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# PREVIEW

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# CIVIL PROCEDURE

## Do Corporate Registration Statutes Constitute Consent to State Court Personal Jurisdiction in Violation of Fourteenth Amendment Due Process?

### CASE AT A GLANCE

This appeal from the Pennsylvania Supreme Court addresses whether the Fourteenth Amendment Due Process Clause prohibits a state from requiring that nonresident corporations register to do business in the state, thereby subjecting the corporation to the state’s personal jurisdiction.

***Mallory v. Norfolk Southern Railway Co.***  
**Docket No. 21-1168**

Argument Date: **November 8, 2022** From: **The Pennsylvania Supreme Court**

**by Linda S. Mullenix**  
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### Issue

Does Pennsylvania’s corporate registration statute, coupled with its long-arm statute, violate the Fourteenth Amendment Due Process Clause by automatically conferring personal jurisdiction over nonresident businesses sued in Pennsylvania?

### Facts

Robert Mallory, a Virginia resident, worked for Norfolk Southern for almost 20 years in Virginia, Ohio, and Pennsylvania. He sued Norfolk Southern in the Philadelphia Court of Common Pleas under the Federal Employers’ Liability Act. 45 U.S.C. §§ 51–60. He alleged he developed colon cancer from exposure to asbestos and other toxic substances while working for the railroad in Ohio and Virginia. In 1998, Norfolk Southern registered to do business in Pennsylvania as a foreign corporation. At that time, Norfolk Southern was a Virginia-based corporation, with its principal place of business in Virginia. The company is now based in Georgia.

The railroad runs about 19,300 miles of track in 22 eastern states. It owns 2,278 miles of track and operates 11 railyards and three locomotive repair shops in Pennsylvania.

Mallory contended that the Pennsylvania courts had valid personal jurisdiction over Norfolk Southern based on two statutes. First, Pennsylvania’s modern corporate registration statute, enacted in 1978, provides that a foreign corporation cannot conduct business until registered with the Commonwealth. 15 Pa. Cons. Stat. § 411 (a)–(b). Second, the state’s long-arm statute provides that a relationship between a registered foreign corporation and Pennsylvania “shall constitute sufficient basis of jurisdiction to enable tribunals of this Commonwealth to exercise general personal jurisdiction over such person.” 42 Pa. Const. § 5301(a)(2)(i).

Norfolk Southern moved to dismiss the lawsuit for a lack of personal jurisdiction. The trial court granted Norfolk Southern’s motion, holding that the railroad’s registration was not a sufficient basis to confer personal jurisdiction.

The court concluded that the railroad had not voluntarily consented to Pennsylvania's general jurisdiction through the corporate registration and long-arm statutes. The court held the railroad's consent to jurisdiction was involuntary because Pennsylvania's statutory scheme subjected the railroad to a Hobson's choice: either register to do business while concomitantly subjecting to Pennsylvania jurisdiction or not do business there.

The Pennsylvania Supreme Court affirmed. The court acknowledged that Fourteenth Amendment due process is not violated when a defendant voluntarily consents to state personal jurisdiction. The court concluded, however, that Pennsylvania's foreign corporation registration requirement to do business in the state did not constitute voluntary submission to jurisdiction. Instead, Pennsylvania's statutes compelled and coerced foreign corporations to submit to jurisdiction by legislative command.

Discussing the Supreme Court's most recent personal jurisdiction decisions, the court concluded that the Supreme Court implicitly had overruled *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) (citing *Daimler AG v. Bauman*, 571 U.S. 915 (2014); *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915 (2011)). These decisions dramatically altered the concept of general jurisdiction; Norfolk Southern was not "at home" in Pennsylvania. Therefore, a Pennsylvania court could not subject a foreign corporation to general all-purpose jurisdiction based exclusively on the fact that it conducted business in the state.

The court noted that the Supreme Court has never ruled on whether due process forbids a state from conditioning a foreign corporation's privilege to do business by mandatory registration, thereby submitting the corporation to the state's general jurisdiction. The court considered, but rejected, Supreme Court historical precedents holding that a corporation's consent to jurisdiction through registration is constitutionally valid. *Pennsylvania Fire; Ex parte Schollenberger*, 96 U.S. 369 (1877). The court held that those decisions were "relics of the *Pennoyer* area during which courts were prohibited from exercising personal jurisdiction over persons or corporations outside the geographic boundary of the courts" (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

## Case Analysis

In *Mallory*, the Supreme Court returns to one of its favorite subjects: the jurisprudence of state personal

jurisdiction. It is black letter law that no court may issue a valid, binding, and enforceable judgment against a defendant in the absence of personal jurisdiction. Since the 19th century, at least, problems relating to assertions of personal jurisdiction have centered on states' ability to exercise jurisdiction over nonresident defendants.

For more than 50 years, the Supreme Court cabined authority to assert personal jurisdiction over nonresident defendants based on territorial theories of state sovereignty. In *Pennoyer*, the Court limited the ability of state courts to reach beyond their borders to make nonresident defendants answerable to a lawsuit. The Court recognized several traditional bases for legitimate assertion of personal jurisdiction: physical presence, personal service of process, voluntary consent, and property within the state attached prior to the institution of legal proceedings. In the early 20th century, the Court upheld the ability of states to statutorily mandate personal jurisdiction over nonresident motorists who traveled in state and caused injury, a form of implied consent. Throughout the *Pennoyer* era, however, courts hewed to constricted territorial theories of personal jurisdiction.

By the mid-20th century, the expansion of interstate commerce and the transport of goods and services across state lines altered the economic landscape. Courts increasingly grappled with questions relating to the "presence" of foreign corporations in state and what principles governed assertions of personal jurisdiction over nonresident business entities. In 1945, the Court transformed personal jurisdiction jurisprudence by centering the inquiry on Fourteenth Amendment due process. In the landmark case *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court held that the touchstone was whether the state's assertion of personal jurisdiction would offend traditional notions of fair play and substantial justice. The Court articulated its famous minimum contacts test as the basis for assessing the due process.

Throughout the 21st century, the Court has refined minimum contacts jurisprudence several times, but the due process inquiry has remained the centerpiece of this jurisprudence. Thirty years after *International Shoe* the Court reaffirmed its commitment to the due process framework, holding that the minimum contacts test applied to all assertions of personal jurisdiction, including over persons and tangible and intangible property. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

Mallory’s appeal focuses the Court on the question of whether in the post–*International Shoe* era state corporate registration statutes can, consistent with due process, confer consent to personal jurisdiction by nonresident defendants who wish to conduct business in the state. Since the mid-19th century, 20 states have enacted such statutes. Today, all 50 states and the District of Columbia have corporate registration statutes that require registration to do business in the state.

Mallory and Norfolk Southern agree that state corporate registration statutes fall into four distinct categories. First, some statutes require foreign jurisdictions to submit to the general personal jurisdiction by service of process on officers or agents in the state, which constitutes consent to the court’s jurisdiction. Second, some states have registration statutes targeted to specified foreign corporations, such as railroads. Third, some states have registration statutes that provide that all foreign corporations, through registration, give consent to general personal jurisdiction for claims that resident plaintiffs pursue, but not out-of-state plaintiffs. Fourth, some states have registration statutes that require corporations submit to personal jurisdiction for claims that arise out of the corporations’ activities in the state. Mallory suggests that each category rests on the same essential premise, that states could condition the privilege of doing business in the state on consent to personal jurisdiction.

The Court has never reviewed whether state corporate registration statutes violate defendants’ Fourteenth Amendment due process protections by mandating consent because of registering to do business in the state. At the outset, both Mallory and Norfolk Southern agree that a court may establish valid personal jurisdiction by consent. They disagree whether Pennsylvania’s registration statute confers such voluntary consent as a condition of doing business in the state, consistent with modern views of Fourteenth Amendment due process requirements.

The Supreme Court has twice addressed the narrow issue of foreign corporate consent to personal jurisdiction through state statutory provisions that require appointment of an agent for service of process. In 1877, the Court upheld a federal court’s assertion of personal jurisdiction over a foreign insurance company based on a Pennsylvania statute requiring appointment of an agent for service of process as a condition for doing business in the state. And in *Pennsylvania Fire*, the Court upheld Missouri jurisdiction over an Arizona corporation based

on the requirement of Missouri’s statutory requirement that foreign corporations appoint an agent to accept service of process.

Mallory argues that “a mountain of historical evidence” supports his argument that consent to jurisdiction through a state registration statute, as a condition of doing business in a state, constitutes voluntary and valid consent for the purposes of the Fourteenth Amendment Due Process Clause. Pennsylvania, Mallory notes, has had a consent-by-registration statute since 1874, and its statute is still constitutional. He notes that the historical record is clear: since the 19th century, every state has required consent to jurisdiction as a condition for doing business in a state, and federal and state courts routinely have treated these statutes as establishing voluntary, valid consent to jurisdiction.

Mallory suggests that contemporaneous with enactment of the Fourteenth Amendment, every state had enacted statutes requiring foreign corporations to consent to the courts’ personal jurisdiction as a condition of doing business in the state. The statutes were commonplace “because they were critical to each jurisdiction’s sovereignty.” Both before and after Congressional ratification of the Fourteenth Amendment, the Court applied and upheld registration statutes as consent to jurisdiction in dozens of cases.

Mallory’s core argument relies on *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), where the Court upheld California’s assertion of personal jurisdiction over a nonresident defendant who was transitorily within the state and served with process while there. In *Burnham*’s plurality decision, Justice Antonin Scalia held that the long historical pedigree of so-called tag jurisdiction served as a valid basis for personal jurisdiction, without the need to satisfy *International Shoe*’s minimum contacts test; the plurality’s decision “was rooted in a proper recognition of *International Shoe*’s limits.” Mallory contends that the *International Shoe* modern paradigm does not undermine the historical validity of state consent-by-registration statutes as conferring valid personal jurisdiction. Neither *International Shoe* nor any of the Court’s subsequent personal jurisdiction decisions has disturbed actual consent as a basis for personal jurisdiction.

Like *Burnham*, Mallory contends that the long historical pedigree of consent-by-registration statutes supports

the constitutionality of the Pennsylvania statute. Relying on the Court's 1917 decision in *Pennsylvania Fire*, Mallory argues that controlling precedent establishes that consent-by-registration as a condition of doing business in the state is consistent with the Fourteenth Amendment, and there is no good argument for the Court to disregard *stare decisis* and overrule *Pennsylvania Fire*. For a court to overrule a precedent, the decision must be egregiously wrong as a matter of law, which *Pennsylvania Fire* was not, Mallory concludes.

Finally, Mallory argues that Pennsylvania's statute does not violate the doctrine of unconstitutional conditions because the Court has never applied that doctrine to a waivable procedural right, such as assertions of personal jurisdiction. The doctrine, Mallory argues, has no application in the procedural context of consent-to-jurisdiction statutes. If the Court decides to apply the doctrine, this will destabilize a body of case law where governments have conditioned a benefit on a person forfeiting a waivable procedural right.

In response, Norfolk Southern argues that the Court's decision in *International Shoe* effected a sea change in personal jurisdiction jurisprudence that made registration-jurisdiction obsolete. The railroad contends that Mallory "ignores *International Shoe*, relies on the wrong framing, and misrepresents how the ratification-era laws applied." Citing *Daimler* and *Goodyear*, Norfolk Southern contends that the modern concept of specific jurisdiction is the centerpiece of modern jurisdiction theory, which ensures that states may assert personal jurisdiction for claims arising from a corporation's activities in a state, whether the corporation is registered or not. "Registration-jurisdiction is thus a relic of a bygone era. It is neither necessary nor doctrinally supportable today." The concept of general jurisdiction plays a reduced role, replacing "rickety" concepts of general jurisdiction. Permitting all states to assert general jurisdiction over foreign corporations doing business would gut the Court's protection against encompassing jurisdiction in *Goodyear* and *Daimler*.

The nub of Norfolk Southern's argument is that Pennsylvania's registration-jurisdiction scheme is not based on express or implied consent. The railroad maintains that Pennsylvania's statutory scheme is unique; the corporate registration requirement does not itself mention personal jurisdiction. Instead, the Pennsylvania

long-arm statute provides the basis for asserting general jurisdiction, which is separate from consent. All states require companies to register and appoint an agent for service of process. Only Pennsylvania's statute asserts jurisdiction based solely on registration. Upholding Mallory's view would deter corporations from registering. Although some state courts have read their registration laws to confer jurisdiction, recently many have backtracked from this conclusion.

Norfolk Southern maintains that Pennsylvania's assertion of general jurisdiction pursuant to its registration statute, based on the mandatory registration requirement, does not involve express consent. Nor can Mallory show implied consent, and "the court will not presume acquiescence in the loss of fundamental rights." According to Norfolk Southern, Pennsylvania's statutory scheme is a coercive assertion of personal jurisdiction. Registration-jurisdiction is unlike any other form of consent the Court's modern jurisdiction cases recognize; express consent is plainly absent. Furthermore, courts may not imply consent, because under Pennsylvania's two-step statutory scheme consent would always exist.

The railroad contends that the original public meaning of registration statutes does not support the plaintiff's argument and that he badly misstates ratification-era law and practice. Reviewing state registration statutes, Norfolk Southern maintains that most laws were limited to claims with a forum connection; the statutes were not intended to allow states to seize authority over foreign plaintiffs' claims against foreign defendants on foreign causes of action. Additionally, the railroad rejects Mallory's extensive reliance on the Court's *Burnham* decision upholding general tag jurisdiction over individuals, which the railroad claims is an inapt precedent. Like the competing *Burnham* opinions, Mallory and the railroad present different versions of the historical pedigree of tag and registration jurisdiction. Norfolk Southern argues that Mallory's historical analysis is mistaken and cannot demonstrate that registration-jurisdiction is functionally equivalent to tag jurisdiction over individuals; it is like comparing apples and oranges.

Moreover, Norfolk Southern argues that Mallory's invocation of the Court's *Pennsylvania Fire* decision as controlling is mistaken; the Court's consent analysis there addressed service of process and not jurisdiction. *Pennoyer*-era consent was limited to claims arising in

the state, and no part of *Pennsylvania Fire*'s reasoning survived *International Shoe*. Nor have any modern decisions suggested that registration-jurisdiction remains viable. If necessary, Norfolk Southern argues, the Court should formally overrule *Pennsylvania Fire*. The doctrine of *stare decisis* cannot support the Court's thinly reasoned conclusion in that case, and no *stare decisis* factors counsel otherwise.

Norfolk Southern urges the Court not to revive registration-jurisdiction because this would have dire consequences and violate principles of federalism. If Pennsylvania, through its statutes, can assert jurisdiction on any foreign corporation doing business there simply because of its statute, so can any other state. Most states have abandoned registration-jurisdiction, "but it would only take a few to badly distort the interstate balance of sovereignty." Registration-jurisdiction, therefore, creates serious interstate federalism problems. Moreover, registration-jurisdiction is unfair to defendants because it encourages plaintiffs to forum shop, imposing practical burdens on corporations to defend in distant forums.

Furthermore, the Pennsylvania statute creates an unconstitutional condition on foreign businesses wishing to do business in a state by forcing them to forfeit constitutional rights. The unconstitutional conditions doctrine prohibits governments from denying a benefit to a person because he exercises a constitutional right. The doctrine grew out of a context apt to this case: state conditions on doing business in a state. To do business in the state, Pennsylvania forces a company to choose between forfeiting its constitutional personal jurisdiction protections or breaking the law and giving up its constitutional right to access to the courts. Thus, Pennsylvania's punishment for failing to register is to deny corporations state court access, a condition that the Court has already condemned.

## Significance

This quirky personal jurisdiction appeal echoes the Court's consideration of tag jurisdiction in *Burnham*, which commanded no majority opinion but resulted in a badly fractured array of opinions from the nine justices. *Burnham*, famously, presented Justice Scalia's and Justice William Brennan's competing histories of tag jurisdiction, which the litigants engage in here. Although Justice Scalia concluded that tag jurisdiction's historical

pedigree supported tag jurisdiction without more, Justice Brennan vigorously argued that, post-*International Shoe* and *Shaffer*, all assertions of personal jurisdiction require minimum contacts analysis to determine fundamental due process fairness. Concurring Justice John Paul Stevens was reluctant to endorse either view, eschewing the unnecessarily broad reach of the opinions. He joined instead based on common sense, noting in a footnote that the adage about hard cases making bad law should be revised to cover easy cases.

The question is whether this is an easy case or a hard case, and whether the Court may make bad law in addressing registration-jurisdiction statutes. The Court could render a decision that is narrowly tailored to the unique two-step Pennsylvania registration-jurisdiction scheme without making any broad pronouncements. Or the Court could seize this appeal to side with Justice Brennan, reaffirming that all assertions of personal jurisdiction after *International Shoe* and *Shaffer* require application of minimum contacts jurisprudence in the interest of due process fairness. Or, if the justices' views degenerate into a babble of conflicting opinions, the Court may regret having granted *certiorari* to hear this appeal.

Predictably, plaintiff-favoring interest groups such as the American Association for Justice, the Pennsylvania Association for Justice, and Public Citizen have aligned as amici in support of Mallory. The Atlantic Legal Foundation appears as amicus in support of Norfolk Southern, urging the Court to overrule *Pennsylvania Fire* as a relic of the *Pennoyer*-era territorial approach of personal jurisdiction jurisprudence. Unusually, five individuals and groups have filed as amici in support of neither party. Civil procedure professors ask the Court to vacate the judgment and remand the case to develop a better record to determine whether registration-jurisdiction statutes exceed constitutional authority based on the Dormant Commerce Clause of the Constitution, rather than under due process considerations. Corporate registration scholars reject the stark and incorrect solutions posed by the parties, which they contend would create doctrinal complications that would require the Court's further interventions. Insurance policyholders ask the Court, if it affirms *Pennsylvania Fire*, to distinguish that case from the insurance context to avoid upsetting centuries-old reliance interest undergirding state insurance law. Finally, victims of terror prosecuting claims against the Palestine Liberation Organization and

the Palestinian Authority ask that Court be sensitive to implications of its decision for the congressionally enacted consent-to-jurisdiction statute, Promoting Security and Justice for Victims of Terrorism Act, 18 U.S.C. § 2334(e).

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