

June 30, 2023

Supreme Court Holds That Due Process Clause Does Not Bar States From Requiring Corporations to Consent to General Personal Jurisdiction

On June 27, 2023, the U.S. Supreme Court concluded in *Mallory v. Norfolk Southern Railway Co.* that Pennsylvania's consent-registration statute, which requires all corporations registered to do business in the state to consent to general personal jurisdiction, did not violate the Due Process Clause of the Fourteenth Amendment. But the Court remanded to Pennsylvania's highest court to decide whether Pennsylvania's statute violated dormant Commerce Clause doctrine for impermissibly burdening out-of-state commerce. The fractured decision in *Mallory* suggests that the Court continues to seek analytical precision in its personal jurisdiction cases in a manner that does not predictably favor defendants. At the same time, while all nine justices acknowledged the possibility that additional states may join Pennsylvania in legislating a requirement of consent to the exercise of general personal jurisdiction in the state's courts as a condition of doing business, all nine justices also acknowledged that such legislative actions remain subject to substantial other challenges.

Background

This case involves a Pennsylvania law that requires out-of-state corporations to consent to general personal jurisdiction in Pennsylvania courts as a condition of doing business in Pennsylvania. The Due Process Clause of the U.S. Constitution limits the power of courts in a given state to exercise jurisdiction over a defendant. Historically, the limit of that power was understood within a territorial framework. That is, if a defendant did not voluntarily appear within the state court in question, that court could exercise jurisdiction only if the defendant were a citizen of the state or served with process in the state. Courts applied those principles to corporations (themselves lacking any physical presence) by looking to the physical presence of the corporation's agents. Specifically, a litigant could hale into court an out-of-state corporation by serving its agent with process there. Corporations were therefore incentivized to limit liability by limiting the locations of agents. Accordingly, states passed laws that required corporations, as a condition of doing business, to assent to the exercise of personal jurisdiction. Some states required the appointment of an agent to accept service of process; others directly required consent. Some states limited the requirement to suits brought by their citizens or arising from in-state business; others did not.

Sometimes courts would go so far as to imply consent to the exercise of personal jurisdiction, even if a corporation had not registered to do business, and had not appointed an agent for service of process. That doctrine was unpredictable and unpopular, and it met its end in the watershed case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the U.S. Supreme Court introduced the modern personal jurisdiction test based on minimum contacts: to be haled into court, an out-of-state defendant must have "such 'contacts' with the forum State that 'the maintenance of the suit' is 'reasonable, in the context of our federal system of government,' and 'does not offend traditional notions of fair play and substantial justice.'" *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1024 (2021) (quoting

International Shoe, 326 U.S. at 316-317). The test “focus[es] on the nature and extent of the defendant’s relationship to the forum State,” and has crystallized into two forms of personal jurisdiction—general and specific. *Ibid.* (internal quotation marks and citations omitted). General personal jurisdiction “extends to any and all claims,” but exists “only when a defendant is essentially at home in the State”—an individual’s “place of domicile” or a corporation’s “place of incorporation and principal place of business.” *Ibid.* (internal quotation marks and citations omitted). Otherwise, courts may exercise specific personal jurisdiction if the defendant has “purposefully avail[ed] itself of the privilege of conducting activities within the forum State,” and if the claims in the suit “arise out of or relate to the defendant’s contacts” with the forum.” *Id.* at 1024-1025. A defendant may raise a personal jurisdiction challenge at the outset of a lawsuit, as grounds for dismissal. Otherwise the lawsuit proceeds, the court exercises personal jurisdiction over the defendant, and the defendant is bound by any resulting judgment. Since *International Shoe*, most litigation over personal jurisdiction has focused on the metes and bounds of specific and general jurisdiction, without discussion of consent and the import of appointing an agent for service of process, or registering to do business, within the state. Nevertheless, debate has persisted over the extent to which physical presence or consent suffices to establish personal jurisdiction. *Ford*, 141 S. Ct. at 1037-1038 nn.3-4 (Gorsuch, J., concurring).

The Court granted certiorari to answer the latter question, concerning consent to jurisdiction, in *Mallory*. Robert Mallory, a Virginia resident, sued his former employer, Norfolk Southern Railway Company, a large railroad then headquartered and incorporated in Virginia. Mallory worked for Norfolk for nearly 20 years, in Virginia and Ohio. Mallory filed suit in Pennsylvania, where he previously lived and where his lawyers were, raising claims that his work for Norfolk exposed him to toxic chemicals that caused him to develop colon cancer. Norfolk moved to dismiss for lack of personal jurisdiction, and the trial court affirmed on the grounds that Norfolk had not voluntarily consented to jurisdiction because the only alternative was not doing business in Pennsylvania. The Pennsylvania Supreme Court affirmed, rejecting a theory of consent to jurisdiction as a “relic[]” of pre-*International Shoe* territorial doctrine of personal jurisdiction.

In so ruling, the Pennsylvania Supreme Court reached the same conclusion as the highest courts of several other states, along with several federal courts of appeals, and opposite to several other highest state courts and federal courts of appeals that had held that such a theory of consent could be consistent with the Constitution’s Due Process protections. The Supreme Court granted Mallory’s petition for certiorari to resolve that split.

The Supreme Court’s Decision

In an opinion by Justice Gorsuch, the Court vacated the judgment and remanded. Justices Thomas, Sotomayor and Jackson concurred in full; Justice Jackson also authored a concurrence. Justice Alito concurred only in part and concurred in the judgment. Justice Barrett dissented, joined by Chief Justice Roberts and Justices Kagan and Kavanaugh. The majority concluded that *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), remained good law and required the result here—that jurisdiction by consent comports with the Due Process Clause, independent of modern personal jurisdiction analysis.

In *Pennsylvania Fire*, Gold Issue Mining (an Arizona company) brought suit in Missouri state court against Pennsylvania Fire (a Pennsylvania company) over a Colorado contract. Missouri had a statute requiring out-of-state insurance companies to accept service in Missouri as a condition of doing business in the state. Pennsylvania Fire had complied with that registration scheme. The Court upheld the regime in a unanimous opinion, reasoning that due process does not bar a state from holding a company to its consent to suit by virtue of having appointed the requisite agent for service of process.

Assessing that case, the five-justice majority in *Mallory* concluded that *Pennsylvania Fire* had not been expressly or impliedly overruled by *International Shoe* or its progeny because those cases address nonconsenting defendants; accordingly, *Pennsylvania Fire* and *International Shoe* do not contradict each other. Nor did principles of fairness or federalism demand that *Pennsylvania Fire* be overruled, the majority explained. After confirming that *Pennsylvania Fire* was good law, the majority identified no basis to distinguish the case factually from *Pennsylvania Fire*: in both cases, a non-resident plaintiff sued a non-resident defendant over conduct occurring out of state, and the defendant consented to general jurisdiction by virtue of the

process for registering to do business in the state. Thus, under *Pennsylvania Fire*, due process did not bar the Pennsylvania court from hearing Mallory's suit against Norfolk.

Moreover, Pennsylvania's exercise of personal jurisdiction over Norfolk here would not be out of line with the "fair play and substantial justice" aspect of the Due Process Clause's limits on personal jurisdiction. Norfolk's "extensive operations" and advertisements in Pennsylvania rendered it reasonable to anticipate being haled into court there. Concerns about interstate federalism were unavailing here because Norfolk had "submit[ted] to suit in the forum State" and "personal jurisdiction is a *personal* defense that may be waived or forfeited." And Norfolk's consent was legitimate given the many contexts in personal jurisdiction doctrine in which a sophisticated party is presumed to understand the jurisdictional consequences of its actions.

Writing for a plurality of the Court, Justice Gorsuch elaborated on why *International Shoe* did not overrule *Pennsylvania Fire*. The "two precedents sit comfortably side by side," he explained, because the minimum-contacts test set forth in *International Shoe* did not replace the preexisting personal jurisdiction regime of consent, domicile and tag. Instead, in setting up what would eventually become the modern framework of specific and general jurisdiction, *International Shoe*'s minimum-contacts test constitutes "an *additional road*" to personal jurisdiction over *nonconsenting* persons and corporations. Further, in the plurality's view, the Court had already held that the minimum-contacts test supplemented, rather than displaced, traditional grounds for jurisdiction. Namely, in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), the Court had rejected a due process challenge to tag jurisdiction many years after *International Shoe*.

Concurring, Justice Jackson emphasized that "the due process requirement of personal jurisdiction is an individual, waivable right." Therefore, she reasoned, defendants may "subject" themselves "to powers from which [they] may otherwise be protected." And there was "no question that Norfolk Southern waived its personal-jurisdiction rights," nor "was Norfolk Southern compelled" to consent to suit here.

Concurring in part, Justice Alito agreed that *Pennsylvania Fire* had not been overruled and controlled the outcome. He also agreed that jurisdiction was not unfair or unreasonable as a matter of the due-process limits on personal jurisdiction, and that Norfolk's dormant Commerce Clause challenge remained open on remand. But Justice Alito highlighted the importance of resisting the view that the Due Process Clause protects miscellaneous constitutional principles that would otherwise be "homeless." Specifically, he explained, the Due Process Clause is unsuitable for addressing the federalism concerns involved here; the dormant Commerce Clause, by contrast, is a more natural fit. Under that framework, Justice Alito expressed doubt that Pennsylvania's registration scheme was constitutional. He addressed each step of the dormant commerce analysis and concluded that Pennsylvania's scheme imposes serious burdens on commerce without any perceptible, legitimate local interest.

Writing for the dissenting justices, Justice Barrett concluded that the exercise of personal jurisdiction here violated the Due Process Clause on the ground that no "actual consent" had occurred by virtue of the Pennsylvania's registration scheme. And under the modern framework, she explained, general jurisdiction generally exists only where a corporation is incorporated or has its principal place of business—circumstances not present here. The Court's ruling would encourage other states to adopt similarly pernicious state-registration schemes, which encroach on interstate federalism. Justice Barrett was unpersuaded that *Burnham* supported the outcome here. Whereas *Burnham* relied on the uniform practice of states continuing to allow tag jurisdiction, Justice Barrett reasoned, Pennsylvania now stands alone in requiring consent to general jurisdiction as a condition of registering to do business. And Justice Barrett noted that, even in the past, regimes like Pennsylvania's were anomalous.

Implications

The immediate implication of the Court's decision is that corporations that have registered to do business in Pennsylvania and consented to general jurisdiction may be subject to suit there on any claim without violating the Constitution's Due Process Clause. The same could become true elsewhere, should other states adopt similar regimes. As the Court observed, all other states have thus far declined to legislate a Pennsylvania-like regime, but those legislative decisions could be revisited in the wake of *Mallory*. That could increase the litigation exposure involved with doing business in states whose legislatures have imposed such a regime. But all of the justices acknowledged the troubling prospect of states erecting untenable barriers to out-of-state

business, despite disagreeing as to which constitutional provision might limit that practice. Those concerns are likely to be worked out in subsequent challenges to consent-registration statutes, in which litigants remain free to argue that such statutes are invalid for other reasons, including the dormant Commerce Clause and case-specific statutory interpretation principles.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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