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U.S. Supreme Court Rejects Due Process Challenge to State Business Registration Statute Requiring Consent to Jurisdiction

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On June 27, 2023, a closely divided U.S. Supreme Court held in *Mallory v. Norfolk Southern Railway Co.* that a state business registration statute requiring out-of-state corporations to consent to all suits in the state's courts does not violate the Fourteenth Amendment's Due Process Clause. The Court's 5-4 decision could have a far-reaching impact on corporate defendants, who typically cannot be haled into courts in a state with which they lack sufficient contacts. By rejecting a due process challenge to consent-by-registration statutes, the Court's decision may lead to the adoption by more states of such laws, which effectively sidestep principles of specific and general jurisdiction that have long constrained courts' power to render valid judgments against nonresident defendants. Accordingly, corporate defendants could soon find themselves subject to jurisdiction in the state and federal courts of any state in which they have registered to do business, even if they have few if any contacts there and a lawsuit has no connection to that forum — a sea change in the law with potentially broad ramifications for litigation practice.

Background and Court's Holding

The *Mallory* case centers on the concept of personal jurisdiction, which refers to a court's authority to subject a defendant to suit. Because a state court's assertion of jurisdiction "exposes defendants to the State's coercive power," it is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause."[1] Beginning with its seminal decision in *International Shoe Co. v. Washington*[2], the Supreme Court has long recognized two types of personal jurisdiction — general and specific — each with its own limits. General jurisdiction allows a court to hear any claim against a defendant, even if the claim has no connection to the forum state. But the defendant's

contacts with the state must be so "continuous and systematic" as to render it "essentially at home" in that state — which, for a corporation, typically means only its place of incorporation or principal place of business.[3] Specific jurisdiction "covers defendants less intimately connected with a State, but only as to narrower class of claims."[4] A court may exercise specific jurisdiction only if a claim "arise[s] out of or relate[s] to the defendant's contacts" with the forum."[5] The Supreme Court has also held that a state court may exercise personal jurisdiction over a defendant who expressly or impliedly consents to suit in the forum state, because the "requirement of personal jurisdiction" is "an individual right" that can "be waived."[6]

In *Mallory*, the Court examined a Pennsylvania statute that requires a corporation's consent to personal jurisdiction in the state's courts as a condition of doing business in the state. Specifically, Pennsylvania law provides that an out-of-state corporation "may not do business" in Pennsylvania "until it registers with" the Department of State and identifies and "continuously maintain[s]" an office for service of process in the state.[7] By registering in this manner, a foreign corporation agrees that Pennsylvania courts can "exercise general personal jurisdiction" over it for "any cause of action" asserted against it.[8]

Mallory, the plaintiff in the case, sued Norfolk Southern, his former employer, in Pennsylvania state court under the Federal Employers Liability Act[9] for an illness he allegedly suffered as a result of Norfolk Southern's purported negligence. Mallory worked for Norfolk Southern in Ohio and Virginia, and he lived in Virginia at the time he filed suit. Norfolk Southern was incorporated and headquartered in Virginia, though it was registered in Pennsylvania as a foreign corporation and conducted business there. The company argued that subjecting it to personal jurisdiction in Pennsylvania state court violated the Fourteenth Amendment's Due Process Clause because Mallory's suit did not arise out of any contacts with Pennsylvania (thus, specific jurisdiction was lacking) and the company was neither incorporated nor had its principal place of business in Pennsylvania (thus, general jurisdiction was lacking). The Pennsylvania Supreme Court agreed. The U.S. Supreme Court granted certiorari in light of a conflicting recent decision by the Georgia Supreme Court rejecting a similar due process argument.

The Supreme Court vacated the Pennsylvania Supreme Court's decision. Justice Gorsuch wrote for the majority, which included Justices Thomas, Alito, Sotomayor and Jackson. He concluded that the Court's precedent in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*[10], which held that laws like Pennsylvania's do not violate the Due Process Clause, controlled the case. *Pennsylvania Fire* involved a suit between an Arizona corporation and a Pennsylvania corporation in Missouri

state court regarding a claim based on an insurance contract issued in Colorado that protected property in Colorado. Missouri's law required out-of-state insurance companies doing business in Missouri to appoint an agent for service of process and accept service on that official as valid in any suit. In an opinion by Justice Holmes, the Supreme Court unanimously rejected a due process challenge to the Missouri law and concluded that the insurance company could be sued there by an out-of-state plaintiff for conduct that occurred out of state, because the insurance company agreed to accept service of process in Missouri as a condition of doing business there.

In *Mallory*, the Court reasoned that *Pennsylvania Fire* governed because the Pennsylvania law and the Missouri law were substantially similar and because Norfolk Southern complied with the law for many years by registering to do business in Pennsylvania, establishing an office there to receive service of process, and understanding that compliance with the law subjected it to suit in Pennsylvania. According to the Court, the "law and facts" fell "squarely within *Pennsylvania Fire*'s rule," requiring rejection of Norfolk Southern's due process argument. The majority also concluded that *Pennsylvania Fire* had not been implicitly overruled by the Court's subsequent decisions in *International Shoe* and its progeny, and it declined Norfolk Southern's invitation expressly to overrule *Pennsylvania Fire*. A plurality of the Court — Justice Gorsuch, along with Justices Thomas, Sotomayor and Jackson — proceeded to explain why *Pennsylvania Fire* is not inconsistent with *International Shoe* and later decisions: *Pennsylvania Fire* addressed defendants who had *consented* to in-state suits, whereas the *International Shoe* line of cases involved *non-consenting* defendants and how they might be subject to jurisdiction based on the extent of their contacts with the forum. In short, the plurality stated, *International Shoe* and its progeny "stake out an *additional* road to jurisdiction over out-of-state corporations."

Justice Alito, who provided the critical fifth vote to reject Norfolk Southern's due process challenge, wrote separately, concurring in part and concurring in the judgment. He agreed that Norfolk Southern's argument was foreclosed by *Pennsylvania Fire* and that the Court had never expressly or impliedly overruled its holding. He added that he would not overrule *Pennsylvania Fire* in this case, as Norfolk Southern's extensive operations in Pennsylvania, its frequent availment of Pennsylvania courts, and its clear notice of the Pennsylvania statute did not render the circumstances "so deeply unfair that it violates the railroad's constitutional right to due process." Justice Alito cautioned, however, that *Pennsylvania Fire* might not control a controversy with different facts, such as a defendant maintaining fewer contacts or having less activity in a forum state than Norfolk Southern did in Pennsylvania. Justice Alito added that while registration-based jurisdiction comports with the Due Process Clause in this situation, it might run afoul of other constitutional

constraints. In particular, he explained, laws like Pennsylvania's could violate the "so-called dormant Commerce Clause," which "prohibits state laws that unduly restrict interstate commerce," because they conceivably discriminate against out-of-state companies or place "undue burdens" on interstate commerce. Norfolk Southern had raised a dormant Commerce Clause challenge in the Pennsylvania Supreme Court, which did not address the argument given its Due Process Clause holding. Accordingly, both the plurality and Justice Alito recognized that the Pennsylvania Supreme Court could address this contention on remand.

Justice Barrett, joined by Chief Justice Roberts and Justices Kagan and Kavanaugh, dissented. She maintained that the Court's holding flouted the longstanding rule that the Due Process Clause prohibits state courts from exercising general jurisdiction over out-of-state defendants simply because they conduct business in the state. In her view, *Pennsylvania Fire* did not control because it was decided before and is inconsistent with *International Shoe*, which expanded the grounds for specific jurisdiction but left in place the rule that general jurisdiction for a corporation turns on its place of incorporation or principal place of business. Justice Barrett warned that the Court's decision will invite states to use registration requirements similar to Pennsylvania's to circumvent constitutional limitations on their courts' jurisdiction over foreign corporations.

Key Takeaways

The *Mallory* decision could have far-reaching impact on corporate defendants. *Mallory* purports to maintain the principles of specific and general personal jurisdiction that have long protected corporate defendants from suits in forums with which they lack sufficient ties — either because the suit does not arise out of the defendant's contacts with the forum state, or because the defendant is not incorporated or does not have its principal place of business in the forum state. Yet *Mallory* effectively gives the green light for states to enact statutes like Pennsylvania's that could subject corporations to jurisdiction in their courts — both state and federal courts — for *any* claims. Although few states currently have such laws[11], that scarcity may be attributable to concerns by state legislatures that consent-by-registration provisions violate the Fourteenth Amendment. Now that the Supreme Court has rejected that theory, more states may move in this direction, resulting in the very real possibility that corporate defendants could be subject to any suit in numerous states, including those least favorable to corporate defendants or with plaintiff-friendly counties or districts.[12] Although some states might resist enacting such laws, others may just as readily welcome them. Even in states that might not require express consent to suit as a condition of doing

business, plaintiffs' lawyers will likely argue for broad constructions of implied consent, perhaps even contending that the appointment of a registered agent for service of process is sufficient for consent. Interpretation of such state laws will ultimately be up to state courts, which may show a pro-plaintiff proclivity.

Nevertheless, *Mallory* leaves open other possible challenges to consent-by-registration statutes like Pennsylvania's. Justice Alito, the necessary fifth vote for the Court's decision, wrote a lengthy concurrence suggesting that consent-by-registration laws may violate the dormant Commerce Clause. The Pennsylvania Supreme Court might accept this argument on remand, as could other courts addressing similar statutes that might be enacted. In turn, the Supreme Court may again be called upon to address the validity of such laws, only this time on a dormant Commerce Clause theory. The Supreme Court's dormant Commerce Clause jurisprudence is anything but settled, however, and whether five Justices would vote to prohibit such laws under the dormant Commerce Clause is far from certain.[13]

Justice Alito also suggested that an as-applied Due Process challenge to a consent-by-registration statute might succeed. In his concurrence, he intimated that if an out-of-state corporation consented through registration but lacked extensive operations in the state, then *Pennsylvania Fire* might not control; indeed, he observed, *Pennsylvania Fire* governed only "due to the clear overlap with the facts of this case." Under his view, therefore, a due process challenge could conceivably succeed on the ground that it would be "unfair" for the state court to exercise jurisdiction over a defendant who was not so "actively engaged in business" in the state as Norfolk Southern was in Pennsylvania. This theory may be promising for some corporate defendants, but likely not those whose operations have a national reach. Additionally, it is unclear where the line would be drawn between a defendant that is insufficiently "engaged in business" in the forum state — and thus can successfully challenge jurisdiction on due process grounds — and one that is too "engaged in business" to avail itself of this exception.

Defendants could also look to venue challenges as a way to avoid suit in fora where they might be subject to personal jurisdiction based on consent-by-registration statutes. Whether such efforts would succeed is unclear, however, because venue statutes can turn on personal jurisdiction. For example, the general federal venue statute describes a corporate defendant's "residency" for venue purposes as "any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question."[14] And it permits venue in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located."[15] Therefore, a suit against a single defendant where personal

jurisdiction is established based on consent-by-registration would lie in any district in the state — as would a suit against multiple defendants if all defendants have registered in that state. Similarly, the venue statute provides that "if there is no district in which an action may otherwise be brought as provided in this section," venue may lie in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."[16]

The full effects of the *Mallory* decision remain to be seen, but the potential proliferation of consent-by-registration or similar laws poses a risk to companies across the country. An expansion of these provisions in the wake of *Mallory* will upend the settled understanding of jurisdictional constraints and expose corporate defendants to suits in unfavorable fora with which they have no other connections previously thought sufficient to establish jurisdiction. Companies that have registered to do business in multiple states should stay attuned to legislative developments and prepare for an increased likelihood of defending suits in plaintiff-friendly courts.

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1. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918-19 (2011). Federal courts "ordinarily follow state law in determining the bounds of their jurisdiction over persons," and states typically permit their courts to exercise personal jurisdiction on any basis not inconsistent with the federal Constitution. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014); *see* Fed. R. Civ. P. 4(k)(1)(A). Accordingly, the constitutional principles governing personal jurisdiction generally apply to both state and federal courts. ↩

2. 326 U.S. 310 (1945). ↩

3. *Goodyear*, 564 U.S. at 919; *Daimler*, 571 U.S. at 137. ↩

4. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017, 1024 (2021). ↩

5. *Id.* at 1024-25. ↩

6. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S 694, 703 (1982). ↩

7. 15 Pa. Cons. Stat. § 411(a), (f). ↩

8. 42 Pa. Cons. Stat. § 5301(a), (b). ↩

9. 45 U.S.C. §§ 51-60. ↩

10. 243 U.S. 93 (1917). ↩

11. *Mallory v. Norfolk Southern Railway Co.*, No 21–1168 (Barrett, J., dissenting) (slip op., at 10). ↩

12. Indeed, Mallory's decision to file suit in Pennsylvania (specifically, Philadelphia) was "hard to see … as anything other than the selection of a venue that is reputed to be especially favorable to tort plaintiffs." *Mallory* (Alito, J., concurring in part and concurring in the judgment) (slip op. at 5). ↩

13. *See, e.g.*, *Nat'l Pork Producers Council v. Ross*, 143 S.Ct. 1142 (2023). ↩

14. 28 U.S.C. § 1391(c)(2). ↩

15. *Id.* § 1391(b)(1). ↩

16. *Id.* § 1391(b)(3). ↩

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