KRS 12.028(1) so narrowly to *exclude* university governing boards for purposes of re-organization, as the circuit court has decreed? The answer is that there is no such basis. This is especially true in light of the fact that KRS 446.080(1) requires courts to take a liberal construction of statutes in KRS Chapter 12. Under a liberal construction of KRS Chapter 12, there is no way to justifiably eliminate the University's Board of Trustees from the meaning of the term "administrative bodies" in KRS 12.028, particularly when the term "administrative bodies" is defined to mean

"*any multi-member body* in the executive branch of the state government, including but not limited to *any board.*" KRS 12.010(8) (emphasis added).

The reasoning in *Galloway* compellingly demonstrates that the state university boards are subject to KRS 12.028. But *Galloway* is not the only authority that points to this conclusion. KRS 12.210, and the authorities interpreting it, do as well. It provides that:

> The Governor, or any department with the approval of the Governor, may employ and fix the term of employment and the compensation to be paid to an attorney or attorneys for legal services to be performed for the Governor or for such department.

This statute has long been interpreted to apply to the state universities and to require them to obtain the Governor's approval for the hiring of counsel. Indeed, the Office of the Attorney General concluded in OAG 84-255 that the statute is applicable to the universities, and it went on to state that "we conclude that **state universities are clearly a state executive entity and subject to the various provisions of KRS Chapter 12.**" OAG 84-255 at *2 (July 24, 1984) (emphasis added). Likewise, in OAG 92-19, the Office of the Attorney General reiterated the conclusion in OAG 84-255 that KRS 12.210 applies to the state universities. *See* OAG-92-19 (Feb. 10, 1992). Indeed, the Governor to this day approves the hiring of outside counsel by state universities pursuant to KRS 12.210. *See, e.g.,* Executive Order 2016-342 (June 20, 2016) (approving outside counsel for Northern Kentucky University), available at http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2016-MISC-2016-0342-245297.pdf. If multiple Attorney General Opinions have recognized over the years that the state universities are subject to the provisions of KRS Chapter 12 despite the alleged removal of the universities from the organizational structure of the executive

branch in 1952, then it must be all the more true that the *university boards* are subject to KRS Chapter 12.

More recently, on September 29, 2015, the Office of the Attorney General issued the previously mentioned OAG 15-015, stating that KRS Chapter 12 applies to the state universities. This opinion is remarkably on point with the case at hand, addressing not only the issue of reorganizing a state university's board, but the very issue of reorganizing the *University of Louisville's Board.* As previously stated, OAG 15-015 addressed the lack of an adequate number of racial minority members on the University of Louisville Board of Trustees. In response to this problem, the Office of the Attorney General suggested in that opinion that "**[o]ne novel corrective action that the Governor could possibly take is an executive reorganization of the Board [under KRS 12.028(2)]**. OAG 2015-015 at 5-6 n.7 (Sept. 29, 2015) (emphasis added).

Finally, if there were any remaining doubt that the state university boards are boards within the executive branch of state government—and therefore subject to the provisions of KRS Chapter 12, including KRS 12.028—such doubt is easily dispelled by the well-established fact that the state university boards are entitled to sovereign immunity. *See, e.g., Hutsell v. Sayre*, 5 F.3d 996, 1002 (6th Cir. 1993). If the state university boards are entitled to sovereign immunity, then they must be part of state government. And if they are part of state government, then they must be in one of the three branches of government. They obviously are not part of the legislative or judicial branches. So that leaves the executive branch. And this, therefore, means

that they are it is within the definition of "administrative body" in KRS 12.010. As a result, the state university boards can be reorganized under KRS 12.028.[4]

B. Applying KRS 12.028 to the state university boards does not conflict with KRS 63.080(2) or KRS 164.821(1)(b).

As an alternative basis for sidestepping KRS 12.028, the circuit court concluded—erroneously—that applying KRS 12.028 to the state university boards would create a conflict between that statute and KRS 63.080(2) and KRS 164.821(1)(b), which provide that members of the University of Louisville Board of Trustees may only be "removed" for cause following a due process hearing. Even though KRS 63.080 and KRS 164.821 do not expressly exempt university boards from the Governor's reorganization powers under KRS 12.028, the circuit court nevertheless concluded that they do so *implicitly* because—in the court's view—the Governor's reorganization of the Board amounted to the "removal" of its members without cause or a hearing, and thus violated those statutes. In reality, however, there is no conflict between or among the statutes. All three of these statutes can be given effect. There is no need to negate KRS 12.028, or render it inapplicable, in order to avoid any perceived conflict with KRS 63.080(2) and KRS 164.821(1)(b).

Once again, *Galloway v. Fletcher* is a good starting point for analysis. As discussed earlier, the Court in *Galloway* was confronted with a claim that KRS 12.070(3), which allows the Governor to reject lists of nominees to state "administrative boards and commissions" and require that other lists be submitted, did not apply to university boards because it was in conflict with KRS 164.005, which

[4] The fact that the state university boards are not expressly listed in KRS 12.020 is not in any way dispositive, as that statute expressly states, "It is not intended that this enumeration of administrative bodies be all-inclusive."

provides that the PSENC shall submit to the Governor a list of three names for each university board vacancy "from which the Governor **shall** select each gubernatorial appointment." The plaintiffs in *Galloway* argued that the two statutes were in conflict, could not be reconciled, and that KRS 164.005, the newer statute, preempted KRS 12.070(3). The plaintiffs also argued that the mandatory "shall" language in KRS 164.005 trumped the more general language in KRS 12.070(3).

The Court of Appeals rejected the plaintiffs' arguments. Noting the statutory requirement in KRS 446.080(1) that all statutes must be liberally construed and given meaning to promote their objectives, the court stated:

> It is a basic rule of construction that "[w]here there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try and harmonize the interpretation of the law so as to give effect to both statutes or sections if possible." [citing cases.] In the same vein, "[i]t is well settled that two or more acts dealing with the same subject matter must be construed in pari materia, and any apparent conflict between them must be reconciled, if possible, so as to give effect to both.

Galloway, 241 S.W.3d at 823.

The *Galloway* plaintiffs also urged that the first sentence in KRS 12.070(3) be given no effect. The Court of Appeals likewise rejected that argument, stating:

> The universal rule means that the courts will construe the act if possible so that both shall be operative and effective if that can be done without contradiction or absurdity.

Id. at 824 (quoting *Schultz v. Ohio County,* 11 S.W.2d 702, 704 (1928)).

The Court of Appeals also rejected the *Galloway* plaintiffs' argument that KRS 164.005 must be the controlling statute because it was the more specific of the two statutes. The Court found "that as to the narrow issue of whether or not the

Governor has the authority to reject tendered lists of nominees and require the submission of other lists, it could be said that the more specific statute is KRS 12.070(3)." *Id.* The same is true in the instant case—*i.e.*, on the question of whether the Governor can reorganize the state university boards, KRS 12.028 is more specific than KRS 63.080 and KRS 164.821, and KRS 12.028 plainly authorizes the Governor to reorganize university boards.

The principles discussed in *Galloway v. Fletcher* are well-settled. The requirement that courts must harmonize conflicting statutes to give both meaning if at all possible is fundamental to our rules of statutory construction. *Halsell v. Commonwealth*, 934 S.W.2d 552, 555 (Ky. 1996) (rule is "well-established" that "it is the duty of the court to try and harmonize the interpretation of the law so as to give effect to both sections of statues if possible"); *Allen v. McClendon,* 967 S.W.2d 1, 3 (Ky. 1998) (finding no conflict between the statutes, but even if there were, "it is the responsibility of this court to make an interpretation of the law that harmonizes the two...so as to give effect to both statutes. [A] statute should be construed so that no part of it is meaningless or ineffectual.").

Here, as in *Allen v. McClendon,* there is no need to engage in a detailed "harmonization" between KRS 12.028 on the one hand and KRS 63.080(2) and KRS 164.821 on the other hand because there is no conflict between the statutes. There simply was no removal of a board member through Executive Order 2016-338. The intent and goal of the General Assembly with regard to KRS 12.028 (structural reorganization) is different than KRS 63.080(2) and KRS 164.821 (individual member removal with board structure unchanged).

As outlined in *Johnson v. Laffoon,* 77 S.W.2d 345, 346 (Ky. 1934), KRS 63.080 dates back to 1934. Prior to 1934, a governor was not permitted to remove from office a gubernatorial appointee to a fixed-year term "unless for failure to discharge, or neglect in the performance of the duties of his office." *Johnson*, 77 S.W.2d at 346. With the repeal and re-enactment of Ky. Stat. § 3750 in 1934, governors were generally given the power to remove officials without cause before the expiration of their fixed terms.

Ky. Stat. § 3750 underwent amendments over the years and later became what is now KRS 63.080. While continuing to allow removal, mid-term, of officers appointed for set terms of years, the statute has exceptions. Subsection (1) says "Except as provided in subsection (2) of this section and otherwise provided by law" a governor can remove an appointee from office for any reason. Subsection (2) of the statute provides specifically that members of the boards of public postsecondary education institutions and certain related entities are not subject to removal under subsection (1) and "shall not be removed except for cause." Consistent with this provision, KRS 164.821 requires that such board members be given a due process hearing before being removed for cause.

KRS 63.080 and KRS 164.821 deal solely with the power of one state executive officer—the governor—to finally remove without cause individual fixed-term appointees during the term of their appointment without any need for subsequent legislative approval. KRS 12.028, on the other hand, deals with an entirely different subject. It does not address the power of a governor to remove appointed officers from their offices. Rather, as discussed above, KRS 12.028(1) provides the statutory

framework by which the Governor, other elected state executive officers, and the Kentucky Economic Development Partnership may propose to the General Assembly, for its approval, changes in the entire structure of "any organizational unit or administrative body" and the transfer of that unit or body's personnel and assets to another unity or body.

KRS 12.028(2) takes subsection (1) a step farther. In it, the General Assembly provides those same state executive officers the ability to put their proposed changes into effect temporarily, *i.e.,* until the next regular session of the General Assembly convenes and either approves or disapproves the proposed changes. *See L.R.C. v. Brown*, 664 S.W.2d 907, 930 (Ky. 1984).

When a governor (or other elected official) proposes that a board be abolished, and then exercises his or her right under KRS 12.028(2) to *temporarily* put the abolition into effect, no member is personally "removed" from the board; the board itself—as an entity—is simply *temporarily* abolished subject to later confirmation by the legislature.

Thus, there is no conflict between KRS 63.080(2) and KRS 164.821 on the one hand, and KRS 12.028(1) and (2) on the other, because they are totally different in scope and intent. The General Assembly clearly intended them to address wholly different things. Thus, there is no apparent conflict that must be harmonized.

In the instant matter, Governor Bevin did not attempt to "remove" any trustee from the former University of Louisville Board. Rather, a *proposal* was made to the legislature that *the Board itself*—as a corporate entity—be abolished.

Thus, both statutes can easily be read together and harmonized. One relates to the removal of individual board members. The other relates to the reorganization of state executive branch administrative units and bodies, including their abolition. The law requires both statutes to be read so as to give full effect to both. Yet, if the Governor in this instance were unable to propose a reorganization of the 20-person University of Louisville Board so as to reduce its number because that would entail a reduction in the number of members—*i.e.*, the "removal" of members—then his legislatively-given power to reorganize would be thwarted; KRS 12.028(1) and (2), along with the General Assembly's intent for governor to be able to reorganize, would become meaningless because a so-called "removal" of some board members would result, thereby precluding a reorganization that results in a lesser number of members.

The obvious intent of KRS 63.080(2) was to keep governors from being able to pick and choose the removal of individual university board members without good cause. That is what the legislature has mandated. Yet, it has also given the Governor the power to reorganize, which includes the power to abolish and re-create entire boards. KRS 12.028(1) and (2) and KRS 63.080(2) can and must be read together to give effect to both. Absent a clear, obvious, direct, and true removal of the individual members of the former University of Louisville Board by the Governor—which did not occur here—there has been no violation of KRS 63.080(2) by his exercise of his separate and distinct right of reorganization pursuant to KRS 12.028(1) and (2). There is no conflict between the statutes.

Nevertheless, the Attorney General and the circuit court attempted to manufacture a conflict among these statutes rather than harmonizing them. In doing so, they tried to insert into KRS 12.028 a judicially-created exception for university boards—an exception that the General Assembly has not seen fit to prescribe. This pointless exercise should be given short shrift. The law requires the plain language of the statutes to be harmonized if at all possible, and it is indeed possible: KRS 164.821(1)(b) and KRS 63.080(2) apply in situations where individual Board members are being removed from the Board, and KRS 12.028 applies in situations where the Governor is abolishing a university board and re-creating it with an altered structure.

If the General Assembly had intended to exempt university boards from the Governor's reorganization powers, or if it had intended to prohibit reorganizations that result in newly appointed university board members, it would have said so. But it did not. And the law does not allow the courts to re-write the statute in such a manner simply because the Attorney General has attempted to conjure up a contrived, unnecessary conflict between the reorganization and removal statutes.

The Attorney General and the circuit court erroneously took the position that the distinction between removal and reorganization is a distinction without a difference. The Governor agrees that if a purported reorganization of a university board did nothing more than substitute a new board member for one of the previous members, there would be a significant question as to whether it was truly a reorganization of the board or simply a removal of a member. But that situation is not presented here, and the Court need not address that hypothetical question. The

facts here are entirely different: exercising the executive function expressly delegated to him by the General Assembly, the Governor determined that in order to achieve greater efficiency and improved administration, it was necessary to abolish the old Board and re-create it with a different, smaller structure. The Governor addressed this problem not by individually *removing* the Board members, but by *reorganizing* the Board—as KRS 12.028 permits—by abolishing it and re-creating it in a different form. The fact that the Governor did not re-appoint any of the previous Board members to the newly re-created Board does not convert his action to a personal removal of those members. In fact, if he had re-appointed some of the previous members, then his action might have looked more like a prohibited removal than a permissible reorganization; *removal* occurs when individual members are plucked off the Board, whereas *reorganization* occurs when the Board is abolished and re-created wholesale. Thus, the removal provisions of KRS 164.821(1)(b) and KRS 63.080(2) can be harmonized with the Governor's reorganization power under KRS 12.028. As a result, KRS 12.028 must be applied according to its plain language, which permits the Governor to reorganize the University's Board. The refusal by the Attorney General and the circuit court to acknowledge this point ignores the rule that statutes must be harmonized if at all possible.

The position of the Attorney General and the circuit court also violates the obvious rule that Courts must apply statutes as they are written and cannot read into them language that the General Assembly chose not to include. Under the Attorney General's position, the Governor can presumably reorganize the Board by enlarging it—because that would not involve the "removal" of any Board members—but cannot

reorganize it by reducing its size since that would necessarily mean that at least some of the previous board members would not be re-appointed to the reorganized board. In other words, the Attorney General's position would require the Court to read into KRS 12.028 a prohibition against reorganizing university boards so as to make them smaller. This restriction does not exist on the face of KRS 12.028, and the courts are not at liberty to rewrite the statute to add it. If the Governor can reorganize the Board by enlarging it—and there is no reason, even under the Attorney General's argument, to believe that he cannot—then he must also be able to reorganize it by reducing its size. The statute places no restrictions on the manner in which the Governor can re-create a board. The General Assembly has not seen fit to append such restrictions, and the circuit court was not at liberty to do so by judicial fiat.

IV. The various other issues raised by the Attorney General before the circuit court are not alternative grounds for affirmance.

The Attorney General raised a plethora of issues before the circuit court, but the court ignored all but the ones discussed above. The circuit court found that the Attorney General had raised other "significant questions," namely whether the reorganization of the Board violated the separation of powers doctrine, the prohibition against suspension of laws, and the requirement that the Governor faithfully excecute the laws. However, the circuit court declined to address these questions because it had already concluded—erroneously—that the state university boards are not subject to KRS 12.028 and that applying KRS 12.028 would create a conflict between that statute and KRS 63.080 and KRS 164.821. The circuit court was correct that those issues did not warrant discussion, but not for the reasons the court gave. Instead, those issues did not warrant discussion because they were meritless. In the interest of

addressing all possible issues in this case, the Governor will briefly explain why the ancillary raised by the Attorney General before the circuit court lack merit.

A. The Governor's reorganization of the Board did not violate the doctrine of separation of powers.

There is no question but that the Governor's reorganization power—whether used on a state university board or another other state board or commission—is consistent with the doctrine of separation of powers. This matter was definitively settled in *L.R.C. v. Brown*, when the Supreme Court held that:

> [Once] the General Assembly has made a determination that the power to reorganize state government in the interim periods between legislative sessions does exist, and determines that the power is in the hands of the Governor, **such interim action is purely an executive function.**

L.R.C. v. Brown, 664 S.W.2d 907, 930 (Ky. 1984) (emphasis added). There is no way around the fact that *Brown*, as an essential part of its multi-issue holding, held that reorganization is a purely executive function when exercised between legislative sessions. The doctrine of separation of powers is only implicated when a branch of government exercises powers belonging to another branch. That has not happened here. The reorganization power—including the right to temporarily effect a reorganization—was given by the legislature to the Governor, subject only to the legislature's later approval at its next session. As the Supreme Court clearly stated in *L.R.C. v. Brown*, the Governor's power to reorganize state government agencies in the interim periods between legislative sessions is an executive power. The next step—whether that temporary reorganization becomes permanent—is, however, a legislative question. *See Brown*, 664 S.W.2d at 931 ("Implicit in this provision is that

the final approval of any plan is legislative in nature."). Thus, when the Governor exercises such temporary power—as he has here—it is a case of an executive branch official exercising executive branch power that is subject to later, ultimate legislative power. As such, the doctrine of separation of powers is not even implicated.

Moreover, the Governor cannot possibly be seen as usurping or infringing upon the exclusive domain of the legislative branch when that very branch has expressly given him the power and authority to do exactly what he did in promulgating Executive Order 2016-338. The General Assembly, through the enactment of, and plain language in, KRS 12.028(1) and (2), legally and voluntarily gave not only to the Governor, but to other constitutionally elected officers, "the power to reorganize state government in the interim periods between legislative sessions" and "determine[d]that that power is in the hands of the Governor . . . ." *Brown*, 664 S.W.2d at 930. Thus, Governor Bevin, in exercising that very power—partially upon the advice of the very law office that is suing him—has in no way violated the doctrine of separation of powers.

Additionally, it must be remembered that the Governor's actions remained ultimately subject to the General Assembly's approval. KRS 12.028(1) and (2) give the Governor the authority to "temporarily effect" the proposed changes pending the next regular session of the legislature, at which time that body retains the full power to accept or reject the Governor's proposal. The Governor has always recognized that his role in the reorganization process is limited; that the ultimate decision, lies in the complete and unfettered hands of the General Assembly.[5] Perhaps more importantly,

[5] While some suggest this is a form of brinkmanship since if the legislature disapproves the proposed reorganization the Governor might, under KRS 12.028(5), within ninety days after *sine die* simply

though, the General Assembly retains an even greater check on the Governor's power: it can repeal KRS 12.028 altogether, or it can expressly exempt the state university boards from the Governor's reorganization power. Indeed, some boards and commissions can—by statute—expressly be beyond the Governor's reorganization powers. *See, e.g.,* KRS 342.1228 (expressly exempting the Workers' Compensation Funding Commission from reorganization under KRS 12.028). Of course, the state university boards are not among them. It is not this Court's place to exempt the state university boards from KRS 12.028 when the General Assembly has not seen fit to do so.

The reality is that this case does indeed present a separation of powers issue, but not in the manner suggested by the Court and the Attorney General. The only threat to the doctrine of separation of powers in this case is the contention—from the Attorney General—that the courts should insert themselves into the "purely [ ] executive function" of the Governor and attempt to qualitatively second-guess the Governor's reasons for promulgating Executive Order 2016-338 and potential effects resulting from the reorganization. Respectfully, the judicial branch has a limited role, if any, in the KRS 12.028 reorganization process. That framework was established by the General Assembly to work between it and the Governor: the Executive Branch proposes changes in the law (and implements them temporarily) and the Legislative Branch decides whether the proposed changes, including the underlying reasons for the changes, are sufficient. The only role the Court might play is if the Attorney General were, *e.g.*, alleging either that the statute itself is unconstitutional or that the

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reorganize again, that is purely speculative at this juncture and in this context. In any event that is a question for the legislature would need to resolve, not the Court.

Governor did not follow its technical requirements in promulgating the executive order. Neither allegation has been made or supported.[6] It is apparent that the doctrine of separation of powers is not being violated by the Governor. The only threat to that doctrine is this very lawsuit.

B. The Governor's reorganization of the Board did not violate his duty under of Section 81 of the Constitution to faithfully execute the laws.

Contrary to the Attorney General's claims, the Governor's reorganization of the Board is not a violation of his duty to faithfully execute the laws. The Governor did indeed faithfully execute the laws of the Commonwealth by exercising the reorganization powers expressly given to him by the General Assembly. The fact that the Attorney General does not agree with the manner in which the Governor is using his authority under KRS 12.028 does not mean that his use of that authority is unconstitutional. Moreover, the question of whether the Governor is in compliance with Section 81 of the Constitution is a nonjusticiable political question.

C. The Governor's reorganization of the Board was not a suspension of a law in violation of Section 15 of the Kentucky Constitution.

The Governor's reorganization of the Board arguably does suspend at least parts of KRS 164.821, which is the statute that creates the Board and specifies its structure. But this is perfectly constitutional. *Every single reorganization* under KRS 12.028 creates some variance with existing statutes. This is acceptable because Section 15 of the Constitution permits the suspension of laws when done "by the General Assembly ***or its authority***." Ky. Const. § 15 (emphasis added). KRS 12.028

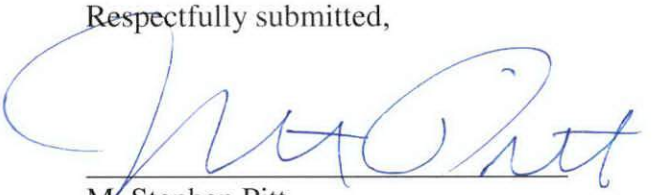
[6] Indeed, the Attorney General utilized KRS 12.028 to reorganize his own office in Executive Order AG 16-01, which was filed with the Secretary of State on June 3, 2016.

is undoubtedly a statute that has been passed by the General Assembly. Thus, no one can reasonably say that a suspension of laws pursuant to KRS 12.028 is anything but a suspension done by the General Assembly's authority.

CONCLUSION

This case is moot. And if mootness is to continue having any significance under the law in Kentucky, the permanent in junction should be vacated and the case remanded with instructions to be dismissed as moot. Nevertheless, if the Court sees fit to go beyond the issue of mootness, it should reverse the circuit court on one of two grounds. First, the Attorney General should have been prohibited from going forward with the case because he had a conflict of interest. The Attorney General cannot sue the Governor for following the advice given by the Attorney General's Office. Second, the circuit court was wrong on the merits of the case. KRS 12.028 gives the Governor authority to reorganize the state university boards, and that authority does not conflict with the provisions of KRS 63.080(2) or KRS 164.821(1)(b).

Respectfully submitted,



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