COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 16-CI-738

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

V. ORDER GRANTING TEMPORARY INJUNCTION UNDER CR 65.04

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

This action is before the Court on the motion of Attorney General Andy Beshear for injunctive relief under CR 65.04. General Beshear seeks to temporarily restrain and enjoin the operation of an executive order issued by the defendant Governor Matthew Bevin that purports to abolish the Board of Trustees of the University of Louisville, and to re-constitute that Board with an entirely new membership. The Court held a hearing on this motion on July 23, 2016, and all parties were represented by counsel. In ruling on this motion, the Court is required to apply the familiar test of Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978),[1] which sets forth the standard for injunctive relief recently reaffirmed by the Kentucky Supreme Court. See Commonwealth *ex rel* Conway v. Shepherd, 336 S.W.2d 98, 104 n. 20 (Ky. 2011), Commonwealth *ex rel.* Conway v. Thompson, 300 S.W.3d 152, n.18 (Ky. 2009). After carefully considering all of these elements, the Court finds that the Attorney General has demonstrated "a probability of irreparable injury, presented a substantial question as to the merits, and the equities

[1] "First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded. However, the actual overall merits of the case re not to be addressed in CR 65.04 motions." Maupin, 575 S.W.2d at 699.

are in favor of issuance" of a temporary injunction. Maupin, 575 S.W.2d at 699. Most importantly, the Governor's unilateral action raises profound issues regarding the statutes on governance of public universities and the separation of powers under the Kentucky Constitution, Sections 27-28. Accordingly, for reasons more fully explained below, the Court **GRANTS** the motion for a temporary injunction.

BACKGROUND

This case raises an issue of first impression regarding whether the Governor's reorganization power, codified at KRS 12.028, empowers him to unilaterally abolish and recreate a board of trustees of a state university. Kentucky law explicitly provides that no state university trustee can be removed from office "except for cause." KRS 63.080(2). State law further provides that "[b]oard 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) (emphasis added). It is undisputed that the Governor removed all members of the Board of Trustees of the University of Louisville from office in Executive Order 2016-338. It is also undisputed that the Council on Postsecondary Education held no hearing and made no finding.

The irreparable injury in the case arises from the apparent violation of the statutory requirements for appointment of university trustees, tenure in office, staggered terms, and continuity of membership in the governing bodies of public universities, as well as the alleged violation of separation of powers inherent in a Governor's unilateral action to abolish a statutory board by executive fiat. The Governor's executive order bypasses the statutes that require cause for removal of trustees and a due process hearing before removal of trustees. The Governor has asserted the unilateral authority to make these changes in university governance, which are

legislative in nature, without any meaningful checks on the exercise of this authority. If the Governor's order violated Kentucky law, the damage to the statutory structure of university governance, and the disruptive effects on the public and the university, is real and immediate: the Board of Trustees was "abolished" and individuals who are not lawfully serving as Board members are now making (or according to published news reports, about to make) employment and career decisions concerning senior administrative officials at the University, as well as tuition and other budgetary decisions affecting tens of thousands of people. Without injunctive relief to restore the *status quo* prior to the Executive Order, the actions of the Governor and his appointees could cause substantial disruption that would be difficult or impossible to undo, and thus negate any ruling in favor of the Attorney General on the merits and "tend to render a final judgment ineffectual." CR 65.04(1). Or, in more practical terms, you can't un-ring the bell.[2]

As to the Maupin factor of whether the Attorney General has presented a "substantial question," the Governor argues that removal through reorganization under KRS 12.028 circumvents these requirements of law, and allows the Governor the unfettered ability to abolish any board and reconstitute it with an entirely new membership at his sole discretion. The Governor's brief argues that "Governor Bevin believes he was elected to lead and that one hallmark of leadership is prompt, positive, and decisive action." (Governor's Memorandum in Opposition to Temporary Injunction ("Governor's Memorandum") at 4.) Although the Governor concedes that "[r]eorganization ultimately [is] legislative in nature" (Id. at 8), he

[2] The Court notes that published reports indicate the resignation of President Ramsey was negotiated and accepted by the new Board, acting under its authority pursuant to the Executive Order, on Wednesday evening, July 28, 2016. This Court has expedited the hearing, review and decision of this motion, while giving due consideration to the complexity of the arguments, the significance of the legal issues, and the need to allow all parties to make a full record under CR 65.04. There was no injunctive order from this Court restricting the newly appointed board from taking such action, and the Court perceives no conflict between the newly appointed board's action and the Court's ruling today granting *prospective* injunctive relief. Any party aggrieved by this ruling has the right to bring any such concerns before the Court by motion.

claims that the legislature has delegated its legislative power to him, when the legislature is not in session, to make these legislative changes. The Governor argues, somewhat inconsistently, that the exercise of this *legislative* power is "purely an executive function." Id. (citing Legislative Research Commission v. Brown, 664 S.W.2d 907, 930 (Ky. 1984)). The Governor's counsel stated at the hearing that the only limit on the Governor's exercise of reorganization power is that the Governor must submit the changes to the legislature for approval at its next session. Accordingly, under the Governor's interpretation, interim reorganizations are not subject any judicial review or other constitutional check or balance. Or, as the Governor argued "[t]here is no interim review process." (Governor's Memorandum at 8).

If the Governor's interpretation of law is correct, the statutory protection against removal from office except for cause, and the statutory requirement of a hearing prior to removal, are meaningless formalities. Any university trustee, or group of trustees, can be removed for no reason or any reason—good or bad, well-intentioned or malicious—through the vehicle of reorganization. The Governor can remove these trustees with no notice, no opportunity to be heard, and no remedy, because—according to the Governor—the wielding of the executive reorganization power is beyond judicial review. The Governor submits that the judicial branch of government is "not permitted to second-guess the Governor in his executive decisions under KRS 12.028." (Governor's Memorandum at 9.) This argument is advanced notwithstanding the Governor's concession that reorganization is a legislative power. Thus, the Governor necessarily raises serious questions about the separation of powers when he wields this legislative power (without any meaningful review prior to implementation).

The theory of executive power advanced by the Governor grants one person unlimited discretion to completely restructure every public institution in this Commonwealth, to vitiate all

statutes setting forth requirements for governing boards, and to suspend statutes without any meaningful legislative or judicial oversight. While the Governor submits that such reorganizations are "temporary" and subject to legislative acceptance or rejection, in reality even that limitation would be illusory because the Governor can continue to circumvent such oversight by issuing a new (or slightly altered) executive order.

Thus, the Attorney General has demonstrated a substantial legal question: whether the Governor has the power to remove university trustees by unilateral executive action under KRS 12.028 when the more specific statutes governing university boards limit the Governor's power to cases in which there is legal cause for removal (KRS 63.080(2)), and require a due process hearing (KRS 164.821).

Indeed, this case also presents a more basic issue as to whether the Governor's reorganization power under KRS 12.028 applies to state universities at all. The Governor argues that some agencies, such as the Workers Compensation Funding Commission, are expressly exempted from the Governor's reorganization power. But the applicable legislative definitions here make an equally strong case that universities were exempted from the entire organizational structure of KRS Chapter 12. It is undisputed that no prior Governor has *ever* attempted to reorganize a university board under KRS 12.028. The Governor was granted reorganization power decades ago—in 1960—and yet the Governor has cited no precedent for such a reorganization of a university board. A careful reading of KRS Chapter 12, entitled "Administrative Organization," raises serious questions as to whether state universities are included within either the definitions of that chapter or the scope of the reorganization power in KRS 12.028. Likewise, the Court believes the public interest requires that this issue be decided before the Governor fully implements his unilateral orders.

Finally, as to the last Maupin factor, the Court concludes that the balance of the equities also favors entry of injunctive relief to restore the status quo before the Governor's Order. In particular, the public interest requires that the substantial questions of the Governor's power should be answered in court before the changes unilaterally mandated by the Governor are given the force and effect of law. In balancing the equities, it is also significant that the Governor apparently took action without any review, approval, or even consultation with the Southern Association of Colleges and Schools ("SACS"), although the University's accreditation requires such consultation. This appears to be contrary to the public interest because the Governor's actions could have a profound, and negative, impact on the accreditation of the University of Louisville by SACS. That agency has already initiated a review of these issues. See Attorney General's Exhibit 6, Letter from Dr. Belle S. Wheelan, President of SACS to Dr. James R. Ramsey, June 28, 2016. Assistant Provost Connie Shumate indicated in her testimony at the hearing that, while the University is not under *immediate* threat of sanctions, that is only because SACS has a lengthy process for review and response to these concerns. Although the threat of sanctions may not be immediate, the University must promptly address issues around university governance and its compliance with SACS governance standards. Ms. Shumate's testimony also provided persuasive evidence (to this point unrefuted) that the unilateral action of the Governor made it impossible for the University to comply with the requirement that the Board of Trustees be independent and free from operational control by outside political influences. See Attorney General's Exhibit 2, The Principles of Accreditation, SACS Standard 3.2.4. Moreover, SACS requires that major changes in university governance must be submitted to SACS for review and approval *prior* to implementation. Id. SACS Standard 3.12.1. The University had no knowledge of the Governor's Executive Order before it was issued. In fact, the record before this Court

shows no consideration by the Governor about the impact of his Executive Order on the University's accreditation. Thus, the issuance of injunctive relief to restore the *status quo* prior to the issuance of the Executive Order will protect the public interest by ensuring that all SACS requirements have been met before the changes to university governance set forth in the Executive Order are given full legal effect.

FINDINGS OF FACT

1. Executive Order No. 2016-338 was filed by the Governor on June 17, 2016. In that Order, the Governor made extensive findings upon which he based his reorganization of the Board of Trustees of the University of Louisville. Among other findings, the Governor noted that "the administration of the University of Louisville and the members of its Board of Trustees have become operationally dysfunctional," and that the Board "is irreparably fractured and broken and that a strained relations exists between certain trustees and the University administration, which is seriously damaging the entire University community in many ways." The Governor further alleged that "the University's Board of Trustees has acted in a manner that manifests a lack of transparency and professionalism," and that the "reputation of the University of Louisville as an academic institution is at risk . . . ."
2. The Governor then directed that "the University of Louisville Board of Trustees, as established by the provisions of KRS 164.821, should be abolished, altered, recreated, and restructured with a new, smaller and more efficient governing membership" and that "reorganization efforts should be taken immediately in order to achieve greater economy, efficiency, transparency, and improved oversight and administration of the University of Louisville."

3. Executive Order 2016-338 abolished the "University of Louisville Board of Trustees as established by KRS 164.821."
4. The Executive Order further provided "[t]he terms of the members appointed by the Governor serving on the University of Louisville Board of Trustees as it existed prior to the filing of this Order shall expire immediately upon the filing of this Order."
5. All members of the Board of Trustees serving under appointment of the previous Governor were unilaterally removed from the Board by Governor Bevin without any statement of cause, as required by KRS 63.080(2), or any notice and due process hearing before the Council of Postsecondary Education, as required by KRS 164.821.
6. The Governor did not consult SACS, as the agency responsible for academic accreditation of the University of Louisville, before he issued his reorganization order.
7. SACS, through its President, Dr. Belle S. Wheelan, has initiated a review of the actions taken by Governor Bevin. See Attorney General's Exhibit 6, Letter from Dr. Belle S. Wheelan, President of SACS to Dr. James R. Ramsey, June 28, 2016.
8. Uncontested evidence at the hearing, in the form of the letter from SACS President Wheelan, demonstrates that the Governor's actions have raised substantial questions about the University's compliance with the following SACS requirements: Core Requirement 2.2 (Governing Board); Comprehensive Standards 3.2.1 (CEO evaluation/selection), 3.2.4 (External Influence), 3.2.5 (Board dismissal), and 3.12.1 (substantive change). See id.
9. SACS initiated its review based on concerns that the Governor's actions violated SACS requirements regarding: 1) the independence of the Governing Board, 2) the

evaluation and selection of the CEO, 3) the external influence on the Governing Board, 4) the requirement for a fair process before the dismissal of board members, and 5) the requirement that substantive changes in the governing structure of the University be submitted for SACS approval prior to their implementation. See Attorney General's Exhibit 6, Letter from Dr. Belle S. Wheelan, President of SACS to Dr. James R. Ramsey, June 28, 2016; see also Testimony of Assistant Provost Connie Shumate.

10. SACS's concern regarding CEO evaluation and selection appears to be tied to the "President [of the University's] notice of an intent to submit his resignation/retirement upon the 'legal restructure of the Board of Trustees.'" See Attorney General's Exhibit 6, Letter from Dr. Belle S. Wheelan, President of SACS to Dr. James R. Ramsey, June 28, 2016.
11. SACS President Wheelan specifically noted "[i]n particular, the news reports raise questions about the institution's governance and external political influence." Id.
12. Dr. Ramsey's letter to Governor Bevin, dated the day before the Governor signed Executive Order 2016-338, states that Dr. Ramsey was "writing to reaffirm what we discussed." Dr. Ramsey then states that "upon a legal restructure of the Board of Trustees at the University of Louisville, I will immediately offer, the newly appointed board, my resignation/retirement as President of the University of Louisville." Attorney General's Exhibit 11, Letter from Dr. Ramsey to Gov. Bevin, June 16, 2016.
13. Dr. Ramsey's letter to the Governor appears to memorialize a conversation between the Governor and Dr. Ramsey in which the parties discussed Dr. Ramsey's

resignation in conjunction with the Governor using of his reorganization power under KRS 12.028 to replace the entire Board of Trustees.

14. The Governor has offered no affidavit or testimony explaining the actions he took to reorganize the Board.

15. When, at the hearing, the Governor's counsel was asked about the limits that apply to the Governor's exercise of his reorganization power, the counsel essentially replied that there are no limits in between legislative sessions, and that the only real limit was the ability of the legislature to alter or reject a reorganization at its next legislative session.

16. If the Governor's interpretation of KRS 12.028 is correct, the Governor could, unilaterally, by executive order, merge the University of Kentucky with the University of Louisville. Or, the Governor could merge all public universities into one institution with a board of trustees appointed entirely by himself.

17. Over the last twenty years, it has become common for executive orders that radically restructure administrative agencies to continue even if the legislature rejects, or fails to adopt, the Governor's "proposal" at the next legislative session. See, e.g., House Bill 919 (1996 General Assembly)[3], Senate Bill 153 (2004 General Assembly)[4], and

[3] This bill would have confirmed Governor Patton's Executive Order splitting of the former Cabinet for Human Resources into two Cabinets, the Cabinet for Families and Children and the Cabinet for Health Services. The bill did not pass, but the dual Cabinet structure established in the Executive Order remained in effect because of a new Executive Order issued after adjournment of the General Assembly in 1996.

[4] In 2003, Governor Fletcher, by Executive Order, recombined the Cabinet for Health Services and the Cabinet for Families and Children, into a single Cabinet for Health and Family Services. That reorganization was submitted to the General Assembly for confirmation in 2004 in Senate Bill 153, which was not enacted. Some two years after the original Executive Order merging the Cabinets, the legislature passed Senate Bill 47, which finally gave legislative approval to the merger.

House Bill 473 (2009 General Assembly).[5] These prior reorganization orders demonstrate that such orders can become permanent, or last for years, without legislative approval.

18. Moreover, if the Governor's reorganization power applies to universities, then it would likewise seem to allow him to abolish or reduce academic departments, name department heads, approve appointment and tenure decisions, and otherwise insert himself into management decisions that are currently overseen by an independent board.

19. The Governor's counsel stipulated at the hearing that the University of Louisville has an annual budget of approximately $1.2 billion, and that funds from the Commonwealth of Kentucky through General Fund appropriations account for approximately ten percent of this budget.

20. Prior to the enactment of Senate Bill 113 in 1952, all state universities were listed in the organizational structure of the executive branch of state government as divisions of the Department of Education. See 1952 Ky. Acts, ch. 41, Section 1[6]; KRS 156.010(3) (Carroll's Ky. Statutes, 1934-52).

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[5] In 2008, Governor Beshear, by a series of Executive Orders, merged a number of agencies into a new Public Protection Cabinet, and submitted the reorganization to the General Assembly in 2009 for approval in House Bill 473, which did not pass. In the 2010 regular session of the General Assembly, legislation passed that substantially adopted those reorganization orders in House Bill 393, although the merged agencies continued joint operation even after the legislature rejected the reorganization orders in 2009.

[6] Amending KRS 156.010(3) to strike the statute's language that "the University of Kentucky, the Eastern Kentucky State Teachers College, the Western Kentucky State Teachers College, the Morehead State Teachers College, and the Murray State Teachers College, with their governing boards .... are included in the Department of Education and constitute divisions thereof." The state universities were all included as divisions of the Department of Education from the time of enactment of KRS 156.010 in 1934 until this amendment by S.B. 113 in 1952.

21. Since 1952, it appears to the Court that no state or public university governing board has been listed as a department or division of the executive branch of state government in the Kentucky Revised Statutes, as set forth in KRS 12.020, subject to the reorganization power now codified at KRS 12.028.

22. The Legislative Research Commission explained the reason for removing the state universities from the organizational chart of state government in a comprehensive report in 1952:

> 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.
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> Public Higher Education in Kentucky, 117, Research Publication 25, Legislative Research Commission (1951) (emphasis added).

CONCLUSIONS OF LAW

1. Under Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978), a party seeking a temporary injunction must show irreparable injury, the existence of a substantial legal question, and that, after balancing the equities, injunctive relief is in the public interest. The Court finds and concludes that the Attorney General has met this standard.

2. On the issue of irreparable harm, the Court concludes that the allegations that the Governor has violated KRS 63.080(2), KRS 164.821, and Sections 15, 27, and 28 of

the Kentucky Constitution are so substantial that they demand judicial intervention to avoid significant disruption and preserve a meaningful right of judicial review. Additionally, allegations that the Governor has violated these laws give rise to irreparable harm because the allegations suggest that the integrity of the process by which the University removes board members has been compromised. Moreover, the Court concludes that the legality of the appointment and replacement of board members must be addressed immediately to prevent uncertainty, and the potential for chaos, in the administration of the University. The need for certainty is particularly important because the University needs a board to address on-going decisions about administration, staffing, and budgeting, including pending tuition decisions affecting tens of thousands of students and their families.

3. Here, the legal issues go to the heart of the democratic process. The Court must intervene to preserve the proper checks and balances governing executive action and legislative delegations of power under Sections 27 and 28 of the Kentucky Constitution. Injuries caused by violations of the constitutional separation of powers, by their nature, cannot be remedied by monetary damages. The Kentucky Supreme Court has held that an injury is irreparable if there is no pecuniary standard for the measure of damages. Cypress Mountain Coal Corp. v. Brewer, 828 S.W.2d 642 (Ky. 1992). *See also* United Carbon Co. v. Ramsey, 350 S.W.2d 454 (Ky. 1961). Here, as in Boone Creek Properties v. Lexington-Fayette Urban County Board of Adjustment, the violation of the law itself constitutes another irreparable injury. 442 S.W.3d 36. 40 (Ky. 2014). The Governor argues that Boone Creek is inapplicable because it was a zoning case decided under the police power. The Court cannot agree

with the Governor that a violation of the separation of powers doctrine enshrined in the Kentucky Constitution is less worthy of protection through injunctive relief than a zoning ordinance.

4. Additionally, the Kentucky Supreme Court has found that "a violation of the separation of powers" contributes to "great and irreparable harm," and that correcting such a violation is "necessary and appropriate in the interest of orderly judicial administration." Fletcher v. Graham, 192 S.W.3d 350, 356-57 (Ky. 2006). Because the Attorney General has made a *prima facie* showing of a constitutional violation, irreparable injury for purposes of injunctive relief has been established.

5. The Governor's executive order appointed replacement members to the Board. That Board, according to published reports, has begun to meet to consider important matters of academic administration. These matters include the negotiated resignation of Dr. Ramsey, the execution of a contractual obligation to pay him almost $700,000, and the appointment of the provost as the interim chief executive officer of the University. The Court concludes as a matter of law that, without injunctive relief pending a final decision on the merits of this case, the interim acts of Governor Bevin and the new Board "will tend to render such final judgment ineffectual." CR 65.04(1). Oscar Ewing, Inc. v. Melton, 309 S.W.2d 760 (Ky. 1958). This is because the new Board will continue to make important decisions in an uncertain legal context about University governance, the process for a presidential search, and the hiring of a new president—potentially depriving the statutorily appointed Board of its right and duty to make these decisions.

6. The Attorney General has raised a substantial question of law concerning whether the Governor's reorganization of the Board violated the statutory requirements that public university trustees cannot be removed except for cause (KRS 63.080(2)), and that removal of public university trustees must be subject to a due process hearing before the Council on Postsecondary Education (KRS 164.821).

7. The Governor's reliance on Legislative Research Commission v. Brown, 664 S.W.2d 907, 930 (Ky. 1984) for the proposition that reorganization "is purely an executive function" is misplaced. LRC v. Brown struck down as unconstitutional a statute that purported to grant the legislative interim committees the power to veto executive reorganizations during the interim between legislative sessions. That case, contrary to the Governor's argument, did not stand for the proposition that executive reorganizations are beyond the scope of judicial review.

8. It is well established that actions of the executive branch that are alleged to violate constitutional prohibitions are subject to judicial review. Pritchett v. Marshall, 375 S.W.2d 253 (Ky. 1964). Here, the alleged delegation of legislative power to alter, abolish, and amend the statutory structure and membership of a public university's board of trustees, raises serious questions as to whether such a delegation of power violates the separation of powers doctrine of the Kentucky Constitution. As the Court held in LRC v. Brown, *supra*, "any statute subject to the scrutiny of Sections 27-28 of the Kentucky Constitution should be judged by a strict construction of these time-tested provisions." Id. at 914. Or, as the Court observed there, "the General Assembly cannot delegate its *power to make a law*. It can, however, establish

standards for administration and delegate authority to implement a law. As in so many instances, the principle is easy to state. Its application is difficult." Id. at 915.

9. Whether the Executive Order here complies with statutory authority and legislative intent is fundamentally a question for *judicial* review. The Court, in LRC v. Brown, struck down a provision for interim legislative review of administrative regulations. To do so, that court had to exercise the power to review the provision and determine its legality. The same principle applies to this action for review of the executive reorganization power. As the Court held in LRC v. Brown: "It requires no citation of authority to state unequivocally that such a determination is a judicial matter and is within the purview of the judiciary, the Court of Justice." Id. at 919.

10. The Court further concludes as a matter of law that KRS 164.830 establishes "the board of trustees of the University of Louisville" as "a body corporate, with the usual corporate powers", including the appointment, suspension or removal of the president. Thus, the actions of the Governor in connection with the submission of the "resignation/retirement" of Dr. Ramsey (as indicated in Exhibit 11), would also appear to have been inconsistent with those statutes.

11. The power of appointment and removal of the President is vested by statute in the Board of Trustees. For a Governor to directly inject himself into the negotiation of the resignation of a university president, without participation of the board of trustees, raises profound questions about the governance of the university and the university's compliance with SACS requirements for an independent board. If an embattled university president can bypass the board of trustees and negotiate the removal of the

entire board with the Governor (with no due process), then the authority and independence of that board of trustees would seem to be greatly undermined.

12. The record here is devoid of any legal or factual precedent for a Governor to abolish and recreate an entire board of trustees of a public university. Such an action would seem to destroy statutory requirements for boards such as tenure of office, staggered terms, and institutional continuity. Those concepts are bedrock principles of public administration, enshrined in KRS 63.080(2) and KRS 164.821. No Governor can unilaterally vitiate those requirements through the exercise of executive power. At this early stage of the litigation, the Governor has not provided a legal or factual basis for the Court to conclude his exercise of the reorganization power is consistent with the above cited statutes, the constitutional requirements for separation of powers (Ky. Const., Sections 27-28), or the constitutional prohibition against unilateral suspension of statutes (Ky. Const., Section 15) by the Governor. Accordingly, injunctive relief is justified.

13. A substantial legal question also exists as to whether the Governor's temporary reorganization power set forth in KRS 12.028(2) applies to public universities at all. The definitions of KRS 12.010 do not clearly include public universities in the administrative organization of the executive branch of government. Likewise, the administrative organization of the executive branch of state government detailed in KRS 12.020 does not include state universities. Prior to 1952, state universities *were* included in the administrative organization of state government, and were designated as "divisions" of the Department of Education. It appears that universities have not been included in the organizational structure of state government in KRS 12.020

since 1952.[7] In balancing the equities and weighing the public interest, the Court finds and concludes that the cloud cast over the University's accreditation by Executive Order 2016-338 is a compelling factor that cuts strongly in favor of injunctive relief because of the vital public interest in protecting the academic reputation of the University and maintaining its accreditation. Here, the Governor unilaterally implemented his Executive Order the day after his meeting with Dr. Ramsey. It appears from the record in this case that he took this step without consideration for the SACS requirement that material changes in university governance be submitted to SACS for approval prior to implementation. At the scheduling conference in this action on July 7, 2016, counsel for the Governor represented to the Court that the University and the Governor anticipated a letter from SACS that would confirm that SACS did not object to the Executive Order. It is apparent that this misunderstanding of the SACS review process has great potential to damage the University's compliance with the requirements for continuing accreditation, unless an injunction restores the *status quo* prior to the issuance of the Executive Order.

14. The Court further finds that there is an overriding public interest in requiring the Governor and the Board of Trustees to act in a manner that is consistent with the

[7]The Court of Appeals has recently decided that one section of Chapter 12 applies to public university board appointments, holding that the Governor may reject lists of nominees to university boards under KRS 12.070 in Galloway v. Fletcher. 241 S.W.3d 819 (Ky. App. 2007). But that decision was limited to the application of KRS 12.070, relating to the Governor's appointment of candidates for boards from lists submitted by nominating groups. That case did not decide that that the Governor can abolish and recreate university boards, thus circumventing the removal process of KRS 63.080 and KRS 164.821. Nor did it determine that public universities are more broadly subject to the provisions of KRS Chapter 12. Moreover, it appears that Galloway 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 removal of state universities from the organizational structure of the executive branch in 1952. Id. At 822-23.

University's existing accreditation. Based on Ms. Shumate's testimony at the hearing, the University of Louisville established its compliance with SACS requirements for board independence and fair process for removal of board members by citing KRS 63.080 and KRS 164.821. Yet those statutes are without meaning if the Governor can unilaterally override them by issuing an executive order. Accordingly, the public interest supports having the Governor's changes in the governance of the University be STAYED until the correct procedures for assuring continuing compliance with SACS accreditation have been followed. The Court concludes that the Attorney General has made an initial showing that the executive order is inconsistent the applicable SACS standards, and this inconsistency provides another basis for finding that the public interest demands injunctive relief.

15. In balancing the equities and the public interest, the Court further finds that the Governor has numerous management tools available to address the problems that he perceives in the management of the University. He may initiate removal actions for Board members who have breached a material duty under KRS 164.821. He may request resignations of board members, as prior Governors have done in similar circumstances. See William E. Ellis, A History of Higher Education in Kentucky, 397 (University Press of Kentucky 2011) (documenting Governor Martha Layne Collins' request for resignations of Morehead State University Board of Regents during turmoil over presidential tenure). Likewise, similar disputes over presidential leadership have previously been resolved though the normal administrative and judicial processes of law, rather than unilateral executive action. See, e.g., Board of Regents of Murray State University v. Curris, 620 S.W.2d 322 (Ky. App. 1981). Moreover, it now appears that,

whatever concerns the Governor may have had with the leadership of President Ramsey, those concerns are now moot with the submission of Dr. Ramsey's resignation, effective July 28, 2016.

16. In balancing the equities, the Court is also mindful of the precedent that will be set if the Governor is granted the power to intervene in governance disputes at public universities by abolishing and recreating boards of trustees. While Governor Bevin's motives here may be laudable, there is no guarantee that others would not wield such unilateral and unchecked power for improper motives, political advancement, or private economic benefit. Such a possibility is particularly concerning given that public universities are institutions that are entrusted with billions of dollars of funds that should be administered as a public trust.

17. In weighing the public interest, the Court further concludes that Executive Order 2016-338 makes serious allegations of malfeasance and misconduct against the incumbent Board that was serving at the time the Governor implemented this Executive Order. When the members of a governing board of a public institution are removed from office based on allegations of mismanagement, dysfunction, and failure to protect the public interest, the individuals who accepted those appointments have rights to have the veracity of those charges tested in a hearing. At that hearing, the individuals have a right to defend themselves, and the public has a right to know the full factual basis of these charges. These are the core requirements of KRS 63.080(2) and KRS 164.821. Here, the Governor's charges of dysfunction were not tested before the Governor acted. The fact that there is disagreement among board members is not necessarily a sign of dysfunction. To the contrary, a board that

always is in agreement and acts as a rubber stamp may be dysfunctional. In any event, the public has a right to know *all* the facts surrounding such charges so that it can decide for itself the validity of the proposed action. A unilateral executive order diminishes the public interest in bringing out all the facts relevant to this important matter before an unbiased tribunal, as required by KRS 63.080(2) and KRS 164.821.

ORDER GRANTING TEMPORARY INJUNCTION

For the reasons stated above, IT IS ORDERED AND ADJUDGED:

1. The Attorney General's motion for a temporary injunction under CR 65.04 is GRANTED;
2. The provisions of Executive Order 2016-338 are hereby STAYED, and the Governor's appointment of replacement board members, and their authority to act as the duly constituted Board of Trustees of the University of Louisville is TEMPORARILY ENJOINED pending a final judgment in this action;
3. Governor Bevin, his agents, employees, and all other persons acting at his direction, or under pursuant to authority granted by him in Executive Order 2016-338, or any other person acting in concert with him and his appointees, are hereby ENJOINED from taking any action to implement the provisions of Executive Order 2016-338.
4. This Order shall remain in effect until issuance of a final judgment in this action, or until modified by the Court upon motion and after a hearing.

Because the Commonwealth, by and through its Attorney General, is the moving party here, no bond is required under CR 81A.

This Order shall be immediately effective upon its entry at 10:40 o'clock a.m. on Friday, July 29, 2016.

IT IS SO ORDERED.

PHILLIP J. SHEPHERD, JUDGE
FRANKLIN CIRCUIT COURT, DIV. 1

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