

[NEWS](#)

No Consensus from Supreme Court in Personal Jurisdiction Case

November 17, 2022 | [Leah Shepherd](#)



The U.S. Supreme Court justices appeared split during oral arguments Nov. 8 in a corporate "personal jurisdiction" case with broad implications for employers because personal jurisdiction relates to where they may be sued.

In [Mallory v. Norfolk Southern Railway - \(https://www.supremecourt.gov/DocketPDF/21/21-1168/214588/20220218182829559_PetitionForAWritOfCertiorari.pdfA.pdf \)](https://www.supremecourt.gov/DocketPDF/21/21-1168/214588/20220218182829559_PetitionForAWritOfCertiorari.pdfA.pdf), the central question is whether a state can require a corporation to consent to personal jurisdiction as a condition of doing business within the state. The lawsuit challenges a Pennsylvania law that allows any company registered to do business in the state to be sued there, even if the corporation is not headquartered there and the alleged infractions occurred somewhere else. Such consent-by-registration statutes previously were common, but almost all have been revoked or interpreted to clash with Supreme Court decisions.

The court's ruling in this case may impact the locations where employers could face trials, perhaps giving plaintiffs more opportunity to choose a jurisdiction that would likely be most friendly to them. Having a lot of employees working remotely in different locations could open an employer up to a bigger number of jurisdictions where the employer could potentially be sued.

"If that Pennsylvania law is upheld, other states might pass similar laws, expanding the scope of general jurisdiction in those states, as well," said Douglas Brayley, an attorney with Ropes & Gray.

Boston.

Background

Virginia resident Robert Mallory sued Virginia-based Norfolk Southern Railway Co. in the Philadelphia County Court of Common Pleas for claims under the Federal Employer's Liability Act (FELA). Mallory said he was exposed to carcinogens that caused his colon cancer while he was employed by the railway in Ohio and Virginia between 1988 and 2005. He sued in Pennsylvania court on a theory that the court could exercise jurisdiction over the Virginia employer because it had registered to do business in Pennsylvania. He did not allege any harmful exposures in Pennsylvania.

Norfolk Southern Railway Co. claimed the Pennsylvania law violates the U.S. Constitution's due process clause, which guarantees fair treatment by the government, by giving state courts jurisdiction over out-of-state companies in all circumstances.

Ashley Keller, a lawyer with Keller Postman who represented Mallory, emphasized originalism and precedent as reasons to uphold the Pennsylvania law. "Fidelity to the original public meaning of the Fourteenth Amendment in this case means that the flesh-and-blood little guy wins and the *Fortune* 500 company loses," he said.

However, Chief Justice John Roberts Jr. told Keller that "history and tradition move on."

Justices Divided

Justice Elena Kagan seemed to lean in favor of the railway. "Pennsylvania does not have a state interest here. Virginia is the state that has an interest in this litigation," she said. "It's not fair and reasonable to haul any company into the court of any state on any ground, even if it has nothing to do with the company's business in that state."

Justice Brett Kavanaugh pointed out that Pennsylvania is the only state to use a consent-by-registration law for out-of-state companies. However, if the court ruled in favor of Mallory, then such a rule would apply in every state.

Large corporations are powerful enough to leave states that impose consent-by-registration laws or pursue change through the political process, Keller noted.

Big corporations "can litigate any place in the country, so the practical consequences for them may not be so serious. But all corporations are not big entities," said Justice Samuel Alito Jr.

Justice Ketanji Brown Jackson said due process is a right that can be waived voluntarily.

Kagan questioned how voluntary it was in this case, saying, "It seems to me you are in unconstitutional conditions land because here's the state saying, 'We're going to demand that you give up this right to have access to our markets.' "

But Justice Sonia Sotomayor disagreed: "I don't know where you get the right not to be sued on the basis of consent, and I don't know where you find a right to unfettered access to a market."

Deputy Solicitor General Curtis Gannon, representing the Biden administration, argued that the Pennsylvania law coerces companies by withholding the right to do business if they don't consent to personal jurisdiction. Upholding the Pennsylvania law could jeopardize international relations because it would permit lawsuits against foreign companies in state courts, he added.

There is room for states to impose certain conditions for doing business there under certain circumstances.

"In equal protection, a state can impose a condition, if it has a rational basis to do so," Sotomayor said. "Tell me what the rational basis is for requiring consent."

"The state's interest is we want to give our residents a forum against these dangerous railroads or these insurance companies that do things nationwide, even if it has no connection to our forum," Keller replied. "The state has a sovereign interest in treating all people equally and not discriminating against out-of-state residents. So, we're not going to create special privileges for our own residents and give them better access to our courts."

It's unclear when the court will issue a final decision in the case.

"The Supreme Court typically takes several months to rule on a case and almost always rules on cases in the same term in which they were argued, meaning that we can expect the decision in this case by no later than the end of June," Brayley noted.