



**Supreme Court Update:
South Bay United
Pentecostal Church v.
Newsom (No. 19A1044),
Financial Oversight and
Management Bd. for Puerto
Rico v. Aurelius Investment,
LLC (No. 18-1334), GE Energy
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SAS, Corp. v. Outokumpu
Stainless USA, LLC (No. 18-
1048), Thole v. U.S. Bank N.A
(No. 17-1712), Banister v.
Davis (No. 18-6943),
Nasrallah v. Barr (No. 18-
1432)**

Greetings, Court Fans!

It's an understatement to say that goings on at One First Street have been overshadowed this week by unrest further down Constitution Ave. (and around the country). Nevertheless, it was a fairly active week for the Court, with five new opinions and one notable order. We've got a lot to cover this week, so we'll get right to it.

Let's start with the order, which actually came down last Friday night, back when Covid-19 was still almost exclusively dominating the headlines. In [*South Bay United Pentecostal Church v. Newsom* \(No. 19A1044\)](#), the Court denied a California church's application for an injunction challenging California Governor Gavin Newsom's executive order limiting religious gatherings to 25% of building capacity or 100, whichever is fewer. The application was submitted to Circuit Justice Elena Kagan and referred by her to the whole Court. By a 5-4 vote, with the Chief Justice joining the liberal wing, the Court denied relief without opinion. The Chief penned a solo concurrence, however, explaining his vote. He began by underscoring the steep hill an applicant seeking an injunction in the Supreme Court faces: As opposed to a stay, which simply preserves the status quo, an injunction is only granted in the Supreme Court where "the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances." The challenge to Gov. Newsom's order could not surmount that standard. Though the Chief recognized that "California's guidelines place restrictions on places of worship," he concluded that "those restrictions appear consistent with the Free Exercise Clause of the First Amendment." That's because "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." As for exemptions, the Chief found that the Order "treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." Given the "dynamic and fact-intensive nature" of public health measures designed to combat a pandemic, the Chief deferred to the reasonable decisions of politically accountable state officials rather than encouraging "second-guessing" by an "unelected federal judiciary" lacking public health expertise.

Justice Kavanaugh disagreed. Writing for Thomas and Gorsuch (Alito also dissented, but did not join the opinion), Kavanaugh contended that the Order "discriminate[s] against places of worship and in favor of comparable secular businesses [that] are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." Kavanaugh agreed that California had a compelling interest in slowing the spread of COVID-19, but took issue with the apparent arbitrariness of the regulatory distinction between worship services and the "litany of other secular businesses that are not subject to an occupancy cap." While California should be afforded "substantial room to draw lines, especially in an emergency," Kavanaugh argued that the Constitution requires the state not to "discriminate against religion."

Turning to argued cases, in [*Financial Oversight and Management Bd. for Puerto Rico v. Aurelius Investment, LLC* \(No. 18-1334\)](#), a unanimous Court held that, while the Constitution's Appointments Clause does apply to "officers of the United States" who exercise power in or in relation to Puerto Rico, the method of appointing members to the Financial Oversight and Management Board overseeing Puerto Rico's financial recovery satisfies the Appointments Clause.

The backdrop of the case was the financial crisis that has engulfed Puerto Rico since 2006. After Hurricane Maria in 2016 made things even worse, Congress passed the Puerto Rico Oversight Management, and Economic Stability

Act (PROMESA) in order to help the Island control spending and discharge over \$70 billion in debt through bankruptcy. Among other provisions, PROMESA created the Financial Oversight and Management Board, a seven-member commission appointed by the President from among vetted candidates submitted by House and Senate leadership. This appointment process for Board members did not include confirmation by the full Senate, which the Appointments Clause of the Constitution requires for ambassadors, federal judges, and “all other Officers of the United States.” After its creation, the Board began filing bankruptcy petitions on behalf of Puerto Rico. Two creditors challenged the Board’s direct presidential appointment process as a violation of the Appointments Clause. The First Circuit held that the Board members’ selection violated the Appointments Clause, but concluded that any Board actions taken prior to its decision were nonetheless valid under the “*de facto* officer” doctrine.

The Supreme Court unanimously reversed. Writing for Seven, Justice Breyer acknowledged that all Officers of the United States are subject to the Appointments Clause, whether they exercise authority in a state or in an unincorporated territory like Puerto Rico. But the members of the Board were *not* Officers of the United States because they exercised primarily *local* powers and duties. Importantly, PROMESA describes the Board as an “entity *within* the territorial government” of Puerto Rico, not a “department, agency, establishment, or instrumentality of the Federal Government.” That definition has been borne out in practice: The Board is funded by Puerto Rico; its investigative powers are delineated by Puerto Rican law; and its fiscal decisions are binding on Puerto Rico alone. Even in federal bankruptcy proceedings, the Board represents Puerto Rico, not the United States. Members of the Board—an instrument of essentially local character—are therefore not “Officers of the United States” subject to the Appointments Clause.

Justice Thomas concurred in the judgment, agreeing that the appointment process for members of the Board does not violate the Appointments Clause. However, he criticized the “ill-defined path that the Court takes to reach this result” and argued that the case should instead be resolved “based on the original public meaning of the phrase ‘Officers of the United States’ in the Appointments Clause.” Rather than relying on the “amorphous test” of “primarily local versus primarily federal” duties, looked to the *source* of the officials’ authority. Unlike “Officers of the United States,” whose authority derives from federal statutes, Board members serve under Congress’s Article IV commission power. Accordingly, their official duties are territorial, not national, in character.

Justice Sotomayor, whose parents were both born in Puerto Rico, also concurred in the judgment, albeit “reluctantly.” She was troubled by the apparent conflict between Congress’s 1952 ratification of the Puerto Rico Constitution—granting the island republican self-government—and PROMESA’s appointment of territorial officers to oversee Puerto Rico’s finances. In keeping with the American ideal of self-determination, Justice Sotomayor would have left major financial decisions about Puerto Rico’s fate to its people, not Congress. Yet she concluded that those questions were not properly presented in this case, and therefore concurred in the result.

Next up is [***GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC***\(No. 18-1048\)](#), where a unanimous Court concluded that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention) does not prohibit non-signatories to an arbitration agreement from enforcing the agreement under state-law contract doctrines like equitable estoppel. That’s a mouthful, but if you break it down, it’s not so bad. Allow us to explain.

ThyssenKrupp Stainless USA entered into three contracts with F. L. Industries to deliver some steel manufacturing equipment to a ThyssenKrupp plant in Alabama. The contracts contained clauses requiring arbitration of any disputes. F. L. Industries subcontracted the work to GE Energy. ThyssenKrupp, for its part, sold its plant to Outokumpu Stainless. The equipment GE delivered broke, so Outokumpu sued it in Alabama state court. After removing the case to federal court, GE Energy moved to dismiss the case and compel arbitration, relying on the arbitration agreements in the F. L. Industries–ThyssenKrupp contracts. The district court agreed with GE and ordered the parties to submit to international arbitration, but the Eleventh Circuit reversed. It held that the New York

Convention, a multilateral treaty addressing international arbitration (which applies here—just take our word for it), only allows courts to compel arbitration between *actual signatories* of an arbitration agreement. It further held that the New York Convention barred GE Energy from relying on state-law equitable estoppel doctrines to enforce the arbitration agreement as a non-signatory, because that would conflict with the Convention’s signatory requirement. Because this holding was contrary to decisions from the First, Fourth, and Ninth Circuits, the Court granted certiorari.

Writing for a unanimous Court, Justice Thomas began with some basic principles of arbitration agreements. The Federal Arbitration Act—something we [talk about a lot](#) around here—treats agreements to arbitrate like any other contracts. That means (among many other things) that general state-law contract doctrines, like piercing the corporate veil or equitable estoppel, apply to arbitration agreements. Sometimes, those doctrines allow non-signatories to enforce arbitration agreements. So as far as the FAA is concerned, GE Energy could argue that equitable estoppel allowed it to enforce the arbitration agreement in the F. L. Industries–ThyssenKrupp contract, despite not being a signatory to the agreement itself (whether it would succeed in that argument is really neither here nor there).

What about this New York Convention, then? For the most part, this multilateral treaty addresses the *enforcement* of international arbitration awards. But it also contains provisions requiring contracting states to enforce agreements in writing to arbitrate disputes. And it defines “agreements in writing” as various types of agreements “signed by the parties.” When the United States acceded to the Convention, it enacted various statutes to give it force. Among them, Congress provided that the FAA applied to any disputes about international arbitration to the extent the FAA’s provisions were “not in conflict” with the Convention. So does the FAA, which allows non-signatories to enforce arbitration agreements under state-law doctrines like estoppel, “conflict” with the Convention, which seems to envision that only *signatories* can compel or be compelled to arbitrate disputes?

No. While the Convention may talk about arbitration agreements in terms of “signatories,” nothing in its text addresses non-signatories at all. And under a general principle of treaty interpretation silence is silence: When a treaty doesn’t explicitly cover a topic, it doesn’t cover it. Since nothing in the Convention purported to prevent states from enforcing arbitration agreements between non-signatories, there was no conflict between the FAA and the Convention. Ordinary equitable estoppel principles thus applied to arbitration agreement subject to the Convention just as much as to arbitration agreements not subject to it.

If it were up to Justice Thomas, the decision probably would have stopped there. But since this is a unanimous Supreme Court decision, he had to throw some bones to members of the Court who wanted additional rationales. One of these was the Convention’s drafting history. That history establishes that the Convention’s basic purpose was to prevent states from *refusing* to enforce arbitration agreements based on hostility to arbitration. Nothing about that purpose was inconsistent with states giving *broader* effect to arbitration agreements under their domestic law. Another rationale for you: Most other parties to the Convention permit non-signatories to enforce arbitration agreements, suggesting that no one else interpreted the Convention to prohibit this. Last of all: The United States, as *amicus curiae*, agreed with GE Energy’s interpretation of the Convention. Justice Thomas noted some uncertainty about how much weight should be given to the Executive Branch’s interpretation of treaties. But that question can be reserved for another day, since all the rationales pointed in the same direction. The Court thus remanded to the Eleventh Circuit, to determine in the first instance whether GE Energy could in fact rely on equitable estoppel or some other state-law contract doctrine to enforce the arbitration agreement as a non-signatory.

Moving on, in [Thole v. U.S. Bank N.A \(No. 17-1712\)](#), the Court limited the ability of retirees enrolled in defined-benefit ERISA plans to sue plan fiduciaries for mismanagement of funds. In this latest sharpening of the Court’s Article III standing jurisprudence, the Court’s conservative wing concluded that the plaintiffs lacked a “concrete stake” in the outcome of the suit, and therefore affirmed the lower courts’ dismissal of the case for lack of standing. The Court’s discussion of the relationship between ERISA and private trust law also carries significant implications for

ERISA litigation more broadly, potentially influencing the management of pensions held by approximately 35 million Americans.

The plaintiffs were retirees enrolled in U.S. Bank's defined-benefit pension plan. They filed a putative class action contending that U.S. Bank had breached its fiduciary duties by investing plan funds poorly and causing approximately \$750 million in investment losses. Crucially, though, the named plaintiffs had received all the pension benefits to which they were entitled, and U.S. Bank was contractually required to continue paying benefits for plaintiffs' lifetimes. For a majority of the Justices, that fact was decisive, as it meant that the plaintiffs had "no concrete stake in this lawsuit."

In a brief 8-page opinion for the majority, Justice Kavanaugh quipped that "[c]ourts sometimes make standing law more complicated than it needs to be." He rejected the plaintiffs' effort to analogize themselves to beneficiaries of a private trust, because trust beneficiaries typically receive more from a trust in the end if the trust sees gains, while ERISA plan participants are entitled to receive only a contractually fixed amount and therefore have no equitable property interest in the plan's funds. Kavanaugh also rejected the notion that ERISA plan participants can generally sue as representatives of the plan. Unless they have been legally appointed to represent the plan, participants must demonstrate their own personal standing to sue. Reaffirming the holding of [Spokeo v. Robins \(2016\)](#), the majority concluded that Article III standing was not automatically demonstrated merely because ERISA "affords . . . participants in a defined-benefit plan . . . a general cause of action to sue for restoration of plan losses." A "statutory right" does not suffice in the absence of a "concrete injury." The Justices were not swayed by the plaintiffs' argument that suits by plan participants are necessary to enforce ERISA, since other enforcement mechanisms do in fact exist and, even if it were factually correct, the plaintiffs' argument would not be a reason to ignore the standing requirement.

The Court left the door open to suits by plan participants if the plan fiduciary's mismanagement 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." Such a scenario was raised in *amicus* brief, but the Court did not reach the issue, as it concluded that the *Thole* plaintiffs had not plausibly claimed that that scenario existed for U.S. Bank—especially given that the federal Pension Benefit Guaranty Corporation often guarantees the full amount of a participant's vested pension benefits.

In a brief concurrence, Justice Thomas, joined by Justice Gorsuch, objected to the Court's "practice of using the common law of trusts as the 'starting point' for interpreting ERISA." In his view, ERISA's fiduciary duties depart from the common law and are "owed to the plan, not [participants]," and that fact alone was dispositive for him.

Writing for the four dissenters, Justice Sotomayor (in a dissent more than three times the length of the majority opinion) accused the majority of reaching an outcome that "encourages the very mischief ERISA meant to end." The dissenters disagreed with the fundamental premise of the majority's opinion, in that they read the Court's ERISA precedents as imposing fiduciary duties not only to the plan but also to plan participants. To the dissenters, ERISA clearly *does* give participants the same equitable property interests that a beneficiary of a private trust enjoys. The majority's conclusion to the contrary, Sotomayor argued, "relie[d] on tautology" and was "unrecognizable" aside longstanding interpretations of ERISA. But even if the trust analogy were rejected in favor of a contract rubric, Justice Sotomayor argued that the plaintiffs would still have standing to sue for breaches of U.S. Bank's contractual promises to act diligently and carefully, whether or not financial loss had yet occurred. Pecuniary harm is not "the *sine qua non* of standing," she noted. Federal courts may "hear disputes over nonfinancial injuries," and ERISA plan participants "have a right not just to their pension benefits, but also to loyal and prudent fiduciaries." What's more, even if the fiduciary duties imposed by ERISA are owed solely to plans, participants would still have standing under the Court's representational standing doctrine. When the plan fiduciary itself is being accused of wrongdoing, the Constitution does not "compel a pension plan to let a fox guard the henhouse." "Only by overruling, ignoring, or misstating

centuries of law,” she argued, “could the Court hold that the Constitution requires beneficiaries to watch idly as their supposed fiduciaries misappropriate their pension funds.”

Onward, then, to [*Banister v. Davis* \(No. 18-6943\)](#), where the Court held that a Rule 59(e) motion to alter or amend a habeas court’s judgment does not count as a second or successive habeas petition under 28 U.S.C. 2244(b).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner is permitted a single opportunity to challenge his or her conviction in federal court and generally prohibited from filing “second or successive” habeas petitions on the same grounds. The statute does not, however, define what a “second or successive” petition is. After exhausting state remedies, Petitioner Gregory Bannister filed for habeas relief, but his petition was denied by the District Court. Bannister then filed a motion under Rule 59(e) of the Federal Rules of Civil Procedure, which permits a litigant to file “[a] motion to alter or amend judgment” within “28 days after the entry of the judgment.” A timely Rule 59(e) motion effectively holds in abeyance the finality of a judgment and the deadline for appeal, and provides a litigant with an opportunity to ask the district court to reconsider the merits of its initial decision. After the District Court denied his Rule 59(e) motion, Bannister filed a notice of appeal in accordance with the timeline for appealing a judgment after the denial of a Rule 59(e) motion. The Fifth Circuit, however, dismissed the appeal, reasoning that his Rule 59(e) motion was really an impermissible successive habeas petition and therefore his appeal was untimely. The Supreme Court granted cert, to decide “whether AEDPA § 2244(b) should displace Rule 59(e) in habeas litigation.”

In a 7-2 decision (the liberal wing, plus the Chief, Gorsuch, and Kavanaugh), the Court held that a motion to alter a judgment under Rule 59(e) is *not* a “second or successive” habeas petition. Writing for the majority, Justice Kagan looked to the two sources the Court has historically examined in interpreting the meaning of “second or successive” under AEDPA: (1) historical, pre-AEDPA habeas decisions; and (2) the stated legislative purpose of AEDPA. Both factors weighed heavily in favor of a finding that the “ordinary operation” of Rule 59(e) does not conflict with AEDPA. As Justice Kagan explained, pre-AEDPA case law makes clear that the term “second or successive” does not “simply refer” to a federal habeas petition that follows in time an initial application; rather, only later-in-time filings that “constituted an abuse of the writ” would, historically, be prohibited. Indeed, the Court had, in *Bowder v. Dep’t of Corrections* (1978) held that Rule 59(e) applies in habeas proceedings and, in the fifty years between Rule 59(e)’s adoption and AEDPA’s enactment, there was only one case that might support the Fifth Circuit’s conclusion. In most instances, Justice Kagan observed, a court confronted with a Rule 59(e) motion after denying an initial habeas petition would simply deny the motion, without construing it as a second or successive petition. Kagan further concluded that permitting Rule 59(e) motions does not undermine the purposes of AEDPA—namely, finality, expediency, and conservation of judicial resources. While it is true that the courts are inundated with second or successive petitions, the rights to which Rule 59(e) entitled a petitioner were sufficiently narrow so as to avoid the risk of undermining AEDPA’s purpose. Indeed, Rule 59(e) has the propensity to make a habeas proceeding “more efficient.”

Justice Kagan brushed aside the Respondent’s argument that a Rule 59(e) motion should be construed in the same manner as a Rule 60(b) motion, which, as the Court held in *Gonzales v. Crosby* (2005), counts as a second or successive petition if it attacks the court’s previous resolution of a claim on the merits. To Justice Kagan, the two rules to differ “in just about every way that matters”: Rule 59(e) emanates from a court’s plenary power to revise its decisions in a single term, whereas Rule 60(b) codifies an extraordinary and unruly remedy. A Rule 59(e) motion holds in abeyance the finality of a decision for a mere 28 days, whereas a Rule 60(b) motion can “arise long after” a conviction is upheld. An unsuccessful Rule 59(e) motion merges into the initial decision on appeal, whereas a petitioner’s appeal of an unsuccessful Rule 60(b) motion in a habeas proceeding “does not bring up the underlying judgment for review.” For all these reasons, the application of Rule 60(b) in the habeas context threatens to impair the purposes of AEDPA in ways the application of Rule 59(e) would not.

Justice Alito dissented, joined by Justice Thomas. In his view, the only difference between Bannister's motion and a Rule 60(b) motion was the self-styled label that Bannister affixed to it. The dissenters simply did not buy the distinction that Kagan attempted to draw between the two rules and would therefore have adhered to the holding of *Gonzales*. As Justice Alito wrote, "a repetitive habeas claim is as much a repetition under Rule 59(e) in 28 days or under Rule 60(b) at, say day 29."

Finally, in [*Nasrallah v. Barr* \(No. 18-1432\)](#), the Court delivered a rare victory to the immigration bar, holding that courts of appeal can review challenges to the Bureau of Immigration Appeals (BIA)'s factual determinations under the Convention Against Torture.

If a noncitizen who is otherwise removable can show that he is likely to be tortured if removed to his home country, then he may seek relief under the Convention Against Torture (CAT). Generally speaking, an Immigration Judge (IJ) will make the determination whether a noncitizen is entitled to CAT relief at the same time that the judge adjudicates removal. The noncitizen may appeal an adverse decision to the BIA, and can appeal an adverse decision of the BIA to the Court of Appeals in the relevant circuit. However, in certain instances that appeal is limited in scope: If the noncitizen has committed a crime enumerated in 8 U.S.C. § 1252(a)(2)(C), then the Court of Appeals may only review the removal decision for constitutional and legal challenges and cannot review the BIA's factual findings. The question in *Nasrallah*—which had divided the circuits—was whether circuit courts are similarly precluded from reviewing factual determinations underlying BIA decisions as to whether a noncitizen is entitled to relief under the CAT.

By a 7-2 vote, the Supreme Court held that courts of appeals *can* review factual challenges to the BIA's CAT determinations. Writing for the majority, Justice Kavanaugh offered a thorough analysis of the three interlocking statutes that bear on judicial review of BIA removal and CAT determinations. The first, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides for a direct "review of a final order of removal" in a court of appeals, skipping the district courts altogether. The second statute is the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implements the CAT and provides for judicial review of CAT claims "as part of the review of a final order of removal." The third and final statute is the REAL ID Act of 2005, which reinforced the point that BIA orders must be reviewed directly in the courts of appeals—and are not subject to habeas challenges in district courts.

As noted above, the courts of appeals' review of final removal orders is limited in scope when the noncitizen has committed certain crimes. In such cases, the circuit courts do not "have jurisdiction to review any *final order or removal*," but may still review "constitutional claims or questions of law." As Justice Kavanaugh explained, the definition of a final order of removal is one "concluding that the alien is deportable or ordering deportation." A CAT order is not itself a final order of removal, and in fact does not actually disturb a final order of removal even where CAT relief is granted. It simply means that the noncitizen cannot be removed to the designated country of removal; she can still be removed somewhere else, or to the designated country once it is no longer likely she will be tortured. Accordingly, Kavanaugh explained, a CAT order does not "merge" into the final order of removal, and so does not fall within the limitations on review spelled out in Section 1252. Having held that factual challenges to CAT determinations are permissible, Justice Kavanaugh went on to emphasize that such review is "highly deferential."

Justice Thomas dissented, joined by Justice Alito. He zeroed in on section 1252's "zipper clause," which states that "all question of law and fact . . . arising from any action taken or proceeding brought to remove an alien . . . shall be available *only* in judicial review of a final order under this section." § 1252(b)(9). This provision, Thomas argued, "clearly covers" CAT claims and pulls such claims within the limitations on judicial review imposed by Section 1252. After addressing the majority's statutory arguments, Justice Thomas warned that its decision would wreak a "sea change in immigration law," and that the majority's reasoning might apply to other immigration challenges, including claims for statutory withholding of removal.

That does it for this week. We anticipate more decisions on Monday. Until next time, stay safe and enjoy your weekend!

Tadhg and Dave

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