

# SCOTUS Rejects Personal Jurisdiction Challenge to Consent-by-Registration Statutes but Leaves Door Open to Dormant Commerce Clause Challenge

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On June 27, 2023, a fractured U.S. Supreme Court decided *Mallory v. Norfolk Southern Railway Co.*, holding that a Pennsylvania statute requiring out-of-state companies to submit to general personal jurisdiction of the state's courts as a condition of doing business there does not violate the due process clause.

The decision generated complicated, separate opinions dividing the justices on issues of due process, federalism and waiver. But at the same time, it did not finally resolve the constitutionality of the Pennsylvania statute. Instead, it identified an alternative argument under the dormant commerce clause — an argument that Justice Samuel Alito at least appeared to think could be meritorious — and left it to the state courts to address that question on remand.

In short, although *Mallory* forecloses due process-based personal jurisdiction objections to business registration statutes, the constitutionality of those laws very much remains an open question.

The plaintiff in *Mallory* filed suit in Pennsylvania state court against his former employer, alleging that it exposed him to asbestos while he was working in Ohio and Virginia. Even though the plaintiff resided only briefly in Pennsylvania and the defendant was headquartered and incorporated in Virginia, the plaintiff argued that the defendant had consented to the jurisdiction of Pennsylvania's courts anyway, solely by registering to do business in that forum. Although the Pennsylvania Supreme Court held that the statutory scheme did purport to establish general personal jurisdiction over any company that complied with the registration requirements, the court struck down the statute because it “clearly, palpably, and plainly violates” due process. *See* Dissent, at 3.

The U.S. Supreme Court reversed, holding that Pennsylvania's business registration law comported with the due process clause of the Constitution. Writing for a five-justice majority, Justice Neil Gorsuch explained that a prior decision of the Court — *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), which was decided more than 100 years ago and involved a similar state statute — constituted binding precedent that “controls this case” and permits jurisdiction by consent, at least as a matter of due process. Gorsuch Op., at 10.

Elaborating on this reasoning in a portion of the opinion that only garnered four votes, the plurality highlighted the defendant's “extensive in-state contacts,” essentially side-stepping more recent Supreme Court precedent, such as *Daimler AG v. Bauman*, 571 U.S. 117 (2014), that had rejected “doing business” in a forum as a basis for general personal jurisdiction in favor of a more exacting standard limiting the exercise of such power to the defendant's state of incorporation or principal place of business.

Justice Alito concurred separately. He agreed that *Pennsylvania Fire* foreclosed any due process challenge but questioned whether Pennsylvania's registration statute separately violates the dormant commerce clause. Justice Alito suggested that allowing one state to haul into court any and all businesses for purposes of being sued on any claim regardless of what (if any) connection that claim has to the forum discriminates against out-of-state companies, would damage the national economy and impinge on the rights and sovereignty of sister states.

Although Justice Alito did not definitively resolve the issue, he expressed “skeptic[ism] that any local benefits of the State's assertion of jurisdiction ... could overcome the serious burdens on interstate commerce that it imposes.” Alito Concurrence, at 14.

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A four-justice dissent authored by Justice Amy Coney Barrett argued that Justice Gorsuch's and Justice Alito's reasoning about due process would "gut" the Supreme Court's more recent cases that proscribe state courts from asserting general jurisdiction over foreign defendants merely because they do business in the forum. Dissent, at 14. In particular, the dissent pointed to *BNSF Railway Co. v. Tyrrell*, 581 U.S. 402 (2017), where the Court held that Montana could not exercise general personal jurisdiction over an out-of-state defendant because "in-state business ... does not suffice to permit the assertion of general jurisdiction over claims ... that are unrelated to any activity occurring" in the state.

In the dissent's view, even assuming that the Pennsylvania statute could be construed as purporting to condition business registration on one's "consent" to personal jurisdiction, that would still be grounding jurisdiction on the unremarkable fact that an out-of-state company does business in the forum — *i.e.*, precisely the loose theory of general jurisdiction rejected in *Daimler* and *BNSF*.

## Takeaways

The primary and most immediate takeaway from *Mallory* is that the due process clause will no longer prevent plaintiffs from suing any company in Pennsylvania that registers to do business there, no matter whether the lawsuit arises out of the company's forum-related contacts or whether the company is actually based (*i.e.*, at home) in that state. As Justice Alito acknowledged, the decision is likely to invite "forum shopping" like the gamesmanship that the Court recently addressed in *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255 (2017). That case rejected attempts by the plaintiffs' lawyers to establish personal jurisdiction by joining the claims of resident California plaintiffs with those of nonresidents in a jurisdiction they perceived to be favorable.

The *Mallory* decision thus threatens to undo what *Bristol-Myers* accomplished with respect to forum manipulation, at least in Pennsylvania.

The implications for personal jurisdiction outside Pennsylvania are less clear. As the dissent pointed out, only a handful of states still have registration statutes like Pennsylvania's. While it is conceivable that states could begin enacting identical statutes, both the plurality and dissent noted that there may be sound public policy reasons for avoiding such a business-hostile regime, which might be one reason why most states have abandoned jurisdiction-by-registration.

But even assuming that *Mallory*'s treatment of the personal jurisdiction question were to invite enactment of jurisdiction-by-registration laws like Pennsylvania's, the fate of those statutes would be far from clear. Although *Mallory* appears to mark a step back from recent decisions vindicating the due process rights of corporate defendants as to personal jurisdiction, it also invites challenges to jurisdiction-by-registration statutes under the dormant commerce clause.

As the majority opinion noted, the Pennsylvania Supreme Court did not address the defendant's alternative challenge under this particular constitutional provision, and "any argument along those lines remains for consideration on remand." Gorsuch Op., at 4. And as noted above, Justice Alito expressed doubts about whether Pennsylvania's business registration statute — by discriminating against out-of-state corporations and burdening interstate commerce to the detriment of sister states — could survive scrutiny under the dormant commerce clause.

The four-justice dissent signals that other justices might be receptive to such a challenge as well, in its lament that exercising general jurisdiction "over every company doing business within [Pennsylvania's] borders infringes on the sovereignty of [] sister States[.]" Dissent, at 7. Although the dissent's concerns about federalism were tethered to the due process clause, similar concerns underlie the dormant commerce clause. And even the plurality did not dispute that there are serious "federalism implications of one State's assertion of jurisdiction over the corporate residents of another." Gorsuch Op., at 21. It concluded that these federalism concerns did not dictate the outcome under a due process analysis, but it is conceivable that such concerns could carry the day under the dormant commerce clause, which some justices might conclude provides a stronger check against state laws with extraterritorial effects on business.

## In Sum

*Mallory* reflects a possible retreat from some of the Supreme Court's personal jurisdiction rulings in recent years, the general thrust of which has been to clarify and strengthen due process protections accorded to out-of-state corporations. At the same time, the ruling leaves open an intriguing path forward for defendants to challenge registration statutes like Pennsylvania's under the dormant commerce clause.