Per Curiam

# SUPREME COURT OF THE UNITED STATES

IN RE JACOB A. KIRKMAN, ET AL.

ON APPLICATION FOR STAY

No. 07A527. Decided May 29, 2019

PER CURIAM.

Applicants Jacob A. Kirkman and the Board of Law Examiners jointly request a stay of the permanent injunction entered by the District Court in *Kirkman* v. *Board of Law Examiners*, 3:19−2215 (D. D. C. 2019), which struck down the since-repealed Reviving the Bar Act of 2019 (the "Revival Act"). The application is denied.

I

At the time of *Kirkman*, the Revival Act was just the latest in a series of attempts by Congress to wrest control of the Board of Law Examiners and the Federal Bar from judicial hands despite a long history of judicial management of both.[1] Indeed, although regulation of the legal practice was historically considered an adjunct of the judicial power,[2] Congress strongly believed that the Federal Bar system would benefit from Executive Branch control and would experience greater vitality under political management. As a result, Congress repeatedly attempted to transfer the institutions comprising the Federal Bar to the Executive Branch. Each attempt, however, was met with

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[1] Both were established by the Judiciary in exercise of statutory and constitutional authority. See Efficient Function and General Duties Act; *Ultiman* v. *United States*, 6 U. S. 19, 21, n. 4 (2019).

[2] See, *e.g.*, *Carlisle* v. *United States*, 517 U. S. 416, 426 (1996); *United States* v. *Hasting*, 461 U. S. 499, 505 (1983); *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 47 (1991); *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 313 (1982); see also *Saucier* v. *Hayes Dairy Products, Inc.*, 373 So. 2d 102, 105 (1978) (describing the historical, nationwide pedigree of "judicial regulation of the practice of law.").

strenuous objections that led to legal challenges; each attempt failed to survive beyond judicial inspection.

The first attempt was included as a rider provision in the Consolidated Appropriations and Authorizations Act of August 2018. In response, a case alleged that the placement of the Federal Bar under Executive control "violated the Due Process Clause [and] the separation of powers doctrine." *Ultiman*, *supra*, at 19. The petitioner there contended that there exists a "constitutionally-cognizable liberty interest in the 'free and fair practice of law.'" *Id.*, at 21 (quoting Pet. for Cert. in No. 05−72, at 4). This Court recognized the "substantial probability that such a liberty interest exists" and credited the petitioner's line of reasoning that *any* requirement of a Bar license to practice law burdens that interest, necessitating "substantial procedural safeguards." *Ibid*. The petitioner believed that one such safeguard was judicial management of the Federal Bar. Additionally, the petitioner argued that it would violate the separation-of-powers doctrine for the Federal Bar to be placed in Executive hands, perhaps because of the weight of precedent supporting the Judiciary's historical authority over the legal profession, see *supra*, n. 2. Recognizing the merit of the petitioner's arguments, Congress responded by passing the Executive Reform Act which repealed the provisions the petitioner had alleged were constitutionally defective, in their place creating a "markedly different" system of judicial control intermixed with Executive representation. *Ultiman*, *supra*, at 22. This Court then dismissed *Ultiman* as moot, reasoning it was "highly unlikely" that "Congress [would] resume its allegedly unconstitutional conduct." *Id.*, at 23.

Alas, flash forward to the passage of S. 147, and Congress had again attempted to—with a rider in an unrelated bill—effect a transfer of the Federal Bar to the Executive Branch. The bulk of that bill, however, was held unconstitutional by this Court in *In re Federal Government*, 7 U. S.

___ (2019) (*per curiam*). The Court struck down the bill's Bar provisions without addressing the "constitutional issues inherent in [them]" because they were inseverable from the portions of the bill already deemed unconstitutional. *Id.*, at ___ (slip op., at 5–6). In doing so, the Court noted that Congress was free to "pass legislation resurrecting" the Bar provisions since they had not been ruled unconstitutional. *Id.*, at ___ (slip op., at 4). But it was understood that if Congress chose to do that, the constitutionality of the Bar provisions would ultimately be subject to direct consideration. *Ibid.*

Congress responded by passing the Revival Act, the bill at issue in *Kirkman*. The law was challenged on the grounds that it violated the separation-of-powers doctrine. After the District Court declined to dismiss the case on standing grounds, the Board of Law Examiners notified the court that it would no longer defend the Revival Act. As a result, the District Court granted an unopposed motion for summary judgment and entered a permanent injunction enjoining the Revival Act.

Soon after the *Kirkman* ruling, the plaintiff in that case and the architects of the Revival Act co-authored new legislation which addressed some of the policy concerns plaintiff had with the original bill. This led Congress to pass the Private Representation Revitalization Act (the "Revitalization Act"). The Revitalization Act repealed the Revival Act. Nevertheless, it greatly resembles the Revival Act and apparently differs in only one way. Namely, it grants members of this Court's Bar automatic admission into the reorganized Federal Bar, subject to the possibility of later removal. Critically, the law did nothing to remedy the defects identified by the District Court in *Kirkman*. Therefore, correctly or not,[3] the *Kirkman* injunction has

[3] This opinion does not address the correctness of the view that the *Kirkman* injunction preempts the Revitalization Act.

been understood to effectively preempt the Revitalization Act. The Act has pursuantly not been given any effect by the courts.

Applicants now request that this Court stay the *Kirkman* injunction so that the Revitalization Act may take effect while proceedings are pending in the Court of Appeals that challenge the continued operability of the injunction.

II

The decision whether to grant a stay is an equitable judgment in large part based in this Court's discretion. *Nken* v. *Holder*, 556 U. S. 418, 433 (2009). In the past, before deciding whether to issue a stay, the Court has often found it "necessary . . . to balance the equities—to explore the relative harms to applicant and respondent [as applicable], as well as the interests of the public at large." *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1305 (1991) (Scalia, J., in chambers). Additionally, an equitable judgment of this variety typically considers whether (1) there exists a "reasonable probability" that this Court will eventually grant certiorari, and if (2) there is a "fair prospect" that the applicant will succeed on the merits. *Conkright* v. *Frommert*, 556 U. S. 1401, 1402 (2009) (Ginsburg, J., in chambers). In some cases, also, there are overriding equitable considerations which either counsel for or against issuing a stay.

In this case, an overriding equitable consideration forms the basis for the Court's rejection of the stay application. More specifically, the extraordinary nature of applicants' request. Indeed, whenever a stay applicant seeks to leapfrog the ordinary judicial hierarchy, bypassing the Court of Appeals and making their request directly in this Court, the request is regarded as extraordinary. There must be a correspondingly-extraordinary justification for that departure from usual practice or the request ought to be denied. The justifications put forward in this application are, though

plausible, for the present moment unavailing.

Transitory delay in the Court of Appeals, without more, is generally insufficient to justify extraordinary intervention by this Court. Until a sufficiently lengthy period of time has passed, action by this Court is usually unwarranted. The record does not indicate, nor do the parties contend, that the Court of Appeals has yet subjected any unreasonable delay in this case. This Court takes seriously the parties' concern that they may be forced to wait "for months and possibly years" on account of what they view as a pattern of inactivity in the Court of Appeals. But if the parties are correct that review in the Court of Appeals would take such a long time, granting a stay while leaving the case in that court would result in a *de facto* final resolution without the benefit of briefing or argument. Thus, once more time has elapsed and if the delay persists, the Court invites the parties to file a petition for a writ of certiorari before judgment to enable more complete review in a timely manner. Alternatively, they may take their stay request to the Court of Appeals; if refused, or if withheld an answer for an extended period of time, they may resubmit their stay application in this Court.

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For the foregoing reasons, the application for a stay is denied.

*It is so ordered.*