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This *Report* summarizes opinions issued on March 25, 2021 (Part I); and cases granted review on March 22, 2021 (Part II).

I. Opinions

● *Ford Motor Co. v. Montana Eighth District Court*, 19-368. Without dissent, the Court held that "[w]hen a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit"—rejecting Ford's argument that specific personal jurisdiction was improper here because its in-state conduct did not give rise to plaintiffs' claims. The decision arises from two products-liability suits brought against Ford following tragic car accidents. The first suit, brought in Montana state court, was filed by the estate of Markkaya Gullett, who was killed when driving her Ford Explorer near her home in the state when the tread separated from a rear tire. The second suit, brought in Minnesota, was filed by Adam Bandemar, a Minnesotan, who was injured on a Minnesota road when an air bag failed to deploy in the Ford Crown Victoria in which he was a passenger. Ford moved to dismiss both suits for lack of personal jurisdiction, contending that the state court "had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed, Ford continued, only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident." That causal link didn't exist in either suit here because Ford designed the cars in Michigan and manufactured them in Kentucky and Canada; and the company originally sold the two cars outside the forum states. The trial courts upheld their jurisdiction, and the Montana and Minnesota Supreme Courts affirmed, rejecting Ford's argument. In an opinion by Justice Kagan, the Court affirmed.

The Court reviewed the basic due process limits on "a state court's power to exercise jurisdiction over a defendant," guided by the "canonical decision in this area," *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Of particular relevance, a state court can exercise specific jurisdiction over a defendant if the defendant takes "'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum state.'" The Court has also stated that the plaintiff's claims "'must arise out of or relate to the defendant's contacts" with the forum. The Court noted that "[t]hese rules derive from and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism.'"

In short, "[t]he law of specific jurisdiction thus seeks to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy."

The Court noted that Ford conceded that it has "'purposefully avail[ed] itself of the privilege of conducting activities' in both forum states." As noted, though, Ford contended that this did not suffice; there needed to be a causal link between its in-state activities and the plaintiffs' claims. The Court ruled, however, that "Ford's causation-only approach finds no support in this Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities." The Court explained that (as noted) it requires that the plaintiff's claims "'must arise out of or relate to the defendant's contacts" with the forum. The first half of that phrase ("arise out of") sounds in causation; "but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." The Court pointed out that in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), it "stated that specific jurisdiction attaches in cases identical to the ones here." And although that statement was "technically 'dicta,'" that conclusion "has appeared and reappeared in many cases since."

The Court then found those decisions make perfect sense. The Court noted that "[b]y every means imaginable—among them, billboards, TV and radio spots, print ads, and direct mail—Ford urges Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias. . . . And apart from sales, Ford works hard to foster ongoing connections to its cars' owners. The company's dealers in Montana and Minnesota (as elsewhere) regularly maintain and repair Ford cars[.] And the company distributes replacement parts both to its own dealers and to independent auto shops in the two States." All this conduct, said the Court, related to the plaintiffs' claims: "Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States." It matters not that the specific cars were first sold in other states, and later resold to the states' residents. "Ford's contacts . . . might turn any resident of Montana or Minnesota into a Ford owner—even when he buys his car from out of state." Indeed, noted the Court, all of those contacts with the forum states may well have satisfied a strict causation test. (Though "jurisdiction in cases like these" should not "ride on the exact reasons for an individual plaintiff's purchase or on his ability to present persuasive evidence about them.") This also explains why subjecting Ford to jurisdiction in Montana and Minnesota here is fair and comports with principles of "interstate federalism." On the latter principle, "[t]hose States have significant interests at stake—'providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,' as well as enforcing their own safety regulations." Montana and Minnesota certainly have a more significant relationship to the case than the states of first sales (Washington and North Dakota). Finally, the Court explained why two precedents upon which Ford relied "stand for nothing like the principle Ford derives from them."

Justice Alito filed an opinion concurring in the judgment. He began by stating that, as discussed in Justice Gorsuch's separate concurring opinion (summarized below), "there are grounds for questioning the standard that the Court adopted in *International Shoe*[.]" Justice Alito also "wonder[ed] whether the case law we have developed since that time is well suited for the way in which business is now conducted." Turning to this case, he stated that the Court "properly rejects" Ford's causation argument, and that he "agree[s] with the main thrust of the Court's opinion." His "only quibble" was with the Court's parsing of the phrase "must arise out of or relate to the defendant's conduct." Justice Alito still believes some causal link is needed, and found that there is a sufficient link here. But he fears that "[r]ecognizing 'relate to' as an independent basis for specific jurisdiction risks needless complications" for it's not clear what limits "relate to" imposes.

Justice Gorsuch filed an opinion concurring in judgment, which Justice Thomas joined. Finding the *International Shoe* "dichotomy" between general and specific jurisdiction "looking increasingly uncertain," he reviewed the history of the Court's personal jurisdiction jurisprudence. He noted that decisions by the Court at the turn of the 20th century allowed corporations to avoid suit outside their home states, even when they engaged in significant business in other states. "In many ways, *International Shoe* sought to start over. . . . In place of everything that had come before, the Court sought to build a new test focused on 'traditional notions of fair play and substantial justice.'" (Cleaned up.) But, said Justice Gorsuch, "it is unclear how far it has really taken us." On the general jurisdiction side, "this Court usually considers corporations 'at home' and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many 'headquarters.'" On the specific jurisdiction side, what do we do with (to use an example mentioned in a footnote in the majority opinion) "an individual retiree carving wooden decoys in Maine," who "can 'purposefully avail' himself of the chance to do business across the continent after drawing online orders to his e-Bay 'store' thanks to Internet advertising with global reach"? Justice Gorsuch said that "[n]one of this is to cast doubt on the outcome of these cases. The parties have not pointed to anything in the Constitution's original meaning or its history that might allow Ford to evade answering the plaintiffs' claims in Montana or Minnesota courts." But, he said, "[t]he real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy." (Justice Barrett took no part in the consideration of the case.)

- *Torres v. Madrid*, 19-292. By a 5-3 vote, the Court held that a Fourth Amendment "seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. . . . The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." In July 2014 four

New Mexico State Police officers went to an apartment complex to execute an arrest warrant for a woman accused of white collar crimes but suspected of having been involved in violent crimes. The officers observed petitioner Roxanne Torres standing with another person near a Toyota FJ Cruiser in the complex's parking lot. As the officers approached the vehicle, the companion departed and Torres got into the driver's seat. When the officers attempted to speak to her she didn't notice them until one of them tried to open her car door. Torres (who was experiencing methamphetamine withdrawal) didn't realize they were police officers but saw that they had guns. Thinking she was being carjacked, she hit the gas to escape. Officers Madrid and Williamson fired 13 shots of their pistols to stop her. They struck her twice in the back, but Torres continued driving, exiting the complex. She soon stole another car, and drove to a hospital 75 miles away. She was arrested the next day and pleaded no contest to aggravated fleeing from a law enforcement officer and two other offenses. Torres later filed a §1983 action against Officers Madrid and Williamson, claiming they violated her Fourth Amendment rights by using excessive force against her. The district court granted summary judgment to the officers, and the Tenth Circuit affirmed. It relied on circuit precedent holding that "no seizure can occur unless there is a physical touch or a show of authority" and that "such physical touch (or force) must terminate the suspect's movement" or otherwise give rise to physical control over the suspect. In an opinion by Chief Justice Roberts, the Court vacated and remanded.

The Court noted that in *California v. Hodari D.*, 499 U.S. 621 (1999), it said that it interprets the term "seizure" by consulting the common law of arrest, and that the common law treated "the mere grasping or application of physical force with lawful authority" as an arrest, "whether or not it succeeded in subduing the arrestee." The Court here said that it independently reached that same conclusion: when the Fourth Amendment was adopted, "[a] seizure did not necessarily result in actual control or detention." Indeed, found the Court, "[t]he cases and commentary speak with virtual unanimity on the question before us today." The Court cited old English cases which held that "[t]he touching of the person—frequently called a laying of hands—was enough. Only later did English law grow to recognize arrest without touching through a submission to a show of authority." (Citation omitted.) The Court found that early American courts followed that same "mere-touch rule," as did courts through the framing of the Fourteenth Amendment. And although this case involved a shooting, not "laying hands," the Court found no reason why that would alter the analysis. "We will not carve out this greater intrusion on personal security from the mere-touch rule just because our founding-era courts did not confront apprehension by firearm."

The Court cautioned that its rule "does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure." First, "[a] seizure requires the use of force *with intent to restrain*," *i.e.*, "to apprehend." "[T]he appropriate inquiry," said the Court "is whether the challenged conduct *objectively*

manifests an intent to restrain"—and it doesn't "depend on the subjective perceptions of the seized person." Second, "a seizure by force—absent submission—lasts only as long a the application of force. That is to say that the Fourth Amendment does not recognize any '*continuing* arrest during the period of fugitivity.'" Here, that means "the officers seized Torres for the instant that the bullets struck her."

The Court rejected the officers' contention that "intentional acquisition of control" is the standard for all types of seizures. First, the Court rejected the officers' view that "the common law doctrine recognized in *Hodari D.* is just 'a narrow legal rule intended to govern liability in civil cases involving debtors.'" The Court stated that "the common law did not define the arrest of a debtor any differently from the arrest of a felon"—even if far more cases arose in the debtor context. The Court went on to explain that the common law recognized separate bases for seizures: "seizures by *control* and seizures by *force*." "Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement. . . . But that requirement of control or submission never extended to seizures by force." The Court concluded by noting that it "leave[s] open on remand any questions regarding the reasonableness of the seizure, the damages caused by the seizure, and the officers' entitlement to qualified immunity."

Justice Gorsuch filed a lengthy dissent, which Justices Thomas and Alito joined. Justice Gorsuch described the majority's "mere touch" rule "as mistaken as it is novel." He noted that *Hodari D.*'s discussion of the rule was mere dicta. And when one starts with text, one sees that "[c]ountless contemporary dictionaries define a 'seizure' or the act of 'seizing' in terms of possession." Justice Gorsuch pointed out that the majority "accepts that a seizure of inanimate objects mentioned in the Fourth Amendment (houses, papers, and effects) requires possession" and found no basis for treating the seizure of persons differently. His review of the common law—Blackstone, Hale, and Hawkins, plus case law—found that an "arrest" "ordinarily required possession too." For example, he noted that "[a]t common law, an officer could be held criminally liable for allowing an individual to escape after being arrested. And to prove the existence of an arrest," the prosecutor had to show that the arrestee had actually been in the officer's custody." Justice Gorsuch explained that the mere-touch rule arose from creditors' efforts to civilly arrest delinquent debtors. The debtors were allowed to hide in their homes to escape civil arrest, so the law allowed a bailiff to effectuate a civil "arrest" if he "could manage to touch a person hiding in his home, often through an open window or door." Stated Justice Gorsuch, "the mere-touch arrest was a feature of civil bankruptcy practice for an unfortunate period. But the majority has not identified a *single* founding-era case extending the mere-touch arrest rule to the criminal context." Nor, added Justice Gorsuch, could "the majority [] point to even a single case suggesting that hitting a suspect with an object—an arrow, a bullet, a cudgel, *anything*

—as she flees amounted to an arrest." Justice Gorsuch next noted that several of the Court's cases described seizures of persons as requiring restraint of movement. Finally, he noted that the majority's rule will be difficult to apply, as courts will struggle with "what kind of 'touching' will suffice." (Justice Barrett took no part in the consideration of the case.)

II. Cases Granted Review

[Editor's note: Some of the language in the background section of the summaries below was taken from the petitions for writ of certiorari and briefs in opposition.]

● *United States v. Tsarnaev*, 20-443. The Court will review a First Circuit decision vacating the death sentence of one of the Boston Marathon bombers, respondent Dzhokhar Tsarnaev. A federal grand jury in the District of Massachusetts indicted respondent on 30 counts, including three counts of using a weapon of mass destruction resulting in death. The government sought the death penalty on 17 counts. As trial approached, respondent filed four separate motions for a change of venue, each of which the district court denied. In early 2015, the district court summoned 1373 prospective jurors and had them complete 100-question questionnaires about their backgrounds, social-media habits, views on the death penalty, and exposure to pretrial publicity about the case. The district court called back 256 prospective jurors for individual voir dire, which took place over 21 court days. The court asked each prospective juror about his or her responses to the questionnaire, including about exposure to pretrial publicity. But the court declined respondent's request to ask every prospective juror "content-specific" questions about pretrial publicity, such as "What stands out in your mind from everything you have heard, read[,] or seen about the Boston Marathon bombing and the events that followed it?" A 12-member jury, with six alternates, was finally empaneled. At trial, respondent's counsel "did not dispute that he committed the charged acts," instead arguing that respondent had participated under his brother Tamerlan's "influence." The jury found respondent guilty on all 30 counts, and after an extensive penalty phase sentenced him to death. The First Circuit affirmed 27 of respondent's convictions, and—of central relevance here—vacated respondent's capital sentences on two grounds and remanded for a new sentencing proceeding. 968 F.3d 24.

The First Circuit first held that the district court abused its discretion by denying respondent's requests for additional specific questions about the jurors' pretrial media exposure. It ruled that one of its precedents, *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968), required granting those requests. The court found that *Patriarca* established a supervisory rule that in cases where the trial judge finds "'a significant possibility that jurors have been exposed to potentially prejudicial material,'" the judge, "'on request of counsel,'" should examine each venireperson "'to elicit[] the kind and degree of his exposure to the case or the parties.'" Second, the First Circuit held that the district court erred in excluding

from the penalty phase evidence regarding a triple murder that occurred in Waltham, Massachusetts, on September 11, 2011, in which Tamerlan had been implicated. Tamerlan's friend Ibragim Todashev admitted that he participated in the murders but said they had been orchestrated by Tamerlan, who cut each man's throat. The district court found, based on its in-camera review, that "'there simply is insufficient evidence to describe what participation Tamerlan may have had' in the Waltham murders," so that evidence "'would be confusing to the jury and a waste of time, . . . without any probative value.'" The First Circuit disagreed, reasoning that the Waltham evidence should have been admitted because respondent's argument at his penalty proceeding was "premised . . . on his being less culpable than Tamerlan." He was therefore entitled to argue that "Tamerlan's lead role in the Waltham killings . . . makes it reasonably more likely that he played a greater role in the crimes charged here." The court also viewed evidence about the Waltham murders as "highly probative of Tamerlan's ability to influence" respondent, and believed that admission of that evidence "could reasonably have persuaded at least one juror that [respondent] did what he did because he feared what his brother might do to him if he refused."

The United States asks the Court to reverse both rulings. On the pretrial publicity questioning, the United States argues that "[o]nly through inappropriate second-guessing could a reviewing court fault the district court's careful jury-selection procedures here." The government points to the questionnaire and lengthy voir dire (during which respondent's counsel was permitted to ask questions about pretrial publicity), all of which winnowed the jury pool down from over a thousand to 12 seated jurors who affirmed "that they could adjudicate [the case] on the evidence as opposed to personal biases or preconceived notions." As in *Skilling v. United States*, 561 U.S. 358 (2010), "the district court's meticulous voir dire, relying on the 'face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news,' provided the court with 'a sturdy foundation to assess fitness for jury service.'" The government further argues that in *Mu'Min v. Virginia*, 500 U.S. 415 (1991), "the Court squarely rejected the claim that, in a capital case that has received media attention, the Constitution requires questioning 'about the specific contents of the news reports to which [prospective jurors] had been exposed' or 'precise inquiries about the contents of any news reports that potential jurors have read.'" On the Waltham evidence, the United States argues that "the district court did not abuse its discretion by declining to allow a complicated minitrial on the sensational but unsolved Waltham murders." Says the government, "[t]he district court correctly determined that any minimal probative value of that evidence was outweighed by the danger of confusing the jury. And in any event, the record amply demonstrates that any error was harmless. Even if jurors found the Waltham evidence credible, Tamerlan's alleged commission of independent crimes almost two years before the bombing had no reasonable prospect of altering the jury's recommendation that respondent receive the death penalty for his own acts of terrorism."

- *Servotronics, Inc. v. Rolls-Royce PLC*, 20-794. At issue is "[w]hether the discretion granted to district courts in 28 U.S.C. §1782(a) to render assistance in gathering evidence for use in 'a foreign or international tribunal' encompasses private commercial arbitral tribunals, . . . or excludes such tribunals[.]" The origins of the case is a January 2016 aircraft engine tail pipe fire that occurred during a flight test at a Boeing facility in South Carolina. Rolls-Royce manufactured the Trent 1000 engine installed on the Boeing aircraft; Servotronics manufactured a component of the engine (a valve). Rolls-Royce and its insurers settled the claim with Boeing for over $12 million, without Servotronics' participation. Rolls-Royce then instituted an arbitration against Servotronics in England pursuant to an agreement between the two companies. Servotronics thereafter filed an ex parte application pursuant to Section 1782 in the Northern District of Illinois, asking the court to issue a subpoena ordering Boeing to produce documents for use in the arbitration. Rolls Royce and Boeing intervened and moved to quash the subpoenas, which the district court did. The Seventh Circuit affirmed. 975 F.3d 689.

The Seventh Circuit noted that "[t]he source of a private arbitral panel's adjudicative authority is found in the parties' contract, not a governmental grant of power." That mattered, the court continued, because "a 'foreign or international tribunal' within the meaning of [Section] 1782(a) is a state-sponsored, public, or quasi-governmental tribunal." The Seventh Circuit concluded that Section 1782(a) was unavailable for Servotronics to obtain discovery for use in the England arbitration proceeding because that proceeding is not a "state-sponsored, public, or quasi-governmental" entity. The Fourth Circuit reached the opposite conclusion in a case arising from this same dispute.

Servotronics argues that "[c]ourts have used the term 'tribunal' to 'describe private, contracted-for commercial arbitrations for many years before Congress added the relevant language to Section 1782(a) in 1964.'" Notably, it says, the Supreme Court used the term "international arbitral tribunal" to describe a private arbitration in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). Servotronics further maintains that "[t]he arbitral tribunal is a 'tribunal' in both the everyday and legal sense of the term. As the Fourth Circuit concluded, the proceeding to which Servotronics and Rolls-Royce are parties qualifies as a 'tribunal,' even under a 'government-conferred authority' requirement that" two lower courts read into the provision "due to the degree to which the UK Arbitration Act sanctions, regulates and provides for governmental and judicial oversight for such proceedings."

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