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Mallory Opinion: Constitutionality Of Jurisdiction By Registration May Be A Mirage

The Supreme Court's recent opinion in *Mallory v. Norfolk Southern Railway Co.*¹ concerned the constitutionality of a Pennsylvania statute providing that registering to do business in the state constitutes a sufficient basis for Pennsylvania courts' exercise of general personal jurisdiction.

While the statute survived the day in a fractured 4–1–4 decision, that outcome may ultimately be a mirage. In fact, only four-and-a-half pages of Justice Gorsuch's 24-page opinion actually garnered five votes.

Because of the split nature of the decision, a scorecard is necessary to keep track of the Court's ruling and reasoning. Four justices voted to uphold the statute under the Due Process Clause. And four justices would have held that the statute was unconstitutional under the Due Process Clause.

Justice Alito provided the crucial fifth vote. While he concluded that the statute did not violate the Due Process Clause, he also determined that there is a "good prospect" that the statute violates the dormant Commerce Clause. But since no Commerce Clause challenge was before the Court, he voted to remand the case for further proceedings.

Mallory therefore leaves the future of jurisdiction-by-registration uncertain. The issue will likely be before the Court again, potentially even with *Mallory* itself returning to the Court in the near future to address the dormant Commerce Clause challenge Justice Alito called for.

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 and Ohio.

Nevertheless, Mallory sued in state court in Pennsylvania, where Norfolk Southern is registered to do business and conducts substantial operations. A Pennsylvania statute provides that registering to do business “shall constitute a sufficient basis” for general jurisdiction (i.e., jurisdiction over any and all claims against a defendant—even where the events have no connection to the state).

Under the Supreme Court’s precedent in *Goodyear v. Brown* and *Daimler AG v. Bauman*, merely “doing business” in a state is insufficient for general jurisdiction.² With respect to a corporation, the place of incorporation and principal place of business are “paradigm” bases for general jurisdiction.³ But Mallory argued that in a case from over a hundred years ago, the Court upheld a Missouri statute with certain similar features.

THE MAJORITY OPINION

Justice Gorsuch wrote the majority opinion which Justices Thomas, Sotomayor, and Jackson joined in full (for a total of 4 votes). Justice Alito provided the fifth vote solely as to Parts I and III-B, which constitute the only opinion of the Court.

Part I merely lays out the background of the case. In Part III-B, the Court concluded that Pennsylvania’s jurisdiction-by-registration statute did not violate the Due Process Clause. This portion of the Court’s opinion relied exclusively on a case decided over a century ago: *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*⁴

In that case, the Supreme Court considered a Missouri law that required out-of-state insurance companies to execute a power of attorney which would render service on a particular Missouri agency official the equivalent of personal service on the corporation in the state. The Supreme Court held that the statute was constitutional and that, because the defendant had been served in state by operation of the power of attorney, Missouri courts had personal jurisdiction over the company at issue.

In the narrow part of the opinion that formed a majority of the Court, the Court upheld the Pennsylvania statute at issue because of its view that “the state law and facts before [the Court] fall squarely within *Pennsylvania Fire*’s rule.”⁵ The Court stated its view simply: “*Pennsylvania Fire* controls this case.”⁶

THE DISSENT

In dissent, Justice Barrett—joined by the Chief Justice, Justice Kagan, and Justice Kavanaugh—critiqued the Court’s perceived departure from settled precedent. She explained: “For 75 years, we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over foreign defendants merely because they do business in the State. Pennsylvania nevertheless claims general jurisdiction over all corporations that lawfully do business within its borders. As the Commonwealth’s own courts recognized, that flies in the face of our precedent.”⁷

Justice Barrett concluded that *Pennsylvania Fire* had been overruled by the Court’s seminal personal jurisdiction case *International Shoe*,⁸ and that even if *Pennsylvania Fire* remained good law, that the power-of-attorney structure in that case was distinguishable from the structure of the Pennsylvania statute.

Justice Barrett ended her dissent with a warning: “Critics of *Daimler* and *Goodyear* may be happy to see them go. And make no mistake: They are halfway out the door. If States take up the Court’s invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and, at least for corporations, specific jurisdiction will be superfluous.”⁹

JUSTICE ALITO’S CONCURRENCE

Justice Alito concurred in part. He concluded that under the circumstances of the case, no violation of the *Due Process Clause* occurred. Justice Alito agreed that the “parallels between *Pennsylvania Fire* and the case before [the Court] are undeniable.”¹⁰ That conclusion, though, came with a big *however*: “I am not convinced, however, that the Constitution permits a State to impose such a submission-to-jurisdiction requirement.”¹¹

He explained that, in his view, “[a] State’s assertion of jurisdiction over lawsuits with no real connection to the State may violate fundamental principles that are protected by one or more constitutional provisions or by the very structure of the federal system that the Constitution created.”¹² In Justice Alito’s estimation, the “federalism concerns that this case presents fall more naturally within the scope of” the dormant Commerce Clause, rather than the Due Process Clause.¹³ At the oral argument, which we previously covered, Justice Alito had previewed his focus on the dormant Commerce Clause.

In his concurrence, Justice Alito explained: “In my view, there is a good prospect that Pennsylvania’s assertion of jurisdiction here—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause.”¹⁴ In critical parts of his concurrence, he concluded:

- “There is reason to believe that Pennsylvania’s registration-based jurisdiction law discriminates against out-of-state companies”¹⁵
- “[A]t the very least, the law imposes a significant burden on interstate commerce by requiring a foreign corporation to defend itself with reference to all transactions, including those with no forum connection.”¹⁶
- “I am hard-pressed to identify any legitimate local interest that is advanced by requiring an out-of-state company to defend a suit brought by an out-of-state plaintiff on claims wholly unconnected to the forum State.”¹⁷

Despite Justice Alito’s seemingly strong views regarding the dormant Commerce Clause, “no Commerce Clause challenge [wa]s before” the Court, so Justice Alito agreed that the case should be remanded for further proceedings.

IMPLICATIONS

While Pennsylvania’s jurisdiction-by-registration statute lives to fight another day, the fractured nature of the Court’s opinion leaves uncertainty about the future viability of these types of laws. Whether these statutes will ultimately be permitted appears to be in Justice Alito’s hands. And both Justice Gorsuch’s and Justice Alito’s opinions pointed to Norfolk Southern’s extensive presence in Pennsylvania, leaving an open question as to

whether a defendant registered to do business in a state but without substantial operations there can be hailed into court based on a jurisdiction-by-registration statute without violating the Due Process Clause.

The *Mallory* decision makes one thing clear: Any party litigating the constitutionality of a jurisdiction-by-registration statute should be prepared to address both the Due Process Clause and the dormant Commerce Clause. The Court's split opinions confirm that both may be implicated in these circumstances.

Mallory also marks the second time in as many personal jurisdiction cases where Justice Gorsuch issued an opinion finding personal jurisdiction over a corporate defendant. His opinion in *Mallory* and concurrency in *Ford Motor Co. v. Montana Eighth Judicial District Court*¹⁸ have made his views on corporate personal jurisdiction evident. Parties with personal jurisdiction cases that may be headed to the Supreme Court would be wise to take Justice Gorsuch's personal jurisdiction outlook into account.

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¹ *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. ____ (2023).

² *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

³ *Daimler*, 571 U.S. at 137 (internal quotations marks and alterations omitted).

⁴ 243 U. S. 93 (1917).

⁵ *Mallory*, slip op. at 12.

⁶ *Id.* at 10.

⁷ *Mallory*, slip op. at 1 (Barrett, J., dissenting) (internal citations omitted).

⁸ *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁹ *Mallory*, slip op. at 18 (Barrett, J., dissenting)

¹⁰ *Mallory*, slip op. at 3 (Alito, J., concurring in part and concurring in judgment)

¹¹ *Id.* at 1.

¹² *Id.*

¹³ *Id.* at 8.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 12–13 (internal quotations marks and alterations omitted).

¹⁷ *Id.* at 14.

¹⁸ 141 S.Ct. 1017, 1034–39 (2021) (Gorsuch, J., concurring in judgment).