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Mallory Argument: Plaintiff Seeks To “Change The Jurisdictional Landscape”

A Virginia resident sued a Virginia company headquartered in Virginia over events that occurred in Virginia. And he filed his lawsuit in..... Pennsylvania. The Court heard argument earlier this week in *Mallory v. Norfolk Southern Railway Co.* on the constitutionality of the Pennsylvania jurisdictional statute the plaintiff attempted to rely on.

The question in the case is whether a state can condition registering to do business on a company being subjected to general jurisdiction. If the Pennsylvania statute is upheld, it would represent a radical expansion of jurisdiction, particularly if other states were to copy the statute.

BACKGROUND

Plaintiff Robert Mallory sued his former employer Norfolk Southern Railway claiming he was exposed to harmful chemicals at work.

Mallory is a resident of Virginia. Norfolk Southern is incorporated in Virginia. It has its principal place of business in Virginia. And the events underlying the claims occurred in Virginia.

Nevertheless, Mallory sued in Pennsylvania state court. Norfolk Southern is registered to do business in Pennsylvania. And a Pennsylvania statute provides that “qualification as a foreign corporation” (i.e. registering to do business) “shall constitute a sufficient basis . . . to exercise general personal jurisdiction.” Recall that general jurisdiction is jurisdiction over *any and all* claims against a defendant—even where the events have no connection to the state.

But under Supreme Court precedent in *Goodyear v. Brown* and *Daimler AG v. Bauman*, merely “doing business” in a state is insufficient for general jurisdiction.¹ “With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.”² So Mallory instead argued that Norfolk Southern *consented* to jurisdiction by registering to do business knowing the jurisdictional consequences of

that action. The theory of jurisdiction turned entirely on consent. As Mallory's counsel said at argument: "Without consent, we don't prevail."

THE ORAL ARGUMENT

Practical Considerations. Many of the justices seemed focused on the practical considerations of their decision. Justice Kavanaugh noted that if the Court ruled in Mallory's favor, "every state could have a statute like" Pennsylvania's, which would mean "every business would be at home . . . throughout the country." Justice Kagan similarly observed that endorsing Mallory's argument would "gut *Daimler* and *Goodyear* and you might even say effectively overrule them." In the course of responding to Justice Kagan, Mallory's counsel even stated: "I'm not even sure I fully agree with Pennsylvania's rule," although he maintained it was constitutional.

Testing Originalism's Limits. Mallory's arguments relied heavily on originalism-based arguments, focusing on statutes existing at the time the Fourteenth Amendment was passed. But many justices expressed skepticism regarding the strength of those arguments in this case. Justice Thomas asked that if there were only a "handful of states" with similar laws historically, "how would we know when there's enough history to support your position?" Justice Barrett similarly mused: "Let's just say that I might not read all those statutes the same way that you do." And Chief Justice Roberts stated that "history and tradition move on."

Other Doctrines: Unconstitutional Conditions and the Dormant Commerce Clause. The argument also dovetailed into a Con Law professor's dreamland of other constitutional doctrines. The parties and the Court debated the question: even if Norfolk Southern is considered to have "consented" to jurisdiction, whether the statute then imposed an "unconstitutional condition." Justice Kagan said outright: "[I]t seems to me you are in unconstitutional conditions land"—because in her view the state was demanding that corporations give up their right not to be haled into court for events unrelated to the state in order to have access to the state's markets.

Several justices also questioned whether conditioning out-of-state companies' access to the state's markets in this way reflected a Dormant Commerce Clause problem. Justice Alito asked: "If excluding a foreign corporation from the state would violate the Dormant Commerce Clause, can you prevail?" That issue overlaps with another case the Court heard in October on the Dormant Commerce Clause, *National Pork Producers Council v. Ross*.

Justices Sotomayor and Gorsuch Reaffirm Their Views. Justice Sotomayor—who issued a separate concurrence in *Daimler* disagreeing with the majority opinion—was less concerned with any negative effect on that decision. She reiterated her disagreement with the Court's approach in that case: "You know in *Daimler* that I disagree with the Court's jurisprudence."

Justice Gorsuch also reiterated his previously expressed personal jurisdiction views. In *Ford* (the Supreme Court's last major personal jurisdiction decision), Justice Gorsuch wrote in a concurrence: "[I]t seems corporations continue to receive special jurisdictional protections." He was referring to how human beings can be subject to "tag" jurisdiction if they are served when they are temporarily travelling through a state. He repeated those points at argument: "[I]f tag jurisdiction was always permissible since time immemorial for persons, how can it be unconstitutional condition to say a corporation must abide by more or less the same rules as we require of individuals?" In response to this theme, Justice Alito quipped: "Are there any natural persons who are present at the same time in all 50 states?"

CONCLUSION

As Justice Kagan put it: “[F]or almost a century, we’ve lived under rules that are entirely different from the ones that you’re [Mallory] suggesting we now adopt.” If the Court were to uphold the statute, it could represent a massive expansion of personal jurisdiction. Mallory’s counsel himself acknowledged: “It would definitely change the jurisdictional landscape.”

But even if the Court were to find the statute unconstitutional, it’s unclear how broad that ruling would be. The parties called *Mallory* a “foreign cubed” case because the (1) plaintiff, (2) the defendant, and (3) the underlying events were all out of state. Some of the argument focused on whether the results might be different in a so-called “foreign squared” case with an out-of-state defendant and events, but a plaintiff from the forum state. Some of the argument also centered on the uniqueness of this Pennsylvania statute, including that no express consent is required. Any decision in favor of the defendant may still leave these issues open for another day.

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¹ *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014).

² *Id.* at 137 (internal quotation marks and alterations omitted).