

Supreme Court Report

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This *Report* summarizes opinions issued on May 14 and 18, and June 1, 2020 (Part I).

I. Opinions



● *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, 18-1334. Without dissent, the Court held that the oversight board established by the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) is not subject to the Appointments Clause of the Constitution. Congress enacted PROMESA in 2016 to address the economic emergency facing Puerto Rico, which had \$71 billion in public debt that year. PROMESA allows Puerto Rico and its entities to file for federal bankruptcy protection and established a Financial Oversight and Management Board with broad authority to oversee the restructuring of Puerto Rico's debt. The Board can file for bankruptcy on behalf of Puerto Rico or its instrumentalities; it can supervise and modify Puerto Rico's laws and budget; and it can gather evidence and conduct investigations to support those efforts. PROMESA empowers the President to appoint the Board's seven members without Senate confirmation, so long as he selects six from lists prepared by congressional leaders. In August 2016, President Obama selected the Board's seven members in that manner. The Board soon filed bankruptcy petitions on behalf of Puerto Rico and five Commonwealth entities. After the court and Board had resolved a number of matters, several creditors moved to dismiss all proceedings on the ground that the Board members' selection violated the Appointments Clause. The court denied the motion, but the First Circuit reversed, holding that they are "Officers of the United States" for purposes of the Appointments Clause, who require Senate confirmation. In an opinion by Justice Breyer, the Court reversed and remanded.

The first section of the Court's opinion agreed with part of the First Circuit's ruling: "like the Court of Appeals, we believe the Appointments Clause restricts the appointment of all officers of the United States, including those who carry out their powers and duties in or in relation to Puerto Rico." Put another way, the Appointments Clause applies even when Congress is acting pursuant to its power under Article IV of the Constitution to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." §3, cl. 2. The Court explained that the Appointments Clause reflects an allocation, and diffusion, of power between the President and Senate. "Why should it be different when [an Officer of the United States'] duties relate to Puerto Rico or other Article IV entities?" Turning from structure to text, the Court noted that the Appointments Clause does not contain an Article IV exception, but instead applies to *all* "Officers of the United States." And the Court found that history confirms its reading, noting that officers governing the Northwest Territory, and later territorial Governors, were appointed consistent with the Appointments Clause.

The Court then turned to "[t]he more difficult question before us": "whether the Board members are officers of the United States such that the Appointments Clause requires Senate confirmation." The Court explained that the term "Officers of the United States" "suggests a distinction between federal officers—officers exercising power of the National Government—and nonfederal officers—officers exercising power of some other government." In legislating for the territories and the District of Columbia under Article I, §8, cl. 17, and Article IV, §3, cl.2, "Congress has both made local law directly and also created structures of local government, staffed by local officials, who themselves have made and enforced local law." When Congress does that, said the Court, "the officers exercise

power of the local government, not the Federal Government.” The Court found that “[l]ongstanding practice”—dating back to the First Congress’s treatment of the Northwest Territories—supports that understanding. “The practice of creating by federal law local offices for the Territories and District of Columbia that are filled through election or local executive appointment has continued unabated for more than two centuries.” And Puerto Rico’s history follows that approach, “reveal[ing] a longstanding practice of selecting public officials with important local responsibilities in ways that the Appointments Clause does not describe.” The Court found this practice consistent with its precedents allowing Congress to “structure local governments under Article IV and Article I in ways that do not precisely mirror the constitutional blueprint for the National Government.”

The Court then turned to the question “whether the Board members have primarily local powers and duties”—and concluded they do. “Congress did not simply state that the Board is part of the local Puerto Rican government. Rather, Congress also gave the Board a structure, a set of duties, and related powers all of which are consistent with this statement.” Among other things: the government of Puerto Rico pays the Board’s salaries and expenses; the Board develops a fiscal plan and budget for Puerto Rico; it may initiate bankruptcy proceedings for Puerto Rico; and its investigatory powers “are backed by Puerto Rican, not federal, law.” “In short, the Board possesses considerable power—including the authority to substitute its own judgment for the considered judgment of the Governor and other elected officials. But this power primarily concerns local matters.” The First Circuit reached the opposite conclusion by relying on three of the Court’s precedents, but the Court found none of those cases relevant. “Each of the cases considered an Appointments Clause problem concerning the importance or significance of duties that were indisputably federal or national in nature.” Finally, the Court noted that given its conclusion, “we need not consider the request by some of the parties that we overrule the much-criticized ‘Insular Cases’ and their progeny.”

Justice Thomas concurred in the judgment. He criticized the “ill-defined path” the Court took and said he “would resolve these cases based on the original public meaning of the phrase ‘Officers of the United States’” in the Appointments Clause. In his view, “[t]erritorial officials performing duties created under Article IV of the Constitution are not federal officers within the original meaning of the phrase ‘Officers of the United States.’” Justice Thomas explained that Article IV gives Congress sweeping power over territories, including the power to structure territorial governments “in ways that do not comport with the Constitution’s restrictions on the National Government” (such as the nondelegation doctrine). Given the distinction between territorial and national powers, Justice Thomas concluded that officers exercising Article IV territorial power are not officers “of the United States.” He pointed to text and “[h]istorical evidence from the founding era” which “confirms that officers exercising Article IV territorial power are not ‘Officers of the United States.’” Finally, Justice Thomas faulted the majority for adopting a test—whether the officer’s duty is “primarily local versus primarily federal”—that is “amorphous.”

Justice Sotomayor also concurred in the judgment. She focused on Puerto Rican home rule, which Congress authorized, the people of Puerto Rico established, and Congress then recognized in the early 1950s. Although the parties did not address those events, Justice Sotomayor “wr[ote] to explain why these unexplored issues may well call into doubt the Court’s conclusion that the mem-

bers of the [Board] are territorial officers not subject to the ‘significant structural safeguards’ embodied in the Appointments Clause.” “[T]he longstanding compact between the Federal Government and Puerto Rico raises grave doubts as to whether the Board members are territorial officers not subject to the Appointments Clause. When Puerto Rico and Congress entered into a compact and ratified a constitution of Puerto Rico’s adoption, Congress explicitly left the authority to choose Puerto Rico’s governmental officers to the people of Puerto Rico. That turn of events seems to give to Puerto Rico, through a voluntary concession by the Federal Government, the exclusive right to establish Puerto Rico’s own territorial officers.” She concluded that “[t]he Board members, tasked with determining the financial fate of a self-governing Territory, exist in a twilight zone of accountability, neither selected by Puerto Rico itself nor subject to the strictures of the Appointments Clause. I am skeptical that the Constitution countenances this freewheeling exercise of control over a population that the Federal Government has explicitly agreed to recognize as operating under a government of their own choosing, pursuant to a constitution of their own choosing.” Justice Sotomayor “reluctantly” concurred in the judgment because the issues she raised “are not properly presented in these cases.”

- *Banister v. Davis*, 18-6943. By a 7-2 vote, the Court held that a motion filed under Federal Rule of Civil Procedure 59(e) to alter or amend a habeas court’s judgment is not a second or successive habeas petition subject to the strictures of 28 U.S.C. §2244(b). Rule 59(e) allows a litigant to file a “motion to alter or amend a judgment” within 28 days from entry of judgment (no extensions). Its purpose is to give a district court the chance “to rectify its own mistakes in the period immediately following” its decision. Courts generally use Rule 59(e) only to reconsider matters within its decision and will not address new arguments or evidence. The timely filing of a Rule 59(e) motion “suspends the finality of the original judgment” for purposes of an appeal. Disposition of the motion “restores th[e] finality” of the original judgment, starting the 30-day appeal clock. “And if an appeal follows, the ruling on the Rule 59(e) motion merges with the prior determination, so that the reviewing court takes up only one judgment.” In this case, Gregory Banister struck and killed a bicyclist while driving his car. A Texas jury found him guilty of aggravated assault with a deadly weapon. He filed a federal habeas petition asserting many claims, including ineffectiveness of counsel. The district court denied the application. Banister then timely filed a Rule 59(e) motion asking the court to correct myriad “errors of law and fact.” Five days later, the court issued a one-paragraph order declining to alter or amend the judgment. Banister then promptly filed a notice of appeal (and a request for a certificate of appealability). The Fifth Circuit dismissed the appeal as untimely. It held that Banister’s Rule 59(e) motion was properly “construed as a successive habeas petition” and not as a Rule 59(e) motion. And unlike a Rule 59(e) motion, a successive habeas application doesn’t postpone the time to file an appeal. “That meant the clock started ticking when the District Court denied Banister’s habeas application (rather than his subsequent motion)—and so Banister’s appeal was several weeks late.” In an opinion by Justice Kagan, the Court reversed and remanded, holding that a Rule 59(e) motion does not count as a second or successive habeas application.

Under 28 U.S.C. §2244(b), a petitioner must first obtain leave to file a second or successive application in district court. A prisoner may not reassert any claims “presented in a prior application.” “And he may bring a new claim only if it falls within one of two narrow categories.” Deeming a Rule 59(e) motion a second or successive application would therefore drastically limit such motions’ availability in habeas cases. The issue is what the phrase “second or successive application” means. The

Court explained that it is a “term of art” that “is not self-defining.” It “does not simply refer to all habeas filings made second or successively in time following an initial application”—for example, all agree that “an amended petition, filed after the initial one but before judgment, is not second or successive.” To determine what counts as second or successive, the “Court has looked for guidance in two main places”: “historical habeas doctrine and practice” and “AEDPA’s own purposes.” The Court concluded that both point in favor of concluding that Rule 59(e) motions are not successive.

The Court found that it had already held—in *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257 (1978)—that history supports that conclusion. *Browder* explained that Rule 59(e) derived from a court’s common-law power “to alter or amend its own judgments during[] the term of court in which [they were] rendered” prior to any appeal. *Browder* added that courts exercised that authority “in habeas cases” just as “in other civil proceedings.” The Court here found that “[t]he record of judicial decisions accords with *Browder*’s view of the use of Rule 59(e) in habeas practice.” In the Court’s view, “if courts had viewed Rule 59(e) as successive, there should be lots of decisions dismissing them on that basis,” as an abuse of the writ. But “[i]n the half century from Rule 59(e)’s adoption (1946) through *Browder* (1978) to AEDPA’s enactment (1996), we (and the parties) have found only one such dismissal.” “Congress passed AEDPA against this legal backdrop, and did nothing to change it.” The Court next found that AEDPA’s purposes are consistent with allowing Rule 59(e) motions. “The upshot, after AEDPA as before, is that Rule 59(e) motions are not second or successive petitions, but instead a part of a prisoner’s first habeas proceeding. In timing and substance, a Rule 59(e) motion hews closely to the initial application; and the habeas court’s disposition of the former fuses with its decision on the latter. Such a motion does not enable a prisoner to abuse the habeas process by stringing out his claims over the years. It instead gives the court a brief chance to fix mistakes before its (single) judgment on a (single) habeas application becomes final and thereby triggers the time for appeal. No surprise, then, that habeas courts historically entertained Rule 59(e) motions, rather than dismiss them as successive.”

The Court then distinguished *Gonzalez v. Crosby*, 545 U.S. 524 (2005), upon which Texas and the dissent relied. *Gonzalez* held that a Rule 60(b) motion for “relie[f] from a final judgment” denying habeas relief counts as a second or successive application if it “attacks the federal court’s previous resolution of a claim on the merits.” The Court here concluded, however, that “Rule 60(b) differs from Rule 59(e) in just about every way that matters to the inquiry here.” First, their historical purpose is different: “Rule 60(b) codifies various writs used to seek relief from a judgment at any time after the term’s expiration—even after an appeal had (long since) concluded. Those mechanisms did not (as the term rule did) aid the trial court to get its decision right in the first instance; rather, they served to collaterally attack its already completed judgment.” And in contrast to Rule 59(e), pre-AEDPA “decisions abound dismissing Rule 60(b) motions” as abuses of the writ. Plus, “Rule 60(b) options can arise long after the denial of a prisoner’s initial petition.” “In short,” the Court said, a “Rule 60(b) motion—often distant in time and scope and always giving rise to a separate appeal—attacks an already completed judgment. Its availability threatens serial habeas litigation; indeed, without rules suppressing abuse, a prisoner could bring such a motion endlessly. By contrast, a Rule 59(e) motion is a one-time effort to bring alleged errors in a just-issued decision to a habeas court’s attention, before taking a single appeal. It is a limited continuation of the original proceeding—indeed, a part of

producing the final judgment granting or denying habeas relief. For those reasons, *Gonzalez* does not govern here.”

Justice Alito filed a dissent, which Justice Thomas joined. The dissent stated that “[a]lthough *Gonzalez* concerned a motion under Rule 60(b), nothing in its reasoning was tied to any specific characteristics of such a motion, and accordingly, there is no good reason why a Rule 59(e) motion should not be subject to the same rules.” Justice Alito found that none of the differences between the two rules upon which the Court relied “matter under *Gonzalez*’s reasoning, which relies on the nature of the claim asserted in the post-judgment motion.” “*Gonzalez*’s logic was simple: If a motion advances a habeas claim, it counts as a habeas petition.” Justice Alito also disagreed with the Court’s treatment of pre-AEDPA practice: “assuming pre-AEDPA practice can inform our understanding of AEDPA, history lends no real support to the Court’s holding that a Rule 59(e) motion cannot count as a second or successive habeas petition. Research has found exactly one decision that directly addresses that question, and its holding is contrary to the Court’s position.” The dissent faulted the majority for speculating why only one case dismissed a Rule 59(e) motion as successive, when the more likely reason was that judges were familiar with claims they had just decided and “might have found it more attractive to decide the merits.”

- *Thole v. U.S. Bank, N.A.*, 17-1712. By a 5-4 vote, the Court held that participants in a defined-benefit retirement plan lack Article III standing to maintain an ERISA lawsuit alleging fiduciary mismanagement of the plan. James Thole and Sherry Smith are retired participants in U.S. Bank’s retirement plan. Their retirement plan is a defined-benefit plan, not a defined-contribution plan, which means they receive a fixed payment each month that does “not fluctuate with the value of the plan or because of the plan fiduciaries’ good or bad investment decisions.” Thole and Smith “are legally and contractually entitled to receive those same monthly payments for the rest of their lives.” They filed a putative class-action suit against U.S. Bank and others under ERISA for allegedly mismanaging the plan. They claimed that the defendants violated ERISA’s duties of loyalty and prudence by poorly investing the plan’s assets. They asked U.S. Bank to repay the plan about \$750 million in losses the plan allegedly suffered; and sought replacement of the plan’s fiduciaries. The district court dismissed the case, and the Eighth Circuit affirmed on the ground that the plaintiffs lack statutory standing. In an opinion by Justice Kavanaugh, the Court affirmed on the ground that the plaintiffs lack Article III standing.

The Court reasoned that, win or lose, the two participants “would still receive the exact same monthly benefits that they are already slated to receive, not a penny less” or more. They “therefore have no concrete stake in this lawsuit.” As such, “they lack Article III standing.” The Court rejected four alternative arguments for standing offered by Thole and Smith. “*First*, analogizing to trust law, Thole and Smith contend that an ERISA defined-benefit plan participant possesses an equitable or property interest in the plan, meaning in essence that injuries to the plan are by definition injuries to the plan participants.” The Court ruled, however, that “the participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to the participants in a defined-contribution plan.” The amount of money received by a beneficiary of a private trust or defined-contribution plan depends on how well the trust or plan is managed. “By contrast, a defined-benefit plan is more

in the nature of a contract” for a fixed payment. “*Second*, Thole and Smith assert standing as representatives of the plan itself. But in order to claim ‘the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving’ them ‘a sufficiently concrete interest in the outcome of the issue in dispute.’” And “the plan’s claims have not been legally or contractually assigned to Thole or Smith.”

Third, Thole and Smith point out that ERISA grants various entities, including participants in defined-benefit plans, “a general cause of action to sue for restoration of plan losses and other equitable relief. But the “Court has rejected the argument that ‘a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.’ *Spokeo, Inc. v. Robins*, 578 U. S. ___, ___ (2016).” *Fourth*, Thole and Smith contend that if defined-benefit plan participants may not sue to target perceived fiduciary misconduct, no one will meaningfully regulate plan fiduciaries.” The Court said, however, that it “has long rejected that kind of argument for Article III standing.” Plus, found the Court, “defined-benefit plans are regulated and monitored in multiple ways.” Among other things, the Department of Labor is authorized to enforce ERISA’s fiduciary obligations. Finally, the Court addressed the theory that “plan participants in a defined-benefit plan have standing to sue if the mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants’ future pension benefits.” The Court found that the plaintiffs did not assert that theory of standing and their complaint did not allege that risk.

Justice Thomas filed a concurring opinion, which Justice Gorsuch joined. They wrote “to observe that by requiring us to engage with petitioners’ analogies to trust law, our precedents unnecessarily complicate this case.” Justice Thomas would instead look to the traditional limits on common-law courts’ powers, which depended on whether the rights sought to be vindicated were private rights or public rights. Here, plaintiffs claim violations of private rights under ERISA, but “none of the rights identified by petitioners belong to them.” Justice Thomas closed by stating that he “continue[s] to object to this Court’s practice of using the common law of trusts as the ‘starting point’ for interpreting ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).” He would revisit that practice “in an appropriate case.”

Justice Sotomayor filed a lengthy dissent, which Justices Ginsburg, Breyer, and Kagan joined. The dissent began as follows: “The Court holds that the Constitution prevents millions of pensioners from enforcing their rights to prudent and loyal management of their retirement trusts. Indeed, the Court determines that pensioners may not bring a federal lawsuit to stop or cure retirement-plan mismanagement until their pensions are on the verge of default. This conclusion conflicts with common sense and longstanding precedent.” Justice Sotomayor concluded that Thole and Smith alleged a concrete injury for at least three reasons. “First, petitioners have an interest in their retirement plan’s financial integrity, exactly like private trust beneficiaries have in protecting their trust. By alleging a \$750 million injury to that interest, petitioners have established their standing.” Even though their payments are fixed, “ERISA expressly required the creation of a trust in which petitioners are the beneficiaries.” “Second, petitioners have standing because a breach of fiduciary duty is a cognizable injury, regardless whether that breach caused financial harm or increased a risk of nonpayment.” Justice Sotomayor pointed to trust law, which for more than a century “has provided that

breach of ‘a fiduciary or trust relation’ makes the trustee ‘suable in equity.’” And third, “petitioners have standing to sue on their retirement plan’s behalf.” Typically the fiduciary would sue on behalf of a plan, but when it has a conflict, “[t]he common law has long regarded a beneficiary’s representational suit as a proper ‘basis for a lawsuit in English or American courts.’” In the end, noted the dissent, “about 35 million people with defined-benefit plans will [now] be vulnerable to fiduciary misconduct.” (Footnote omitted.)

- *Nasrallah v. Barr*, 18-1432. By a 7-2 vote, the Court held that a federal court of appeals should review a noncitizen criminal’s factual challenges to a Board of Immigration Appeals order denying relief under the international Convention Against Torture. In 2007, Nidal Khalid Nasrallah, a native and citizen of Lebanon, became a lawful permanent resident. Six years later, he pled guilty to two counts of receiving stolen property. Based on that conviction, the Government initiated deportation proceedings. In those proceedings, Nasrallah applied for relief under the Convention Against Torture (or CAT). “If [a] noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to CAT relief and may not be removed to that country (although he still may be removed to other countries).” Nasrallah contended that he was tortured by Hezbollah before he came to the United States and would be tortured again if he returned to Lebanon. The immigration judge determined that Nasrallah was removable but that he was entitled to CAT relief. On appeal, the Board of Immigration Appeals disagreed that Nasrallah likely would be tortured in Lebanon and therefore vacated the order granting CAT relief and ordered him removed to Lebanon. Nasrallah sought review in the Eleventh Circuit, claiming that the Board of Immigration Appeals erred in finding that he wouldn’t likely be tortured in Lebanon. The Eleventh Circuit, however, declined to review Nasrallah’s factual challenges. It reasoned that Nasrallah had been convicted of a crime specified in 8 U.S.C. §1252(a)(2)(C), and noncitizens convicted of §1252(a)(2)(C) crimes may not obtain judicial review of factual challenges to a “final order of removal.” §§1252(a)(2)(C)-(D). The issue, then, is whether the bar on judicial review of factual challenges to a “final order of removal” bars review of factual challenges to a CAT order. The Eleventh Circuit held that it does. In an opinion by Justice Kavanaugh, the Court reversed.

The Court explained that three immigration laws enacted between 1996 and 2005 “establish that CAT orders may be reviewed together with final orders of removal in a court of appeals.” But, concluded the Court, a CAT order is not itself an “order of removal.” “In the deportation context,” the Court explained, “a final ‘order of removal’ is a final order ‘concluding that the alien is deportable or ordering deportation.’ §1101(a)(47)(A).” “A CAT order is not itself a final order of removal because it is not an order ‘concluding that the alien is deportable or ordering deportation.’” Indeed, “a CAT order does not disturb the final order of removal”—the noncitizen may still be removed to another country where he is not likely to be tortured. The Court saw no reason why a CAT order “merges” into a final order of removal, for it “does not affect the validity of the final order of removal.”

The Court added that judicial review of factual challenges to CAT orders “is highly deferential”: the agency’s “findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” §1252(b)(4)(B). The Court went on to reject the Government’s arguments for a contrary interpretation of the statute. One of those arguments was a “slippery slope”

argument: that the Court’s ruling “might lead to judicial review of factual challenges to statutory withholding orders,” which prevent removal to a country where the noncitizen’s “life or freedom would be threatened” because of the noncitizen’s “race, religion, nationality, membership in a particular social group, or political opinion.” The Court held that that issue is not presented here and therefore left its resolution for another day.

Justice Thomas filed a dissenting opinion, which Justice Alito joined. They focused on a provision of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implemented Article III of the Convention Against Torture. FARRA provided that no court would have “jurisdiction to consider or review claims raised under the Convention . . . except as part of the review of a final order of removal pursuant to . . . (8 U.S.C. §1252).” And Section 1252, in turn, contains a “zipper clause” stating that “all questions of law or fact . . . arising from any action taken or proceedings brought to remove an alien” shall be consolidated and “available only in judicial review of a final order under this section.” §1252(b)(9). Justice Thomas concluded “that CAT orders fall within the zipper clause.” And “[b]ecause the CAT claim falls within the zipper clause, all of §1252’s other limitations and procedural requirements imposed on final orders of removal, including §1252(a)(2)(C)’s criminal-alien bar, also apply.” Justice Thomas added that “adopting petitioner’s rule will disturb the courts of appeals’ longstanding practice of subjecting criminal aliens’ statutory withholding claims to §1252(a)(2)(C).”

- *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 18-1048. The Court unanimously held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) permits a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel. The Court concluded that domestic law permits enforcement of arbitration agreements by nonsignatories, and the New York Convention does not conflict with that doctrine. ThyssenKrupp Stainless USA entered into three contracts with F.L. Industries for the construction of cold rolling mills at ThyssenKrupp’s steel manufacturing plant in Alabama. Each of the contracts contained an arbitration clause providing that disputes in connection with the contract shall be submitted to arbitration. F.L. Industries then entered into a subcontractor agreement with petitioner GE Energy, which agreed to design, manufacture, and supply motors for the cold rolling mills. GE Energy delivered nine motors to the Alabama plant for installation. Soon thereafter, respondent Outokumpu Stainless USA bought the plant from ThyssenKrupp. Outokumpu alleged that GE Energy’s motors failed, resulting in substantial damages. Outokumpu and its insurers filed suit against GE Energy in Alabama state court. GE Energy removed the case to federal court and then moved to dismiss and compel arbitration based on the arbitration clauses in the contracts between F.L. Industries and ThyssenKrupp. The district court granted GE Energy’s motion, but the Eleventh Circuit reversed. It interpreted the New York Convention to include a “requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration.” And that requirement was not satisfied because GE Energy was not a signatory to the contracts. The court held that GE Energy could not rely on state-law equitable estoppel doctrines because equitable estoppel conflicts with the Convention’s signatory requirement. In an opinion by Justice Thomas, the Court reversed and remanded.

The Court explained that Chapter 1 of the Federal Arbitration Act (FAA) “permits courts to apply state-law doctrines related to the enforcement of arbitration agreements.” In particular, the chapter “does not alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).” (Quotation marks omitted.) And one of those principles of state contract law is “doctrines that authorize the enforcement of a contract by a nonsignatory.” Among the doctrines that authorize nonsignatories to enforce arbitration agreements is equitable estoppel. See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). The Court next turned to the New York Convention, which “is a multilateral treaty that addresses international arbitration.” In 1970, the United States adopted the Convention and Congress enacted implementing legislation, contained in Chapter 2 of the FAA. Chapter 2 states, among other things, that “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention.” 9 U.S.C. §208.

The Court stated that the issue here is “whether the equitable estoppel doctrines permitted under Chapter 1 of the FAA ‘conflict with . . . the Convention.’ §208.” (Citation omitted.) The Court concluded they do not conflict. The Court first pointed to text of the New York Convention, which “does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel.” The Court noted that “[o]nly one Article of the Convention addressed arbitration agreements—Article II—and only one provision of Article II addresses the enforcement of those agreements—Article II(3).” And all Article II(3) provides is that when the parties to an action entered into a written agreement to arbitrate, the courts of a contracting state “shall . . . refer the parties to arbitration.” The Court explained that this provision “does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances.” Put another way, the Court declined to read Article II(3) as “set[ting] a ceiling” on whom domestic law may allow to enforce arbitration agreements.

The Court concluded that the Convention’s negotiating and drafting history, and the postratification understanding of signatory nations, confirms that interpretation. On the former, the Court found that, “[t]o the extent the drafting history sheds any light on the meaning of the Convention, it shows only that the drafters sought to impose baseline requirements on contracting states.” But nothing in that history suggests the Convention meant to bar states from “permit[ting] nonsignatories to enforce arbitration agreements in additional circumstances.” On postratification understanding, the Court found that “courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement.” Finally, the Court rejected the Eleventh Circuit’s reading of Article II(1) and (2) of the Convention as including a “requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration.” Those two provisions, found the Court, “address the recognition of arbitration agreements, not who is bound by a recognized agreement.” The Court remanded for a determination whether GE Energy could enforce the arbitration agreement under the principles of equitable estoppel. Justice Sotomayor filed a concurring opinion to note “an important limitation” on the application of domestic doctrines: “Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate.”

- *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 18-1086. The Court unanimously held that petitioners’ failure to litigate a particular defense in an earlier suit against respondent did not preclude them from invoking that defense in a later suit between the two parties where the two suits did not share the same claim for relief. Petitioners, collectively Lucky Brand, and respondent Marcel both sell jeans and other apparel. And both use “Lucky” in their marks on clothing. In 1986, Marcel received a federal trademark registration for “Get Lucky”; in 1990, Lucky Brand began selling its goods using the registered trademark “Lucky Brand” and other marks that include the word “Lucky.” The two companies have been in litigation for almost 20 years over these marks, in three rounds. In 2001, Marcel sued Lucky Brand based on Lucky Brand’s use of the phrase “Get Lucky” in its advertisements. The parties signed a settlement agreement in which Lucky Brand agreed to stop doing that; in exchange, Marcel agreed to release any claims regarding Lucky Brand’s use of its own trademarks. In 2005, Lucky Brand sued Marcel, alleging that Marcel copied its designs and logos. Marcel filed several counterclaims that turned on Lucky Brand’s alleged continued use of the phrase “Get Lucky.” None of Marcel’s counterclaims alleged that Lucky Brand’s use of its own marks alone (independent of any use of “Get Lucky”) infringed Marcel’s “Get Lucky” mark. The district court enjoined Lucky Brand from violating the settlement agreement by using “Get Lucky”; and a jury found for Marcel on its remaining counterclaims relating to Lucky Brand’s continued use of the “Get Lucky” catchphrase. The third round of litigation began in 2011 when Marcel sued Lucky Brand, maintaining that Lucky Brand’s post-2010 use of Lucky Brand’s own marks (not its use of the phrase “Get Lucky”) infringed Marcel’s mark. The district court granted Lucky Brand summary judgment, but the Second Circuit reversed, concluding that Marcel’s claims in the 2011 action were distinct from those asserted in its 2005 action, which were for “earlier infringements.” On remand, Lucky Brand argued that Marcel has released its claims by entering the settlement agreement. Marcel countered that Lucky Brand was precluded from invoking that defense because it could have pursued that defense in the 2005 action but did not. The district court ruled for Lucky Brand, but the Second Circuit vacated and remanded. It held that a doctrine it called “defense preclusion” prohibited Lucky Brand from raising the release defense in the 2011 action. It reasoned that, when a four-part test is met, “[a] defendant should be precluded from raising an unlitigated defense that it should have raised earlier.” In an opinion by Justice Sotomayor, the Court reversed and remanded.

The Court explained that issue preclusion bars “a party from relitigating an issue actually decided in a prior case and necessary to the judgment”; while claim preclusion “prevents parties from raising issues that could have been raised and decided in an earlier action—even if they were not actually litigated.” Claim preclusion applies only if the two actions involve the same claim—*i.e.*, involve a “common nucleus of operative facts.” When that’s the case, “the plaintiff cannot bring a second independent action for additional relief, and the defendant cannot avoid the judgment by offering new defenses.” The Court then explained that it “has never explicitly recognized ‘defense preclusion’ as a standalone category of *res judicata*, unmoored from the two guideposts of issue preclusion and claim preclusion.” Rather, “any such preclusion of defenses must, at a minimum, satisfy the strictures of issue preclusion or claim preclusion.” Here, where only claim preclusion is at issue, that means “a defense can be barred only if the ‘causes of action are the same’ in the two suits—that is, where they share a ‘common nucleus of operative facts.’” The Court had little difficulty holding that that standard was not met here.

“Put simply,” said the Court, “the two suits here were grounded on different conduct, involving different marks, occurring at different times. They thus did not share a ‘common nucleus of operative facts.’” In particular, in the 2005 action Marcel challenged Lucky Brand’s use of a “Get Lucky” mark and “Get Lucky” slogans alongside Lucky Brand’s other marks. “By contrast, the 2011 Action did not involve any alleged use of the ‘Get Lucky’ phrase. . . . Instead, Marcell alleged in the 2011 Action that Lucky Brand committed infringement by using Lucky Brand’s own marks containing the word ‘Lucky’—not the ‘Get Lucky’ mark itself.” Plus, Marcel complained about conduct that occurred after the conclusion of the 2005 action. Yet “[c]laim preclusion generally ‘does not bar claims that are predicated on events that postdate the filing of the initial complaint.’” All told, “claim preclusion did not and could not bar Lucky Brand from asserting its settlement agreement defense in the 2011 Action.”

- *Opati v. Republic of Sudan*, 17-1268. The Court unanimously held that the Foreign Sovereign Immunities Act, as amended in 2008 by the National Defense Authorization Act (NDAA), permits recovery of punitive damages against foreign states for terrorist activities occurring prior to passage of the NDAA. In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), which generally holds foreign states and their instrumentalities immune from the jurisdiction of federal and state courts. But it contains exceptions, included one—added in 1996—for countries that committed or supported certain acts of terrorism and who are designated by the State Department as state sponsors of terror. 28 U.S.C. §1605(a)(7). As originally enacted, this exception shielded those countries from punitive damages. Two years later, in 1998, al Qaeda operatives detonated truck bombs outside the U.S. embassies in Kenya and Tanzania, killing hundreds and injuring thousands. A group of victims and affected family members led by James Owens sued Sudan in federal district court under the terrorism exception, alleging that Sudan provided shelter and other material support to al Qaeda. While the suit was pending, the D.C. Circuit held that the 1996 terrorism exception merely withdrew immunity but did not create a new cause of action. Congress responded by enacting the NDAA in 2008. It moved the state-sponsored terrorism exception to a new section of the U.S. Code—28 U.S.C. §1605A—which “had the effect of freeing claims brought under the terrorism exception from the FSIA’s usual bar on punitive damages. See §1606 (denying punitive damages in suits proceeding under a sovereign immunity exception found in §1605 but not §1605A).” The NDAA also created an express federal cause of action for acts of terror, codified at §1605A(c). And the NDAA instructed that lawsuits filed before its enactment were to be treated “as if” they had been filed under the new federal cause of action. Finally, the NDAA gave plaintiffs a limited opportunity to file new actions “arising out of the same act or incident” as an earlier action and claim the benefits of §1605A. Following the NDAA amendments to the FSIA, the *Owens* plaintiffs amended their complaint to include the new federal cause of action; and many additional victims and family members filed new claims against Sudan similar to the *Owens* claims. After a consolidated bench trial in which Sudan did not participate, the district court entered judgment for the plaintiffs. The court then awarded \$10.2 billion in damages, including \$4.3 billion in punitive damages. Sudan appealed, arguing that the NDAA did not clearly authorize punitive damages. The D.C. Circuit agreed, holding that “Congress included no statement clearly authorizing *punitive* damages for preenactment conduct.” In an opinion by Justice Gorsuch, the Court vacated and remanded.

The Court acknowledged the general presumption that legislation usually applies prospectively only. See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The plaintiffs countered that the Court in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), created an exception to that presumption in the context of foreign sovereign immunity. The Court concluded that even if it gives Sudan the benefit of the *Landgraf* presumption, it still loses: “Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using §1605A(c)’s new federal cause of action.” The NDAA expressly allows suits for damages that “may include . . . punitive damages.” And “[t]his new cause of action was housed in a new provision of the U.S. Code, 28 U.S.C. §1605A, to which the FSIA’s usual prohibition on punitive damages does not apply.” Plus, the NDAA allowed plaintiffs in prior related actions to invoke that new federal cause of action. “Put another way,” said the Court, “Congress proceeded in two equally evident steps: (1) It expressly authorized punitive damages under a new cause of action; and (2) it explicitly made that new cause of action available to remedy certain past acts of terrorism. Neither step presents any ambiguity, nor is the NDAA fairly susceptible to any competing interpretation.” The Court rejected Sudan’s request that it create a new “super-clear statement” rule, given the “special constitutional concerns” raised by retroactive punitive damages. “[T]he better course,” the Court held, “is for the litigant to challenge the law’s constitutionality, not ask a court to ignore the law’s manifest direction.” Plus, Sudan’s suggestion raises the complicated question of “[h]ow much clearer-than-clear should we require Congress to be when authorizing the retroactive use of punitive damages.” (Justice Kavanaugh did not participate in the consideration or decision of the case.)

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SUPREME COURT CENTER STAFF

Dan Schweitzer
Director and Chief Counsel
NAAG Center for Supreme
Court Advocacy
(202) 326-6010

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