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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PARTY *v.* BOARD OF LAW EXAMINERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 07–18. Argued July ——, 2019—Decided July 28, 2019

After Congress passed the Reviving the Bar Act (old S. 147), which, *inter alia*, transferred control of the Federal Bar to the Executive Branch, Jacob A. Kirkman filed a class action on behalf of the members of the Supreme Court Bar challenging that legislation in Federal District Court. He alleged that the Revival Act violated the *trias politica* doctrine by contravening the separation of powers. After obtaining a favorable judgment in the District Court and an injunction against the Revival Act, Kirkman then worked with the sponsors of the Revival Act on a successor bill, the Private Representation Revitalization Act (new S. 147). This new Act was virtually identical to the Revival Act but addressed some policy concerns particular to Kirkman which led him to file his original case. Once the Revitalization Act became law, Kirkman and the Board of Law Examiners sought to have the injunction dissolved to allow the new Act to take effect. The Court of Appeals vacated the injunction despite no presentation affirmatively challenging it on the merits. SheldonParty, a member of the plaintiff class, filed a motion in this Court to be substituted as class representative to pursue an appeal of the Court of Appeals ruling. This Court granted that motion and SheldonParty argued that the Court of Appeals committed legal error by vacating the injunction without the presentation of any affirmative arguments and that both old and new S. 147 are unconstitutional.

Held:

1. The Court of Appeals erred in vacating the injunction without the presentation of legal arguments. Pp. 1–2.

2. S. 147 is unconstitutional because licensing attorneys is an exercise of judicial power and that power cannot be transferred by Congress

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to the Executive Branch without violating the separation of powers and *trias politica*. The Due Process Clause argument referenced in *Ultiman* v. *United States*, 5 U. S. 72, however, is rejected because there is no constitutional right to practice law. Pp. 2–5.

8 F. 4d ___, reversed.

PITNEY, J., delivered the opinion of the Court, in which HOLMES, C. J., and GORSUCH, O'CONNOR, STEWART, and DOUGLAS, JJ., joined in full, and in which BORK and CHASE, JJ., joined in part. BORK, J., filed an opinion concurring in part, in which CHASE, J., joined. BRANDEIS, J., took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 07–18

SHELDONPARTY, PETITIONER *v.* BOARD OF LAW EXAMINERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[July 28, 2019]

JUSTICE PITNEY delivered the opinion of the Court.

On the 27th of April 2019, President Bakedgoods signed S. 147 ("the law" hereinafter) into law. This law attempted to move the administrative authority to regulate the Bar to the Executive Branch. Originally, counselor Jacob A. Kirkman filed a class action suit against the law, claiming members of the Supreme Court Bar had suffered injury.

The District Court issued an injunction[1] against the law, stating that it violated the *trias politica* doctrine by contravening the separation of powers that exists between the three branches of Government. The existence of such separation has been affirmed repeatedly by this Court: "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power." *Myers* v. *United States*, 272 U. S. 52, 293 (1926); see also *INS* v *Chadha*, 462 U. S. 919 (1983). The Court of Appeals vacated the injunction citing that no party wished for the injunction to continue standing.

[1] See https://secure.link/RoMGEfgc.

Looking to the case at hand, petitioner filed a suit claiming that the Court of Appeals erred in its decision to vacate the injunction on the grounds that nobody wanted it. Petitioner claimed that "neither the Board nor Kirkman offered any legal reason for the Court of Appeals to reverse the District Court's denial of the dissolution motion, nor could they." Pet. for Cert. at 5.

The primary question at hand is whether the Court of Appeals erred in its decision to vacate the injunction with no legal arguments being presented to do so. In essence, the Court of Appeals vacated the injunction *sua sponte*. This Court in a previous case declared: "It is not the burden of the petitioner to show that his appeal has merit, . . . It is the burden of the [respondent] . . . to show the appeal lacks merit." *Coppedge* v. *United States*, 369 U. S. 438, 448 (1962). This means that it would have been the burden of Kirkman to prove the injunction has merit. This, however, is not the situation afoot. Kirkman and the Board of Law Examiners ("the Board" hereinafter) failed to present legal arguments. We would find that the decision to vacate the injunction without legal arguments being presented to be a decision made *ultra vires*. The Court of Appeals does not have authority to carry out judicial review by its own sword.

This is not the first time this Court has been asked to review the constitutionality of an executive-controlled Bar. Indeed, consider the Consolidated Appropriations and Authorizations Act of August 2018. This law led to *Ultiman* v. *United States*, 5 U. S. 72 (2018). In this case, the Court was asked to review a very similar topic, however, the Court chose to withhold from addressing the separation of powers argument; they did however note it raised "legitimate concerns." *Id.*, at 21, n. 4. The Court dismissed the case as moot leaving us now to decide the matter they avoided.

Two main arguments exist between the case at hand and *Ultiman*. The first being that the transfer of a Bar from the control of the Judiciary to the control of the Executive

places a "substantial burden" on those who practice law, causing them to lose clients and the prospect of money. The second being that a Bar controlled by the Executive, the primary argument of this case, violates the separation of powers between the Judiciary and the Executive.

To satisfy the first argument we look to *Ultiman*. "There is a clear nexus between § 304's placement of the then-new system within Executive Branch control and the injury's petitioner has asserted. If we held invalid § 304, those imminent injuries would have been redressed." *Id*., at 22. The petitioner's injuries are those referred to above as a "substantial burden." One may think that the Court upheld the argument that the Due Process Clause has been violated by adding an undue and substantial burden of the petitioner but that is not the case. *Ultiman* upheld that the claim substantiated an imminent injury therefore giving the petitioner standing under *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992). This was merely a "justiciability issue", *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 92 (1998), rather than an argument that holds water. In fact, further inspection of this argument proves it holds no water. "There are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. The right to admission to practice in the courts of a state is not one of them." *Bradwell* v. *State*, 83 U. S. 130, 139 (1872). In *Bradwell*, the Court upheld that no right to practice law is protected by the Constitution, therefore rendering the due process argument flawed. The reason for this can be explored in *Ex parte Garland*, 71 U. S. 333 (1866). *Garland* held that "admission or exclusion [from the Bar] is not the exercise of a mere ministerial power. It is the exercise of judicial power," *Id*., at 378-379. The power of the courts to regulate who can practice within them is a power not only granted by the Constitution, but a power that ensures the administration of justice is fair, and

the rights of those who are seeking such, are upheld. "[Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character." *Ibid*.

The separation of powers is a doctrine embedded within the very Constitution of the United States. In Article I, the legislative power is vested in Congress. In Article II, the executive power is vested in the President. And in Article III, the judicial power is invested in this Supreme Court and its inferior courts. Three powers, three branches—all separate with a system of checks and balances between the three and the People. "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." 1 Annals of Congress 581. The Court has, on many occasions, shut down legislation using judicial review,[2] due to the nature of the legislation violating this very belief of the separation of powers. This case shall be no exception. As noted in *Garland*, *supra*, attorneys are officers of the court, to be chosen by the courts. The idea that the Executive can choose, regulate, and discipline the officers of the court is as absurd as the Supreme Court picking the President's cabinet, or the Senate's Sergeant-at-Arms. It clearly abridges the judicial power vested in the Supreme Court.

Time and time again, this Court has held that the administration of the Federal Bar shalt not be given to the Executive Branch. The notion abridges the separation of powers and therefore is unconstitutional.

The Court of Appeals erred in its decision vacating the injunction; this Court reverses the decision below and

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[2] See *Marbury* v. *Madison*, 5 U. S. 137 (1803).

strikes down S. 147 in its entirety.

It is so ordered.

JUSTICE BRANDEIS took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 07–18

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[July 28, 2019]

JUSTICE BORK, with whom JUSTICE CHASE joins, concurring in part.

The Court's conclusion—that Congressional assignment of Federal Bar administration to the Executive Branch "abridges the judicial power vested in the Supreme Court"—is obviously correct.[1] It is also clearly consistent with the original understanding of the Constitution to declare this arrangement unconstitutional.[2] But the historical record is equally clear that Congress, as long as it leaves *administration* of the Bar to the Judicial Branch, may regulate as to the form and structure the Bar system shall take.[3] I disagree with some of the majority's broader rhetoric suggesting otherwise.

I do not think the majority means to foreclose this type of Congressional involvement and I do not read its opinion to do so. To be on the safe side, however, I concur in part only.

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[1] *Ante*, at 4.

[2] *E.g.*, *In re Kirkman*, 7 U. S. ___, ___ (2019) (slip op., at 1) (describing the "long history of judicial management" of the Federal Bar).

[3] See U. S. Const., art. I, §8, cl. 14 (authorizing Congress to make "necessary and proper" laws to carry into effect "all . . . other Powers vested by this Constitution in the Government.").