

## ***Mallory v. Norfolk Southern Railway Co.*: Supreme Court Recognizes Existence of Consent-Based Theory of General Personal Jurisdiction**

August 2, 2023

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The US Supreme Court recently issued a decision in *Mallory v. Norfolk Southern Railway Co.*<sup>1</sup> holding that a Pennsylvania statute requiring corporations to “consent” to suit in Pennsylvania courts in order to register to do business in Pennsylvania does not violate the Due Process Clause of the US Constitution. Writing for a fractured 5–4 majority, Justice Neil Gorsuch’s opinion acknowledged a consent-based theory of general personal jurisdiction that threatens to limit jurisdiction-based defenses for corporate federal defendants.

For nearly a full decade prior to the Court’s decision in *Mallory*, federal courts have typically followed the Court’s 2014 guidance in *Daimler AG v. Bauman*, and found that they could only exercise general personal jurisdiction over out-of-state corporate defendants that had their principal place of business or incorporation in the forum state.<sup>2</sup> *Mallory* significantly limits the utility of *Daimler* for corporate defendants and has the potential to complicate future challenges to personal jurisdiction significantly, particularly if other states adopt similar registration regimes.

### **Background**

Robert Mallory sued his former employer, Norfolk Southern Railway Co. (Norfolk), in Pennsylvania state court for alleged workplace injuries despite the fact that Mallory resided in Virginia and the injuries occurred in Ohio and Virginia. Mallory argued that by virtue of its registration to do business in Pennsylvania, Norfolk consented to Pennsylvania’s exercise of personal jurisdiction. In that regard, Pennsylvania law requires out-of-state companies that register to do business in Pennsylvania to agree to appear in its courts on “any cause of action” against them.<sup>3</sup> Norfolk argued that the Pennsylvania court could not exercise personal jurisdiction over it because doing so would violate the Due Process Clause of the Fourteenth Amendment to the Constitution.

The Pennsylvania Supreme Court agreed with Norfolk and invalidated the Pennsylvania law on the basis that it violates the Due Process Clause of the Constitution. The US Supreme Court vacated and remanded the decision.

### **The Supreme Court majority clarified the existence of a consent-based theory of personal jurisdiction**

The Supreme Court held that the Pennsylvania statute requiring out-of-state companies to consent to suit in Pennsylvania courts in order to do business in Pennsylvania does not violate the Due Process Clause. Moreover, it held that such “consent” broadly confers personal jurisdiction in Pennsylvania to seek redress against a non-resident corporation for conduct that occurred elsewhere.

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<sup>1</sup> 600 U.S. at \_\_\_\_ (2023).

<sup>2</sup> See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (noting a corporation’s place of incorporation or principal place of business as “paradigm” bases for general jurisdiction).

<sup>3</sup> 42 Pa. Cons. Stat. §5301(a)(2)(i), (b).

This represents a significant departure from previous understandings of the limitations imposed on courts' exercise of personal jurisdiction by the Due Process Clause. Before *Mallory*, the test set forth in *International Shoe Co. v. Washington* allowed courts to exercise general personal jurisdiction over a corporation only when it had established sufficient contacts with the forum state.<sup>4</sup> The *Mallory* majority, though, held that the contacts-based test *International Shoe* established only applies in the absence of consent. Accordingly, *Mallory* clarified the existence of an additional, consent-based theory of personal jurisdiction. When a corporation has consented to being sued in a particular jurisdiction, under *Mallory*, Due Process does not require that the contacts-based test be satisfied.

### **Justice Alito's concurrence raises additional questions regarding the constitutionality of the Pennsylvania statute that will likely be addressed on remand to the Pennsylvania state courts**

Importantly, Justice Samuel Alito wrote a separate concurrence questioning whether the Pennsylvania statute violates the Dormant Commerce Clause of the Constitution, which "prohibits state laws that unduly restrict interstate commerce."<sup>5</sup> Corporations engaged in interstate commerce should keep a close eye on *Mallory*'s progression through the Pennsylvania courts on remand. They will have an opportunity to address this important question.

### **Impact**

This decision threatens to significantly complicate challenges to personal jurisdiction in two important ways.

#### **(1) "Litigation tourism" may become more frequent.**

First, Pennsylvania is likely to experience a surge in "litigation tourism," wherein plaintiffs choose to sue in Pennsylvania based on particularly favorable state law provisions. As a result of the *Mallory* decision, corporate defendants that are registered to do business in Pennsylvania can now be sued there for any case arising in any jurisdiction.

#### **(2) *Mallory* could encourage states to require consent to suit to do business in that state, or change interpretations of existing state laws.**

Second, state legislatures in other states may amend their existing registration requirements to require consent to suit in the same manner as Pennsylvania. The *Mallory* dissent noted that Pennsylvania's statute is unique, because "doing business" registrations in other states generally do not mandate consent to general jurisdiction for actions that occur elsewhere.<sup>6</sup> However, courts in several states (including Georgia<sup>7</sup> and Minnesota<sup>8</sup>) have held that registration to do business in their state is sufficient to establish personal jurisdiction — even in the absence of an explicit statutory consent requirement — and *Mallory* may further entrench this view in additional jurisdictions.

Additionally, New York Banking Law Section 200(3) requires foreign banks to appoint the Superintendent of the Department of Financial Services as an agent for service of process "in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches." Courts have thus far declined to interpret Section 200(3) as a consent to general personal jurisdiction,<sup>9</sup> but the issue remains unsettled. State laws (and their judicial interpretation) could change quickly now that the Due Process cloud has been lifted.<sup>10</sup>

<sup>4</sup> *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997).

<sup>5</sup> 600 U.S. at \_\_\_ (Alito, J., concurring) (citing *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 588 U.S. \_\_\_, \_\_\_-\_\_\_ (2019) (slip op., at 6-7)).

<sup>6</sup> See Dissenting Op. at pp. 9-10.

<sup>7</sup> See *Cooper Tire & Rubber Co. v. McCall*, 312 Ga. 422, 422 (2021).

<sup>8</sup> See *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990).

<sup>9</sup> See, e.g., *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, 2015 WL 1514539, at \*11 (S.D.N.Y. Mar. 31, 2015).

<sup>10</sup> See, e.g., *Brown v. Lockheed Martin*, 814 F.2d 619 (2d Cir. 2016) (rejecting "surprisingly broad" Connecticut state appellate court interpretation of Connecticut registration statute as consent to general personal jurisdiction in light of due process concerns).

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8/2/23