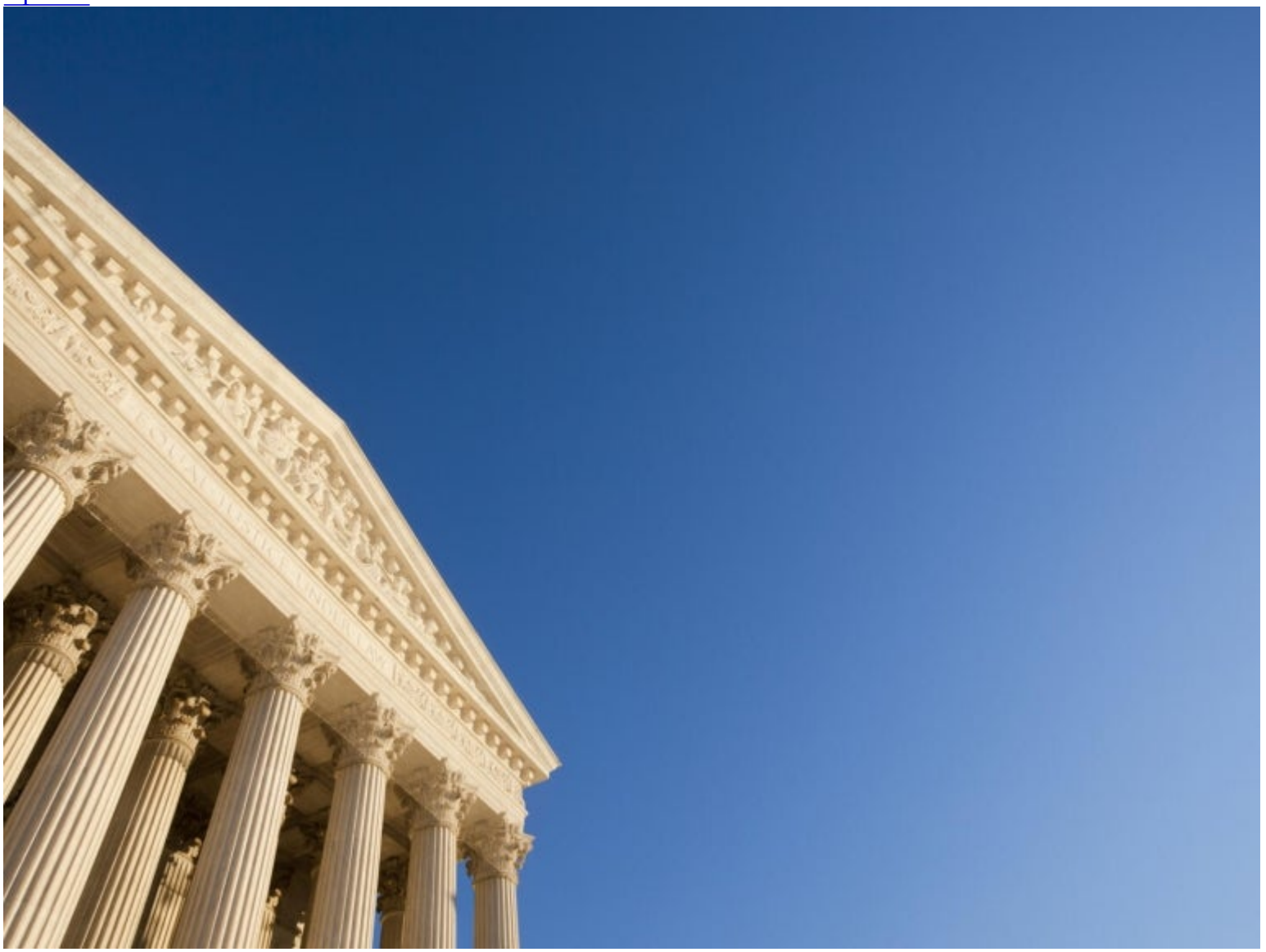
Updates



The U.S. Supreme Court has held—by a 5-4 margin—that it did not violate due process for a Pennsylvania court to exercise jurisdiction over an asbestos case with no connection to Pennsylvania because of a unique Pennsylvania foreign corporation registration statute that requires consent to general jurisdiction to do business in the state. The case—*Mallory v. Norfolk Southern Railroad Co.*—immediately alarmed most large businesses, which are typically registered in many—and likely all—states as foreign corporations in order to do business. This Update provides guidance on the decision, other states to watch out for (if any), and what challenges defendants should preserve when challenging personal jurisdiction.

In sum, the result announced here in a majority opinion by Justice Gorsuch, joined by Justices Thomas, Alito (in part), Sotomayor, and Jackson, appears to be a one-off. The blend of conservative and liberal justices is legally and psychologically interesting, but the sky is not falling for multistate companies. The Court's "holding" is

limited by the views expressed by Justice Alito in his concurrence and by the unified views of the four dissenters. In finding no due process violation, Justice Alito emphasized that the railroad employer had significant connections to Pennsylvania in addition to its consent to jurisdiction by way of the Pennsylvania registration statute. Thus, there is no majority holding that compliance with a foreign corporation registration statute *standing alone* suffices for consent to personal jurisdiction, even if the statute literally requires consent to "general jurisdiction." Justice Alito went on to suggest that such exercises of state jurisdiction could run afoul of the Court's Dormant Commerce Clause case law, and defendants should preserve that issue going forward.

There do not appear to be other state statutes currently that are close to Pennsylvania's, except for Georgia's statute as it has been construed by that state's Supreme Court. But, of course, states could change their laws to something akin to Pennsylvania's. On the current Court, at least, there would appear to be a solid five-vote majority for any such law—standing alone—being insufficient for exercising personal jurisdiction.

**Background and Case Overview**

In an increasingly common, history-focused majority opinion by Justice Gorsuch, the U.S. Supreme Court took a trip down memory lane in its personal jurisdiction analysis and resolution of *Mallory v. Norfolk Southern Railroad Co.* The case involved an asbestos lawsuit by a railroad employee, Mr. Mallory, who had worked for Norfolk Southern in Ohio. Norfolk Southern is based in Virginia but has significant operations in Pennsylvania. While the plaintiff had lived in retirement in Pennsylvania for a bit, he resided in Virginia at the time of filing suit, and Pennsylvania had no connection to the lawsuit other than being the home of Mr. Mallory's lawyers. He sued in Pennsylvania state court. Among the bases for personal jurisdiction, he cited a Pennsylvania registration statute that required Norfolk Southern to consent to Pennsylvania court jurisdiction over "any cause of action" against them.

As it turned out, the U.S. Supreme Court had previously held in 1917 that the consent obtained from an out-of-state corporation by way of compliance with a Missouri registration statute very similar to Pennsylvania's sufficed for due process purposes. See *Pennsylvania Fire Ins. Co. Of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). For good measure, that decision was authored by Justice Oliver Wendell Holmes and was unanimous. (Also of note, amidst the lengthening opinions from appellate courts: The opinion was barely over 1,000 words.)

*Pennsylvania Fire*, though, was nearly 30 years before *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). It occurred amid an era of narrow, formalistic personal jurisdiction analysis based on either "presence" or "consent," with *Pennoyer v. Neff*, 95 U.S. 714 (1878), being the rule of the day. *International Shoe* and its progeny created a new personal jurisdiction paradigm that still dominates first-year civil procedure classes and makes the quantity and quality of "minimum contacts" with the forum state the touchstone (pun intended) of the due process analysis. As former civil procedure professor Justice Barrett explains in the *Mallory* dissent, no reader of the Court's recent cases—several of which were written by former civil procedure professor Justice Bader Ginsburg—would come away thinking that a state could pass a law saying "any corporation doing business in this State is subject to general jurisdiction in our courts." Indeed, in *BNSF R. Co. v. Tyrrell*, 581 U.S. 402, 414 (2017), the Court literally said nearly the opposite: "in-state business . . . does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the State]."

So how does the Pennsylvania statute make this case different from multiple recent cases where the Court held that there were insufficient relevant contacts for a state court to exercise personal jurisdiction over a foreign

corporation? The answer, in short, is that the majority (only partially joined by Justice Alito) analogized the situation to "tag jurisdiction" over individuals, the stuff of crime shows with ever-creative process servers. Notwithstanding the "minimum contacts" regime of *International Shoe*, the Court upheld "tag jurisdiction" regardless of contacts with the forum—thereby preserving the sheer sporting fun and creative fiction of it—in *Burnham v. Superior Court of Cali. County of Marin*, 495 U.S. 604 (1990). The lead plurality opinion was authored by Justice Scalia, and thus, *Burnham* is part of the conservative classic rock canon, like a jurisprudential "You Really Got Me," the Van Halen version being preferred.

It is difficult to believe that Justices Sotomayor and Jackson would have joined Justice Scalia's opinion in *Burnham* (Justices Brennan, Marshall, Blackmun, and O'Connor didn't and tried to square jurisdiction with *International Shoe* instead), but Justices Sotomayor and Jackson may be fine with a formalistic, *Burnham*-style regime for foreign corporations as opposed to individuals. While completely joining the majority, Justice Jackson authored a short concurrence in which she emphasized that she thought *Insurance Corp. Of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), was a particularly apt precedent (more apt, she may have been implying, than *Burnham*). In her view, there was "no question" that Norfolk Southern had waived its personal jurisdiction rights by registering as a foreign corporation in Pennsylvania in exchange for the associated benefits of doing so. For the dissenters, Justice Barrett aggressively rejected the majority's analogy to *Burnham*. It is a very interesting digression for those who love this stuff.

But the most important opinion, because it was the deciding vote and sits between the majority and the dissent, is Justice Alito's 14-page concurrence in the judgment. He concluded that the Due Process Clause is not violated "when a large out-of-state corporation **with substantial operations in a State** complies with a registration requirement that conditions the right to do business in that State on a registrant's submission to personal jurisdiction in any suits that are brought there" (emphasis added). The "substantial operations" limitation is key: Justice Alito noted that Norfolk Southern "had long operated rail lines and conducted related business in Pennsylvania" and "was actively engaged in business" there. The majority also acknowledged that "Norfolk Southern employed nearly 5,000 people in Pennsylvania," "[m]aintained more than 2,400 miles of track across the Commonwealth"—"more miles of track in Pennsylvania than in any other state," "[i]ts 70-acre locomotive shop there was the largest in North America," and "employed more people in Pennsylvania than it did in Virginia, where its headquarters were located." Yet despite acknowledging these "substantial operations," the majority curiously omitted any reference when later summarizing its holding. And as Justice Barrett pointed out in dissent, the extent of the operations was remarkably similar to that of a railroad case only a few years ago ( *BNSF*), where the Court rejected Montana's exercise of general jurisdiction over a railroad company whose tracks and attendant employment spanned Montana.

While Justice Alito agreed that jurisdiction over Norfolk Southern did not violate due process given its railroad operations in Pennsylvania *and* the registration statute, he effectively said that he thought Pennsylvania's exercise of jurisdiction over a case that has nothing to do with Pennsylvania would violate the Dormant Commerce Clause. In his words, "to survive Commerce Clause scrutiny under this Court's framework, the law must advance a 'legitimate local public interest' and the burdens must not be 'clearly excessive in relation to the putative local benefits.'" He went on: "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" (emphasis in original). As it turns out, those might have been fighting words because the legitimacy and rigorousness of the "local interest" balancing in Dormant Commerce Clause cases was precisely the issue in *National Pork Producers Council v. Ross*, No. 21-468, decided on May 11, 2023, in which California's ban on the sale of pork raised contrary to California's animal husbandry standards was upheld against a Dormant Commerce Clause challenge. Justice Alito was among the dissenters who thought that the challengers had sufficiently alleged a deficiency of local benefits compared to the burden on interstate commerce to survive a motion to dismiss. Given his injection of Dormant Commerce Clause issues into the personal jurisdiction realm, the divisions in *National Pork Producers* are now part of the personal jurisdiction calculus as

well.

The Pennsylvania Supreme Court is free to take up any Dormant Commerce Clause issues on remand, and it may well be that there are five votes in favor of rejecting the application of Pennsylvania's registration statute where jurisdiction is exercised over a dispute that has nothing to do with Pennsylvania. We will have to wait and see. There would seem to clearly be five votes saying that a registration statute standing alone is not enough: Justice Alito plus the four dissenters in *Mallory* (Chief Justice Roberts, Justice Kagan, Justice Kavanaugh, and Justice Barrett). Justice Barrett wrote for the dissenters that "Pennsylvania's effort to assert general jurisdiction over every company doing business within its borders infringes on the sovereignty of its sister States in a way no less 'exorbitant' and 'grasping' than attempts we have previously rejected." Justice Alito seems to agree with that, only not as a matter of due process doctrine.

**Other Jurisdictions**

While every state has a registration statute requiring corporations that wish to do business in the state to register and appoint an agent for service of process, only Pennsylvania directly ties business registration to consenting to general jurisdiction, i.e., jurisdiction for any claim, the type of jurisdiction that normally is only present where a corporation is "home"—its state of incorporation or the state of its principal place of business.

While no other states have a statute like Pennsylvania's, the Supreme Court of Georgia has interpreted Georgia Business Code OCGA section 14-2-1505 (b) to extend general jurisdiction over a corporation that is authorized to do business in the state. The Georgia Supreme Court cited its own precedent in further solidifying this interpretation in *Cooper Tire v. McCall* in 2021.

Unlike Pennsylvania and Georgia, in many states, mere compliance with a business registration statute is *insufficient* to grant courts personal jurisdiction over a corporation. A quick overview of several jurisdictions follows:

**California.** § 2105 of the California Corporations Code requires that a foreign corporation obtain a certificate of qualification from the secretary of state before transacting intrastate business. Part of this application requires naming an agent upon whom process directed to the corporation may be served. In *Bristol-Myers Squibb* (2016), the California Supreme Court explained this appointment of an agent, when required by state law, "cannot compel its surrender to general jurisdiction for disputes unrelated to its California transactions." In other words, merely following statutory registration requirements is not a sufficient condition for general jurisdiction in California. *Bristol-Myers Squibb* was overturned by the Supreme Court on other grounds (2017), but the California Supreme Court's particular holding on business registration seems to be good law. For example, a California District Court offered the following reminder in 2017: "[d]esignation of an agent for service of process in California, alone, is not enough to show general jurisdiction."

**Illinois.** 805 ILCS 5/13.05 governs the admission of foreign corporations in Illinois and requires that foreign corporations must be authorized by the secretary of state to transact business in the state. 805 ILCS 5/13.15 requires that registering corporations establish an office and an agent in Illinois. Several recent decisions in Illinois articulate that merely registering a business in the state as required by these statutes does not mean that a corporation has consented to the exercise of general jurisdiction in that state. For example, in *Aspen Am. Insurance Co. V. Interstate Warehousing, Inc.* (2017), the Supreme Court of Illinois held that none of the provisions of the Business Corporation Act of 1983 indicate that consent to general jurisdiction is a condition of

doing business in Illinois.

**New York.** Under BCL § 1301(a), a foreign corporation must be authorized to do business in New York; part of that registration process requires establishing an office in New York and designating a registered agent. Prior to 2014, New York courts interpreted compliance under BCL § 1301(a) as consent to general jurisdiction in the state. In light of *Daimler v. Bauman* (2014), the U.S. Court of Appeals for the Second Circuit changed direction in *Chufen Chen v. Dunkin' Brands, Inc*. (2020), holding that a foreign corporation does *not* consent to general personal jurisdiction in New York by following BCL § 1301(a) and designating an in-state agent for service of process.

**Oregon.** ORS 60.701 requires that a foreign corporation be authorized by the secretary of state before transacting business in Oregon. Under ORS 60.721, foreign corporations must maintain a registered office and appoint a registered agent. ORS 60.731 designates the agent as the person to receive service of process. However, at least three recent cases confirm that this office and agent requirement does *not* constitute corporations' consent to general jurisdiction of the Oregon state courts. For example, in *Figueroa v. BNSF Railway Co.* (2017), the Oregon Supreme Court explicitly stated that the Oregon registration requirements do *not* address or imply jurisdiction. And in *Lanham v. Pilot Travel Centers* (2015), the Oregon District Court held that "nothing" in Oregon law suggests that compliance with business registration statutes "confers general personal jurisdiction over a nonresident defendant for conduct occurring outside Oregon."

**Texas.** Recent case law in Texas suggests that business registration and the maintenance of a registered agent for service of process in Texas is, on its own, not dispositive. Indeed, in 2020, a Texas District Court, following the U.S. Court of Appeals for the Fifth Circuit, held that general jurisdiction requires that a corporation have a business *presence in Texas*, not simply that the business *does business with Texas*. This distinction makes the Texas approach less clear-cut than other states. For example, *Conner v. ContiCarriers and Terminals, Inc.* (1997) held that "[b]y registering to do business, a foreign corporation only *potentially* subjects itself to jurisdiction." More helpfully, the case further explains that compliance with Texas registration statutes constitutes consent to general jurisdiction "*only* if the corporation's contacts in Texas were continuous, systematic, and of such a nature that the imposition of personal jurisdiction would not violate 'traditional notions of fair play and substantial justice.'"

**Washington.** Under Washington's Business Corporation Act, RCWA 23B.15.010, a foreign corporation may not transact business in Washington unless it registers with the secretary of state; part of this registration involves designating a registered agent in Washington. RCWA 23.95.460 explicitly states that "the designation or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state." Case law in Washington has affirmed this proposition. For example, in *Washington Equipment Mfg. Co. v. Concrete Placing Co.* (1997), the Washington Court of Appeals held that "[n]othing" in the Business Corporation Act "states, or implies, that by complying with these mandatory requirements a foreign corporation consents to general jurisdiction in Washington."

**Conclusion**

The result announced by the majority opinion seems likely to be a one-off, and the sky is not falling for multistate companies. The Court's "holding" is limited by the views expressed by Justice Alito in his concurrence and by the unified views of the four dissenters. In finding no due process violation, Justice Alito emphasized that the railroad employer had significant connections to Pennsylvania in addition to its consent to

jurisdiction by way of the Pennsylvania registration statute. Thus, there is no majority holding that compliance with a foreign corporation registration statute *standing alone* suffices for consent to personal jurisdiction, even if the statute literally requires consent to "general jurisdiction." There may also be a majority that views the exercise of jurisdiction based solely on a registration statute as violating the Dormant Commerce Clause. Justice Alito went on to suggest that such exercises of state jurisdiction could run afoul of the Court's "Dormant Commerce Clause" case law, and defendants should preserve that issue going forward. There do not appear to be other state statutes right now that are close to Pennsylvania's, except for Georgia's statute. But, of course, states could change their laws to something akin to Pennsylvania's. On the current Court, at least, there would appear to be a solid five-vote majority for any such law—standing alone—being insufficient for exercising personal jurisdiction.

**Further Helpful Resources**

- Tanya J. Monestier, *Registration Statutes, General Jurisdiction and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343 (2015). Professor Monestier's amicus brief was cited by Justice Alito. In her law review article, she calls for the end to consent-based registration statutes.
- Sam Heyman, *Mallory v. Norfolk Southern Railway Company: The Unwarranted End of Consent to General Jurisdiction in Pennsylvania*, 95 TEMP. L. Rev. 169 (2022). Sam Heyman's article supports consent-based business registration statutes and looks at the historical development of personal jurisdiction law from the lens of a corporation.

**State Cases of Note Regarding Registration Statutes**

**California**

- *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 884 (Cal. 2016), *reversed on other grounds*, 137 S. Ct. 1773 (2017).
- *Thomson v. Anderson*, 6 Cal. Rptr.3d 262, 269 (Cal. App. 2003).
- *L.A. Gem & Jewelry Design, Inc. v. Ecommerce Innovations*, LLC, 2017 WL 1535084, at *5 (C.D. Cal. April 27, 2017).

**Illinois**

- *Aspen Am. Insurance Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440, 446 (Il. 2017).
- *Cincinnati Insurance Co. v. LG Chem America, Inc.*, 2021 WL 4864231, at *2 (S.D. Ill. Oct. 19, 2021).

**Oregon**

- *Figueroa v. BNSF Railway Co.*, 390 P.3d 1019 (Or. 2017).
- *A.B. v. Hilton Worldwide Holdings Inc.*, 484 F. Supp.3d 921, 932 (D. Or. 2020).
- *Lanham v. Pilot Travel Centers, LLC*, 2015 WL 5167268, at *11 (D. Or. Sept. 2, 2015).

**New York**

- *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492 (2d Cir. 2020).
- *Aybar v. Aybar*, 177 N.E.3d 1257 (N.Y. 2021).
- *Okoroafor v. Emirates Airlines*, 145 N.Y.S.3d 807, 808 (N.Y.A.D. June 22, 2021).

**Texas**

- *Rawls v. Old Republic General Insurance Group, Inc.*, 489 F.Supp.3d 646, 660 (S.D. Tex. 2020).

- *Johnston v. Multidata Systems Intern. Corp.*, 523 F.3d 602, 611 (5th Cir. 2008).
- *Conner v. ContiCarriers and Terminals, Inc.* (Tex. App. 1997).

**Washington**

- *Washington Equipment Manufacturing Co. v. Concrete Placing Co.*, 931 P.2d 170, 173 (Wash. App. 1997).
- *Bradley v. Globus Medical, Inc.*, 2022 WL 2373441, at *3 (Wash. App. June 30, 2022).



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