Aug 16, 2023

Categories:

Publications
SCOTUS Collection

Authors:

Ben A. West

‘Consent by Registration’: Supreme Court Reaffirms the Hidden Impact on Out-of-State Companies Registering to Conduct Business in Some States

Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (June 27, 2023)

While it received far less fanfare than other opinions issued in the final week of the U.S. Supreme Court’s 2022 term, *Mallory v. Norfolk Southern Railway Company* has potentially far-reaching effects on all corporations engaged in interstate commerce. In *Mallory*, the Supreme Court considered whether a Pennsylvania statute, which allows an out-of-state corporation to be sued in the state for *any* claim if the company is registered to conduct business in Pennsylvania, violated the Due Process Clause of the Fourteenth Amendment. The Court issued a narrow 4-1-4 decision, with Justice Alito concurring in part and with the result. In a plurality opinion authored by Justice Gorsuch, the Court held that the Pennsylvania statute does not violate due process. In doing so, the Court clarified the applicability of caselaw from a century ago that permits states to enact and enforce “consent by registration” laws, leaving corporations registered in those states vulnerable to any type of lawsuit, not just to claims based on the corporation’s specific activities in the state. As noted by the Court, though, this exercise of jurisdiction is somewhat limited by the facts.

Robert Mallory worked for Norfolk Southern for nearly 20 years, during which he claims he was exposed to asbestos and other carcinogenic chemicals. After being diagnosed with cancer, he sued Norfolk Southern under a federal workers’ compensation law that allows railroad workers to recover damages caused by their employers’ negligence. Although Mallory sued in Pennsylvania state court, he lived in Virginia and had only worked for Norfolk Southern

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

in Ohio and Virginia. Norfolk Southern was incorporated and had its headquarters in Virginia. Norfolk Southern challenged the lawsuit, asserting that the exercise of personal jurisdiction by the Pennsylvania court over the Virginia-based company would offend the Due Process Clause of the Fourteenth Amendment. But when it registered to do business in Pennsylvania, Norfolk Southern had complied with the commonwealth's "consent by registration" statute.

The Pennsylvania statute requires foreign (out-of-state) corporations that wish to conduct business in Pennsylvania to register with the state and establish an office for service. By doing so, the foreign corporation will enjoy the same rights and privileges as a domestic Pennsylvania entity, but it will also be bound to the same liabilities and restrictions—including consenting to the exercise of general personal jurisdiction over the company by Pennsylvania courts. These statutes have long been called "consent by registration" laws because they rely on the foreign company's consent (established by registering to do business) to jurisdiction in the state. Norfolk Southern asserted that such an exercise of jurisdiction—based solely on registration and establishment of a registered agent's office—is overly broad and unsupported by more recent caselaw.

Norfolk Southern challenged Mallory's lawsuit, asserting that the exercise of personal jurisdiction by the Pennsylvania court over the Virginia-based company, based on the "consent by registration" statute, would offend the Due Process Clause of the Fourteenth Amendment. In a 4-1-4 ruling, a plurality of the Supreme Court disagreed, holding that the Pennsylvania statute does not violate the Due Process Clause.

Analysis of Norfolk Southern's argument will likely give most lawyers flashbacks of first-year law school lectures. Norfolk Southern relied heavily on *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the landmark Supreme Court opinion that set forth two means by which a state could exercise personal jurisdiction over a corporation: (1) "specific jurisdiction," which permits lawsuits arising out of the corporation's specific activities in the state; and (2) "general jurisdiction," which allows for lawsuits on any and all claims

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

in a state where the corporation is incorporated or has its "principal place of business." A long line of cases followed *International Shoe*, focusing on the limits of personal jurisdiction through the lens of the Due Process Clause.

But instead of simply applying the restraints of *International Shoe,* Justice Gorsuch explained that *International Shoe* served as an expansion to "the traditional grounds of personal jurisdiction," including those recognized in an earlier case, *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). In *Pennsylvania Fire*, the Court held that a Pennsylvania company could be sued in Missouri by an Arizona plaintiff on claims arising from events in Colorado because it had agreed—as required by Missouri statute—to accept service on *any* claim in Missouri as a condition of being registered to do business there. Rather than invoke *International Shoe*, the Court in *Mallory* simply followed *Pennsylvania Fire*.

Because the Pennsylvania statute at issue in *Mallory* explicitly permitted Pennsylvania state courts to "exercise general personal jurisdiction" over foreign companies that registered to do business in the state, the Court reasoned that Norfolk Southern had consented to subject itself to general jurisdiction in Pennsylvania courts. As noted in Justice Jackson's concurrence, the "due process requirement of personal jurisdiction is an individual, waivable right." The Court held that Norfolk Southern, having complied with the Pennsylvania registration statute for years, had waived its right to object to due process. Thus, despite none of the activities or damages alleged by Mallory occurring in Pennsylvania and Norfolk Southern not being based there, the company could still be sued in Pennsylvania.

While the holding in *Mallory* makes clear that "consent by registration" is alive and well, the composition of the 4-1-4 ruling may portend future challenges to such laws. Though five justices agreed that the Pennsylvania statute complies with the Due Process Clause, Justice Alito—in his partial concurrence—suggested that the statute may run afoul of another issue not (yet) before the Court. While acknowledging that *Pennsylvania Fire* controlled the issues before the Court in *Mallory*, Justice Alito observed that those issues

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

were limited solely to the Due Process Clause. Other constitutional challenges to "consent by registration" statutes are likely to find more traction, he suggested, under "the so-called dormant Commerce Clause," which Norfolk Southern can raise on remand. Further supporting this proposition, Justice Gorsuch, in a footnote, specifically noted that the dormant Commerce Clause issue "remains for consideration on remand."

Based on these signals, and the split 4-1-4 ruling, the days of Pennsylvania's "consent by registration" statute may well be numbered. But any such challenge to the Pennsylvania statute (or that of any other state) will likely take years to wend its way through the courts, meaning "consent by registration" statutes will remain in force for the foreseeable future. Regardless of the outcome of future challenges, the Supreme Court's ruling leaves out-of-state corporations open to being sued in states with "consent by registration" laws for any claim. Corporations and other entities in that position may question whether they wish to remain registered and conduct business in those states, while states without "consent by registration" laws may question whether to enact them.

Key Takeaways

- A foreign corporation registered in any state that has a "consent by registration" statute can be sued in that state on any claims, not just on claims related to the company's activity in that state.
- There are currently only a handful of states with "consent by registration" statutes in place, but nothing prevents states from adding such statutes at any time. Companies should carefully monitor proposed legislation in every state in which they are registered.
- If a company is registered to do business in a state with "consent by registration" statutes but no longer conducts business there, it may be worthwhile to terminate that registration.

Want more U.S. Supreme Court coverage?

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

Explore the full wrap-up and analysis from our Appellate Practice Group on the most consequential rulings for businesses and industries during the 2022-2023 U.S. Supreme Court term.

SCOTUS Collection | GO>>

You'll also find links below to all articles in this collection.

- Supreme Court Reaffirms Patent Law's Enablement Requirement
- Supreme Court Clarifies 'Transformative' Art in the Context of Copyright 'Fair Use'
- Supreme Court Narrows Clean Water Act's Jurisdictional Scope in Sackett v. EPA
- Supreme Court Holds Post-Trial Motions Not Required to Preserve Appellate Rights on Purely Legal Questions
- Divided Court Rules That Appeals From Arbitration Denials Automatically Stay All District Court Proceedings
- 'Consent by Registration': Supreme Court Reaffirms the Hidden Impact on Out-of-State Companies Registering to Conduct Business in Some States
- Supreme Court Rules First Amendment Permits the Sale of 'Expressive' Goods and Services from Compliance with Anti-discrimination Laws
- Supreme Court Defines Limits of Social Media Company Liability
- Supreme Court Ends Considerations of Race in College Admissions
- Supreme Court Rejects Dormant Commerce Clause Challenge to California Restrictions on Sale of Pork
- Student Loan Relief Denied in 6-3 Decision by the Supreme Court
- Supreme Court Rules that States Can't Take More Property Than They Are Owed
- Supreme Court Pokes a Hole in the Ironclad Nature of Bankruptcy 363 Sales

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons