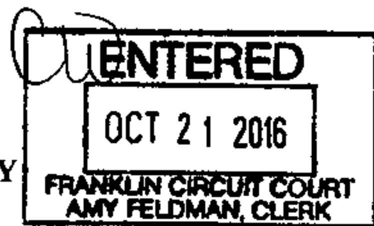

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 16-CI-738

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

V. **ORDER**

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

This action is before the Court on Governor Bevin's Motion to Alter, Amend or Vacate this Court's final judgment entered September 29, 2016. A hearing was held on October 19, 2016. The Attorney General was represented by Hon. Mitchell Denham and Hon. Latasha Buckner. Governor Bevin was represented by Hon. Stephen Pitt and Hon. Chad Meredith. The Court has reviewed the record and arguments of counsel, and, being sufficiently advised, **IT IS ORDERED** that the motion is **DENIED** for reasons more fully set forth below.

BACKGROUND

The Governor asserts four primary grounds for altering, amending or vacating the Court's judgment. He alleges that 1) the Court misapplied *Commonwealth, ex rel. Beshear v. Bevin,* ___ S.W.3d ___ (Ky. 2016) (2016-SC-272, rendered 9/22/16); 2) the Court made a "manifest error of law" in rejecting the Governor's interpretation of *Galloway v. Fletcher*, 241 S.W.3d 819 (Ky. App. 2009); 3) the Court failed to make findings of fact as required by CR 52.01; and 4) the Court's opinion misinterpreted factual issues regarding whether the Executive Order improperly maligned the Board, and whether the Governor improperly injected himself into the negotiation of President Ramsey's resignation. The Court finds that none of the grounds presented in the motion provide a basis to set aside or amend the Court's judgment.

ANALYSIS

A. *Commonwealth ex rel. Beshear v. Bevin*

The Governor's first argument in support of his CR 59 motion is that the Court erred in applying *Commonwealth ex rel. Beshear v. Bevin,* ___ S.W.3d ___ (2016-SC-272-TG) (Ky. Sept. 22, 2016). That decision is now final. The Governor argues the Court misconstrued the case, and that the parties should be given the opportunity to submit further briefing and argument on the application of this recent Supreme Court decision. While the Court believes it is self-evident that the recent Supreme Court ruling is fully consistent with this Court's Final Judgment, there is no need to re-open this case, or to delay its finality, with additional arguments concerning the application of that decision. This Court merely mentioned the *Beshear* case in a footnote, and did not rely on it for any controlling legal principle. This Court's Final Judgment rests on factual findings and legal principles that provide an adequate and independent basis for the Court's judgment, regardless of how the *Beshear* case is interpreted.

B. *Galloway v. Fletcher*

The Governor maintains that the decision of the Court of Appeals in *Galloway v. Fletcher* supports, or even compels, a decision in his favor, and that this Court made a "manifest error of law" in rejecting his analysis of that case. In *Galloway,* the Court of Appeals held that the Governor is not required to accept the first list of nominees for university board appointments, and may require the Postsecondary Education Nominating Committee to submit a new list if the nominees on the original list are unacceptable to him. *Galloway* resolved an alleged conflict between KRS 164.005(5) (the Postsecondary Education Nominating Committee statute) and KRS 12.070(3) (the statute on appointments to boards and commissions). The holding of the Court in *Galloway* was that there was no conflict between the two statutes, and that, under KRS 12.070(3),

"the Governor may reject the list an require that other lists be submitted" for university board appointments, without undermining the requirement of KRS 164.005 that the Governor "shall select each gubernatorial appointment" from a list submitted by the Postsecondary Education Nominating Committee.

The Governor argues that *Galloway* holds, or at least implies, that the boards of trustees of universities are part of the "administrative organization" of state government subject to KRS Chapter 12. This Court has rejected that argument, and held that *Galloway*, dealing with the Governor's power of appointment, should not be extended beyond its facts to apply to the Governor's broad reorganization powers in KRS 12.028. A brief examination of the Court's reasoning is in order.

First, the only issue before the Court in *Galloway* was whether the Governor could reject a list of nominees for appointment to university boards. It addressed KRS 12.070, not KRS 12.028. As *Galloway* noted, the provisions of KRS 12.070(3), allowing the Governor to reject lists of nominees for state boards, were "originally enacted as part of the Reorganization Act of 1936." *Id.* at 822 (citing *Elrod v. Willis*, 203 S.W.2d 18, 20, 21 (Ky. 1947)). Of course, in 1936, state universities *were* included within the organizational structure of the executive branch, as pointed out in the Court's Temporary Injunction (pp. 11–12, Findings of Fact Nos. 20–22), and Final Judgment (pp. 7–9). It is clear from the text of *Galloway* that no one argued, and the Court did not decide, the effect of the subsequent 1952 legislation that removed state universities from the organizational structure of state government. 1952 Ky. Acts, c. 41, Section 1. Accordingly, *Galloway* did not decide that issue because it was not presented in that case. And the Governor has offered absolutely no explanation for how state university boards are included within the provisions of KRS 12.028 when they were excluded from the administrative organization of the

executive branch of government in 1952. The Court has made findings on this issue, which it reaffirms here, and there has been no contrary factual or legal arguments submitted that would support disturbing the Court's ruling on this point.

It is apparent that both the Court of Appeals, and the trial court in *Galloway*, proceeded on the assumption that it was "immediately obvious" that university boards were included in the provisions of KRS 12.070. *Galloway*, 241 S.W.3d at 822–23. The effect of the 1952 legislation was not presented or addressed in *Galloway*, and, accordingly, *Galloway* cannot be considered to be dispositive of that issue. Its holding should not be extended beyond its facts and the statute that it did construe, KRS 12.070. Unless the Governor has some argument or explanation for how university boards remain within the administrative organization of state government *after* the 1952 legislation explicitly removed them from their prior status as Divisions of the Department of Education, then this Court's ruling that state universities (including their boards) are outside the scope of the "administrative organization" of the executive branch of state government subject to KRS Chapter 12 must stand.[1]

As the Court noted in its Final Judgment, KRS 12.015 provides that "each administrative body established by statute or statutorily authorized executive action shall be included for administrative purposes in an existing department or program cabinet."[2] The Governor's motion fails to answer the question: what "existing department or program cabinet" is the University of Louisville Board of Trustees included in? The University of Louisville Board of Trustees is

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[1] The narrow ruling of *Galloway*, is that there is no conflict between KRS 12.070 and KRS 164.005, and therefore the Governor is not compelled to make appointments off the initial list submitted by the Postsecondary Nominating Commission. KRS 12.070(3) simply restates the common law, which has been controlling on this point for over seventy years. *Elrod v. Willis*, 203 S.W.2d 18 (Ky. 1947) and *Kentucky Ass'n of Realtors, Inc. v. Mussleman*, 817 S.W.2d 213 (Ky. 1991). Accordingly, any observation of the Court of Appeals in *Galloway* regarding an alleged broader application of KRS Chapter 12 to university boards beyond KRS 12.070 is unnecessary to the holding.
[2] Final Judgment Granting Declaratory and Injunctive Relief, p. 11.

manifestly **not** "included for administrative purposes in an existing department or program cabinet." The University of Louisville Board of Trustees does not administratively report to any Commissioner or Cabinet Secretary. It is outside the scope of the organizational structure of the executive branch, as defined in KRS Chapter 12, and thus it is beyond the scope of reorganization power of the Governor in KRS 12.028.

Moreover, the controlling rule of *Galloway* compels a finding against the Governor in this case. *Galloway* held that "[w]here there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible." *Id.* at 823 (citing *Commonwealth v. Halsell*, 934 S.W.2d 552, 555 (Ky. 1996)). Here, there is not only an *apparent* conflict, but a *real* one, between KRS 12.028 (the reorganization statute) and both KRS 164.821(5) and KRS 63.080(2) (which provide that university board members may not be removed from office except for cause, and after a hearing before the Council on Postsecondary Education). The Governor's Executive Order under KRS 12.028 removed the incumbent members of the Board of Trustees of the University of Louisville without cause and without a hearing. He has purported to accomplish their removal through the vehicle of "reorganization" under KRS 12.028. If this interpretation of KRS 12.028 is accepted, the statute is directly in conflict with KRS 164.821(1)(b) and KRS 63.080(2).

This Court's ruling applies the rule of *Galloway* that statutes should be construed in a manner that harmonizes potentially conflicting statutes. There is no conflict between KRS 12.028 and KRS 164.821(5) and KRS 63.080(2) *if* the Governor's reorganization power does not extend to the University of Louisville and its Board of Trustees. KRS 63.080(2) and KRS 164.821(1)(b) require cause for the removal of university trustees, and a hearing before the Council on Postsecondary Education, before any trustee can be removed. Those statutes do **not** include the

language "*except when the Governor removes board members through a reorganization under KRS 12.028*," as the Governor has argued to this Court.

In *Galloway*, the potentially conflicting statutes could be readily harmonized by interpreting KRS 164.005 to authorize the Governor to require the submission of a new list if the committee's first list was unacceptable to him. The Court held there is no conflict so long as the ultimate appointment made by the Governor came from a list submitted by the Postsecondary Education Nominating Committee "albeit not the from the first such list." *Id.* at 824.

By contrast, there is no way to harmonize KRS 12.028 with KRS 164.821(5) and KRS 63.080(2) if the Governor can unilaterally remove board members through the vehicle of reorganization without cause, and without a hearing. The *only* way to harmonize these statutes is to hold that KRS 12.028 does not apply to university boards. If a Governor can unilaterally remove all board members through the vehicle of re-organization during the legislative interim by invoking KRS 12.028, then the protections against political interference with Board members that is codified at KRS 164.821(1)(b) and KRS 63.080(2) is rendered utterly meaningless. If the statutes are interpreted in the manner the Governor suggests, then they are in direct conflict. The power to unilaterally "abolish and recreate" a board cannot be reconciled with a prohibition against removal of board members except for cause and after a hearing. The controlling legal principle of *Galloway* that the Court must harmonize statutes to prevent such a conflict compels this Court to hold that KRS 12.028 does not apply to university boards.

C. Findings of Fact

The Governor has also requested that the Court make specific findings of fact under CR 52.01, but the Governor's motion fails to identify any disputed issue of material fact that the Court failed to address with a factual finding. The only disputed issue of material fact that the Court

discerned from the record is the question of whether the Governor's Executive Order was a part of a course of conduct in which the Governor improperly usurped the role of the University of Louisville Board of Trustees in negotiating the terms of President Ramsey's departure. Based on the record before the Court, which consisted primarily of a letter from President Ramsey to Governor Bevin, the Court made a factual finding that the Governor improperly injected himself into the governance of the University of Louisville by agreeing to replace and reconstitute the Board of Trustees, in violation of KRS 164.821. Final Judgment, at 4–5. The Governor has offered no basis to disturb this factual finding, and the Court reaffirms it now.

To the extent that other factual issues are relevant to the Court's decision, those factual issues were fully set forth in the Court's ruling on injunctive relief. The Court, in its Final Judgment, specifically incorporated those factual findings by reference. *See* Order Granting Temporary Injunction, at 7–12. Again, the Court reaffirms those findings of fact, and notes that upon entry of the Final Judgment those issues "shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims that are not specifically disposed of in such final judgment." CR 54.02(2).

Finally, the Court notes that on the issues of declaratory relief, there are no disputed issues of fact. The question of whether university boards are included within the scope of the Governor's reorganization power under KRS 12.028 is purely a question of law. The question of whether the Governor can circumvent the requirements of KRS 63.080 and KRS 164.821(1)(b) (prohibiting removal of university board members without cause and a hearing) through exercise of the reorganization power in KRS 12.028 is a question of law. In ruling on strictly legal issues, there is no requirement for findings of fact. *Lynch v. Dawson Collieries, Inc.*, 485 S.W.2d 494 (Ky. 1972); *Wilson v. Southward Inv. Co. No. 1*, 675 S.W.2d 10 (Ky. App. 1984). To the extent that

the Court's injunctive relief is based on factual determinations, those findings are set forth in the Order Granting Temporary Injunction, at 7–11, and in the Final Judgment, at 2–6.[3]

D. Alleged Misinterpretation of Facts

The Governor has also argued that the Court has misconstrued certain facts in the Final Judgment. First, the Governor objects to the Court's statement that "[i]t is uncontested that the action of the Governor removed *all* non-elected members of the Board of Trustees from office." The Governor objects to the way the Court described the effects of the Executive Order, but does not point to any factual inaccuracy. Rather, the Governor objects to the Court's use of the term "removed" because that same term is used in KRS 63.080(2)[4] and KRS 164.821(1)(b).[5] The Governor acknowledges, as he must, that all incumbent members of the Board serving by gubernatorial appointment who were members of the Board on June 17, 2016, *prior* to the filing of Executive Order 2016-338, were no longer serving on the Board *after* his entry of the Executive Order. It defies common sense, and the basic rules of English grammar, to interpret these facts to mean that those Board members were not *removed* from office, as the Governor argues. While they may have been removed by Executive Order rather than a letter of termination, they were removed nonetheless. They all served on the Board one day, and were no longer on the Board the next day.[6] This may be inconvenient for the Governor's legal argument, but it is a fact. The Governor may use different terms to describe his action if he chooses. But he cannot alter the

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[3] As noted in CR 52.01, "If an opinion or memorandum of decision is filed, it will be sufficient if the finding of fact and conclusions of law appear therein."
[4] "Members of the board of trustees of the . . . University of Louisville . . . shall not be removed except for cause." KRS 63.080(2).
[5] "Board members may be removed by the Governor for cause, which shall include neglect of duty or malfeasance in office, after being afforded a hearing with counsel before the Council on Postsecondary Education and a finding of fact by the Council." KRS 164.821(1)(b).
[6] "Remove" is defined, in the context of an office holder, as follows: "to dismiss from office." *Webster's Seventh New Collegiate Dictionary* 725 (G. & C. Merriam Company 1967).

reality that his unilateral executive order terminated the service of Board members, and effected their removal from office. That they were removed through an Executive Reorganization Order, rather than being removed for cause after a hearing as required by statute, does not alter the reality that the Governor effected their removal from office.

Kentucky law provides, "[a]ll words and phrases shall be construed according to the common and approved usage of language. . . ." KRS 446.080(4). Whether board members are removed by firing, or by reorganization, their terms of office are ended, and they have been "removed" from their official duties. For university board members, such an action cannot be effected without cause, and without a hearing before the Council on Postsecondary Education. KRS 63.080(2); KRS 164.821(1)(b).

The Governor also objects to the Court's findings that the Executive Order maligned the integrity and competence of the Board members, who were removed without due process. The Governor objects that "he was under no legal obligation to even provide reasons." Yet, in this case, he did. And the Executive Order speaks for itself. He accused the Board of "lack of transparency and professionalism." He stated the Board was responsible for placing the "reputation of the University of Louisville as an academic institution . . . at risk." He stated that "members of its Board of Trustees have become operationally dysfunctional." He alleged "certain trustees" engaged in unspecified conduct damaging to the University and which "reflects negatively upon the Commonwealth." *See* Executive Order 2016-338. Those are exactly the kind of allegations that KRS 63.080(2) and KRS 164.821(1)(b) were enacted to address. Those statutes guarantee board members due process and the right to defend themselves against such allegations. Those statutes provide that the Governor must give due process to Board members he seeks to remove. He must state his cause, and provide them with a hearing at which time they can defend

their actions and good name. He cannot circumvent those requirements of law by removing them under the guise of a reorganization.

Next, the Governor objects to the Court's finding with regard to the resignation of Dr. Ramsey. The Governor now advances alternative theories, but no facts were produced to support those alternative theories. Certain facts are indisputable. Dr. Ramsey met with Governor Bevin to discuss his departure. Dr. Ramsey then wrote the Governor his intent to resign or retire *on the condition that the Board be replaced.* Almost immediately thereafter, Governor Bevin issued an Executive Order that replaced all gubernatorial appointments on the Board. The Court believes that weight of the evidence supports a finding that Dr. Ramsey and Governor Bevin reached an agreement for the Governor to replace the Board as a condition of Dr. Ramsey's resignation/retirement, and that Governor Bevin improperly interjected himself into the governance of the University. While there are alternative explanations for the Governor's actions, there was no evidence offered in support of those explanations. The Governor is not compelled to submit such evidence, but, unless some alternative evidence is in the record, the Governor's unsupported theories do not afford a basis for altering or amending the Court's judgment.

The Governor's motion includes various other issues concerning the factual and legal analysis of the Court in its Final Judgment, including an unusual criticism of the Court for observing that the Court does not question Governor Bevin's motives. The Court does *not* question Governor Bevin's motives, but finds as a matter of law that his methods have exceeded his statutory powers. It is an appropriate function of the courts to enforce statutory restrictions on the exercise of the powers of the executive branch of government. As James Madison observed in the Federalist 51, "if men were angels, no government would be necessary."[7] It is the duty of the

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[7] THE FEDERALIST NO. 23 (James Madison), www.constituion.org/fed/federa51.htm (accessed 10/22/16).

judicial branch to provide a check on the exercise of executive power. When the exercise of gubernatorial or legislative power exceeds statutory or constitutional limits, the Courts are required to provide checks and balances. "It requires no citation of authority to state unequivocally that such a determination is a judicial matter and within the purview of the judiciary, the Court of Justice." *Legislative Research Com'n By and Through Prather v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984). The Court has examined the record and finds that none of the issues raised in the motion to alter, amend or vacate requires any change in the final judgment rendered by the Court.

CONCLUSION

For the reasons stated above, the motion to alter, amend or vacate is **DENIED**. This is a final and appealable order and there is no just cause for delay.

IT IS SO ORDERED this 21st day of October, 2016.

PHILLIP J. SHEPHERD, JUDGE
FRANKLIN CIRCUIT COURT

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