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Personal Jurisdiction After *Mallory*

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States should be extremely reluctant to fling their courthouse doors wide open to out-of-state plaintiffs and unrelated cases through consent-by-registration statutes.

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Executive Summary

Should plaintiffs' lawyers be permitted to file cases in states that have no connection to the dispute in order to gain the benefit of a favorable jury pool, a plaintiff-friendly judiciary, or both?

That sort of abusive forum shopping reduces respect for the judiciary, creating the appearance that outcomes are not based on the law or facts but instead result from picking a favorable decision maker. It produces overburdening, poor decision making, and increased costs in the courts that become the preferred "magnet jurisdictions," to the detriment of businesses and consumers alike. It also imposes unfair burdens on defendants and violates basic federalism principles.

Mallory's Narrow Decision

Some in the plaintiffs' bar are invoking the U.S. Supreme Court's recent decision in *Mallory v. Norfolk Southern Railway Co.*[1] to try to convince state legislatures and courts to open the door to abusive forum shopping on a grand scale. Legislatures and courts should refuse.

Mallory addressed a Pennsylvania statutory scheme that, unique among the states, explicitly treats registration to do business by an out-of-state corporation as consent to jurisdiction in the state's courts over that corporation for all lawsuits, regardless of their connection with the state. By a 5-4 vote, the Court held that allowing Pennsylvania to assert personal jurisdiction in this particular case did not violate the Fourteenth Amendment's Due Process Clause.

But the splintered opinions in *Mallory* raise more questions than they answer. Despite the result, when one counts the votes, it is clear that five Justices on the Court question the constitutionality of Pennsylvania's statute. The four dissenting Justices would have concluded that it violates the Due Process Clause, and Justice Alito's concurrence strongly suggested that the statute violates the dormant Commerce Clause.

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In addition, Justice Alito—who provided the critical fifth vote for the Court's judgment—indicated that the due process analysis may come out differently in a case where the defendant has less extensive ties to the forum state than the railroad in *Mallory.* The only certain conclusion to draw from *Mallory* is that further litigation over the validity of consent-by-registration statutes is inevitable.

Mallory's Consequences

Nonetheless, the consequences of *Mallory* are already being felt. Notably, some in the plaintiffs' bar are already invoking *Mallory* to urge states to enact consent-by-registration statutes—particularly states that they perceive to be favorable forums for plaintiffs. State legislatures should decline that invitation; it rests on a legally unsound footing and will have serious adverse consequences.

The first few states may hear from the plaintiffs' bar that adopting such a statute is cost-free, because it affects only out-of-state companies. But those laws will encourage other states to follow the same course—meaning that the first states' decisions will have a domino effect that inflicts serious harm on their own companies. And such statutes raise serious federalism concerns—particularly for claims involving non-resident plaintiffs that lack any connection to the state.

In addition, state courts are already overburdened and underfunded. That burden would be multiplied exponentially if a state were to open its courthouse doors to litigants from across the country with claims having no connection to the state. Suits brought by the state's citizens and actions involving in-state conduct would face significant delays from the addition of cases having nothing to do with the state. They also face a reduction in the quality of decision making; the influx of new cases caused by forum shopping makes already busy judges more prone to error.

Moreover, consent-by-registration statutes, if adopted more broadly, would make it impossible for businesses to predict where they will be sued, leading to massive litigation costs that will be especially burdensome for small and medium-sized businesses. As a result, some businesses may stop offering products and services in states that adopt these statutes, harming those states' economies and depriving consumers of products and services.

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Mallory's Unanswered Constitutional Questions

Aside from the policy arguments against consent-by-registration statutes, the fractured holding in *Mallory* means that such statutes will face serious legal challenges, on multiple grounds. Out-of-state defendants will argue—based on Justice Alito's concurrence—that the federal due process fairness test is not satisfied where the defendants lack the deep connection to the forum state that was present in *Mallory.* Defendants can further argue that such statutes violate the dormant Commerce Clause, as Justice Alito explained in detail in his concurrence. The full Supreme Court left that issue open for the Pennsylvania courts to address on remand. Finally, state constitutional limits (not addressed in *Mallory*) may also preclude jurisdiction over lawsuits with no connection to the forum state.

This edition of *ILR Briefly* explores the history of personal jurisdiction and the background of and reasoning in the *Mallory* decision. It then describes the legal weaknesses of consent-by-registration statutes and the harm they can create and concludes that consent-by-registration statutes are questionable as a matter of law and are bad policy. State legislatures should therefore reject invitations by the plaintiffs' bar to adopt such statutes.

Personal Jurisdiction and the Road to *Mallory*

The Supreme Court has for decades required courts' exercise of personal jurisdiction over defendants to comport with the "traditional notions of fair play and substantial justice" embodied in the federal Constitution's Due Process Clause. That generally requires certain "minimum contacts" between the defendant and the forum state.[2]

General and Specific Jurisdiction

With respect to corporations, the Court has held that the defendant's contacts can support two types of personal jurisdiction. First, a court may assert general, or "all-purpose," personal jurisdiction in states where a company is "essentially at home"—meaning, absent exceptional circumstances, the company's place of incorporation or its principal place of business.[3] A court with general jurisdiction may adjudicate any claim against the company, no matter where the claim arose.

Second, a court may assert specific, or "claim-linked," personal jurisdiction in a state where the claim arises out of, or relates to, the defendant's activities in the state.[4] For specific jurisdiction, due process requires that the defendant's "suit-related conduct" create a substantial connection with the forum state.[5] That is, the court must find a substantial relationship between the forum, the defendant, and the particular plaintiff's claim, so that it is "reasonable" to require the defendant to appear in that court to defend against that claim.[6]

In *Mallory*, the Court appeared to open the door to a third basis for the exercise of personal jurisdiction, as discussed below. But the Court's ruling is not at all definitive—issues that the Court did not resolve, and that are being litigated in lower courts, may bar the personal jurisdiction theory advanced in *Mallory* in some or all contexts.

Pennsylvania's Consent-by-Registration Statute

Pennsylvania, like all other states, requires out-of-state corporations to register with the state before doing business there.[7] Pennsylvania's registration requirement

applies to "all foreign associations"—subject to narrow exceptions, such as for national banks or out-of-state insurers.[8] While the statute does not define "doing business" in Pennsylvania, the enumerated exceptions—such as "[c]onducting an isolated transaction that is not in the course of similar transactions"—suggest that the threshold for the registration requirement is low.[9]

Pennsylvania's statutory scheme is different, however, in one critical respect. Pennsylvania is the only state with a law explicitly providing that registering to do business as a foreign corporation "shall constitute a sufficient basis" for state courts to "exercise general personal jurisdiction" over that corporation—in other words, jurisdiction over "any cause of action," no matter how unconnected to Pennsylvania.[10] As the *Mallory* dissent noted, "Pennsylvania is the only [s]tate with a statute treating registration as sufficient for general jurisdiction."[11]

Mallory's Journey to the Supreme Court

Mallory filed a lawsuit in Pennsylvania state court against his former employer, Norfolk Southern, seeking damages under the Federal Employers' Liability Act.[12] Mallory alleged that he was exposed to carcinogens at work that caused him to develop cancer.[13]

But Mallory's claims had no ties to Pennsylvania. Although he had briefly lived in Pennsylvania after leaving his job, he filed the suit after moving to Virginia.[14] The alleged exposure to carcinogens was in Ohio and Virginia.[15] And Norfolk Southern is both incorporated and headquartered in Virginia.[16]

Mallory asserted that Pennsylvania's statute authorized the court to exercise personal jurisdiction over Norfolk Southern. Norfolk Southern resisted personal jurisdiction on two grounds: (1) the Pennsylvania statute violates the Due Process Clause of the Fourteenth Amendment; and (2) the statute as applied violates the dormant Commerce Clause.[17] The Pennsylvania Supreme Court sided with Norfolk Southern on its due process challenge, and the state court therefore declined to reach Norfolk Southern's alternative argument that the Pennsylvania law violates the dormant Commerce Clause.[18]

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The *Mallory* Decision

The U.S. Supreme Court granted review and, by a 5-4 vote, held that Pennsylvania's assertion of personal jurisdiction in this particular case did not violate the Due Process Clause.

Justice Gorsuch wrote an opinion principally embodying the views of a four-Justice plurality and, in part, for the Court. Justices Thomas, Sotomayor, and Jackson joined Justice Gorsuch's opinion in full, but Justice Alito joined the plurality's explanation of the facts and only a very small part of the plurality's legal analysis, which constituted the opinion of the Court.

The Narrow Majority Opinion

The majority held that the case was controlled by a 1917 decision, *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, which held that a Missouri law (since repealed) requiring consent to general jurisdiction as a condition of registration did not violate the Due Process Clause.[19]

The majority concluded that "[t]o decide this case, we need not speculate whether any other statutory scheme and set of facts would establish consent to suit. It is enough to acknowledge that the state law and facts before us fall squarely within *Pennsylvania Fire*'s rule."[20] Finally, the majority noted that the dormant Commerce Clause issue "remains for consideration on remand."[21]

The Plurality Opinion

The rest of Justice Gorsuch's opinion was for a plurality of four. The plurality declined to overrule *Pennsylvania Fire*, saying that it remained good law even after subsequent decisions like *International Shoe Co. v. Washington*, which represents the modern approach to personal jurisdiction focused on a defendant's contacts with the forum state.[22] In the plurality's view, the two lines of precedent "sit comfortably side by side" because in *International Shoe* the corporation had "'not consented to suit in the forum.'"[23] And the plurality rejected Norfolk Southern's argument that its compliance with the state's registration requirements did not amount to genuine consent to general personal jurisdiction.[24]

Justice Alito's Concurring Opinion

Justice Alito, who did not join most of the plurality opinion, authored an opinion concurring in part and concurring in the judgment. Because his opinion is the narrowest and he supplied

the crucial fifth vote to create a majority on the due process question before the Court, his opinion is controlling on that issue.[25]

Justice Alito agreed that *Pennsylvania Fire* precluded Norfolk Southern's due process challenge to jurisdiction—but only under the narrow facts of the case before the Court. Justice Alito emphasized that "[r]equiring Norfolk Southern to defend against Mallory's suit in Pennsylvania . . . is not so deeply unfair that it violates the railroad's right to due process" because "[t]he company has extensive operations in Pennsylvania; has availed itself of the Pennsylvania courts on countless occasions; and had clear notice that Pennsylvania considered its registration as consent to general jurisdiction."[26]

Moreover, Justice Alito emphasized that "is not the end of the story for registration-based jurisdiction."[27] Instead, "there is a good prospect that Pennsylvania's assertion of jurisdiction—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause."[28] Because the Pennsylvania courts had decided the case based solely on the Due Process Clause and had not ruled on Norfolk Southern's dormant Commerce Clause challenge, Justice Alito agreed that the case should be remanded so that the lower courts could consider that challenge in the first instance.[29]

The Dissent

Justice Barrett dissented in an opinion joined by Chief Justice Roberts and Justices Kagan and Kavanaugh. The dissenters warned that the majority's approach, which upheld jurisdiction "based on implied 'consent'—not contacts," effectively abrogates the "traditional contacts-based approach to jurisdiction" that the Supreme Court had followed since *International Shoe.*[30] The majority's approach also "gut[s] *Daimler*," which "makes crystal clear" that "simply doing business is insufficient" for general personal jurisdiction.[31]

The dissenters explained that registration-based jurisdiction is "neither 'firmly approved by tradition' nor 'still favored.'" As referenced above, the dissenters pointed out that "Pennsylvania is the only [s]tate" that has a statute explicitly making registration sufficient for general personal jurisdiction.[32]

Accordingly, the dissenters would have held that *Pennsylvania Fire* was abrogated by the Court's subsequent decisions in *International Shoe* and its progeny and that the Pennsylvania statute

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violated the Due Process Clause.[33] And they expressed concern that states may view the Court's opinion as an "invitation to manipulate registration" statutes to "manufacture 'consent' to personal jurisdiction."[34]

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States Should Not Adopt Consent-by-Registration Statutes

The plaintiffs' bar has seized on *Mallory* to press for a return to the days of abusive forum shopping when, prior to cases like *Daimler*, they could bring a case almost anywhere—even if the state lacked any connection to the parties or the dispute. Indeed, Justice Alito recognized that *Mallory* is about forum shopping—describing the Philadelphia court system involved in that case as a "venue that is reputed to be especially favorable to tort plaintiffs."[35]

Some plaintiffs' lawyers are not waiting for the adoption of new statutes. They are invoking *Mallory* in pending cases to urge lower courts to interpret the decision broadly, claiming that *Mallory* authorizes general personal jurisdiction based on state laws very different from Pennsylvania's. That line of argument has divided lower courts post-*Mallory*.[36]

It is no surprise that the plaintiffs' bar is pushing for an expansion of *Mallory*'s narrow holding on both the legislative and judicial fronts. One prominent plaintiffs' lawyer has admitted in a moment of candor that unrestricted forum shopping "makes it almost impossible for defendants to get a fair trial" in some of the "magic jurisdictions" favored by the plaintiffs' bar, where "trial lawyers have established relationships with the judges that are elected."[37]

States should not open the door to such abuse—for multiple reasons. Consent by registration remains constitutionally suspect after *Mallory.* Making general jurisdiction available on demand also will have significant harmful effects, straining already backlogged court systems, increasing the number of erroneous decisions, and imposing costs and

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burdens on businesses—particularly small and medium businesses. Those burdens will not be limited to businesses, because the increased costs of litigation will be passed on to consumers in the form of higher prices. And consumers will also have fewer local options if businesses are driven out of the state altogether. Finally, consent by registration raises serious federalism concerns, as it allows one state to displace its sister states' policy judgments and exercise control over its sister states' resident corporations.

Consent by Registration Remains Legally Questionable

Adoption of consent-by-registration statutes will lead to costly litigation over the laws' validity—because, as discussed above, five Supreme Court Justices indicated skepticism about their constitutionality.

To begin with, the opinion for the Court in *Mallory* was exceedingly narrow. It involved only the Due Process Clause of the Fourteenth Amendment. And the critical fifth vote for the Court's holding, Justice Alito, "stress[ed]" that his due-process analysis was based on "the facts of this case"[38] and indicated that the statute could well violate the Commerce Clause. Consent-by-registration statutes—even ones identical to Pennsylvania's—thus continue to face at least three substantial legal hurdles after *Mallory.*

Hurdle One: Absence of Extensive Forum State Ties

First, there are likely five Justices who would conclude that consent-by-registration statutes violate due process when applied to defendants lacking extensive ties to the forum state. The four *Mallory* dissenters would presumably adhere to their view, expressed in the dissenting opinion, that consent-by-registration statutes run afoul of *International Shoe* and violate due process. And while Justice Alito found no due process violation on the specific facts of *Mallory*, his case-specific due process analysis focused heavily on the ties between Norfolk Southern and Pennsylvania.[39] Justice Alito framed the question this way: "The sole question before us is whether the Due Process Clause of the Fourteenth Amendment is violated when a large out-of-state corporation with substantial operations in a [s]tate complies with a registration requirement that conditions the right to do business in that [s]tate on the registrant's submission to personal jurisdiction in any suits that are brought there."[40]

In answering that question "no," Justice Alito noted, for example, that Norfolk Southern:

- is a "large company" that was "actively engaged" in business in Pennsylvania;[41]
- "has extensive operations in Pennsylvania";[42] and
- "has availed itself of the Pennsylvania courts on countless occasions."[43]

In the absence of such extensive ties, Justice Alito's due-process analysis likely would have come out

the other way—because subjecting corporations lacking those sorts of connections to jurisdiction would be "so deeply unfair" that it violates due process.[44]

Hurdle Two: Dormant Commerce Clause

Second, *Mallory* fully leaves open the argument that assertions of jurisdiction over lawsuits unrelated to the state contravene dormant Commerce Clause limits, as Justice Alito explained in detail. Justice Alito's concurrence suggests that consent-by-registration statutes violate both the dormant Commerce Clause's "antidiscrimination" and "substantial burden" principles.[45]

On their face and in practical effect, such statutes discriminate against out-of-state corporations by forcing them, as a condition of doing business in the state, to consent to general personal jurisdiction that otherwise would not exist. As Justice Alito suggested, "Pennsylvania's registration-based jurisdiction law discriminates against out-of-state companies" by "forcing them to increase their exposure to suits on all claims in order to access Pennsylvania's market while Pennsylvania companies generally face no reciprocal burden for expanding operations into another [s]tate."[46]

Defendants may also argue, in Justice Alito's words, that such laws violate the dormant Commerce Clause for an additional, independent reason: they "impose[] a 'significant burden' on interstate commerce" without "advanc[ing] a 'legitimate local interest.'"[47] Justice Alito worried that smaller companies would be especially harmed by the unpredictable effect of Pennsylvania's assertion of jurisdiction over suits unrelated to the forum state.[48] And he noted that he was "hard-pressed to identify any legitimate local interest that is advanced by" this assertion of general personal jurisdiction.[49] Both the Pennsylvania courts on remand in *Mallory* and courts in future cases could well agree with Justice Alito and conclude that consent-by-registration statutes violate the dormant Commerce Clause.[50] And, if the issue returns to the Supreme Court, Justice Alito and the four dissenters could reach the same conclusion.

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Hurdle Three: State Constitutional Restraints

Third, state constitutions are not necessarily coextensive with the federal Constitution, and courts are free to interpret state constitutional restraints requiring procedural

fairness differently than the *Mallory* Court interpreted the federal Due Process Clause. In other words, state constitutions may still bar jurisdiction over lawsuits unrelated to the state based on what courts may view as coerced consent. Doctrinally, there are "[t]hree distinct obstacles to personal jurisdiction: 1) state statutory law; 2) state constitutional law; and 3) federal constitutional law."[51] While personal jurisdiction cases have tended to focus on state long-arm statutes and federal constitutional limitations, the decision in *Mallory* likely will prompt some courts to conclude that state constitutions provide an independent limitation on consent-by-registration statutes.

Consent-by-Registration Statutes Are Bad Policy

If given the chance, the plaintiffs' bar will take advantage of consent-by-registration statutes to bring suits in forums that they perceive as favorable for their claims. *Mallory* is a prime example: Justice Alito "said the quiet part out loud," expressly recognizing that the goal of filing the action in Philadelphia was to get the benefit of a plaintiff-friendly venue.

For several reasons, states should be extremely reluctant to fling their courthouse doors wide open to out-of-state plaintiffs and unrelated cases through consent-by-registration statutes.

Adding to the Overload

First, the influx of litigation will severely strain states' already overburdened and underfunded court systems, to the detriment of local citizens. All participants in the legal system face a significant access-to-justice problem caused by overburdened and underfunded courts. Docket backlogs have skyrocketed, courthouses have been closed due to budget cuts, and trials have been delayed.

State courts have faced budget constraints for the past 15 years—constraints so severe that they "threaten the basic mission of state courts."[52] In the wake of the 2008 financial crisis, state courts became "an easy target" for slashing budgets.[53] As a result, local citizens faced even greater difficulty accessing their courts.[54] More recently, state courts have again faced severe budget constraints and growing dockets due to the COVID-19 pandemic.[55]

For these reasons, states throughout the country continue to struggle with a "[g]rowing backlog of cases."[56] A December 2022 report noted, for example, that there are over "2,000 trial-ready" cases backlogged in New York's Nassau County alone, which would take "years to process" even if the court "operated 24/7."[57]

The problems caused by these fiscal constraints and existing backlogs will be much worse if local citizens are forced to compete for court time with out-of-state plaintiffs with claims unrelated to the state. The deluge of claims can also have troubling consequences for the quality of decision making—placing pressure on even the most well-intentioned judges to

shift focus from dispensing justice to managing their overloaded dockets.[58] That inevitably increases judicial errors. As one judge put it, "[t]he bigger the dockets, the less time we spend on the difficult cases, and the more mistakes we make."[59] And the upshot of this increased delay and likelihood of judicial error will be to undermine citizens' respect for their local courts as fair and objective forums for accessing justice.

Cost, Unpredictability, and Business Flight

Second, consent-by-registration statutes would undermine the "predictability" that corporations find "valuable" in "making business and investment decisions."[60] If businesses are subject to suit everywhere that they register to do business, they will be unable "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[61]

Principles of due process and federalism have long recognized the important benefits of enabling companies to predict the forums in which they will be sued. Under existing due process standards for specific personal jurisdiction, a company "knows that . . . its potential for suit [in a state] will be limited to suits concerning the activities that it initiates in the state."[62] Likewise, prior to *Mallory*, the Supreme Court had repeatedly held that due process limited the states in which a company is subject to general jurisdiction to two places: the state of incorporation and of the principal place of business—i.e., the company's headquarters.[63]

But in a consent-by-registration regime, if a company is subject to general personal jurisdiction merely because it does business in a state, companies could be forced into that state's courts to answer for claims entirely unrelated to that state. The harmful consequences of this unpredictability would be felt beyond the businesses: some businesses may conclude that it is not worth doing business in the state at all, shifting their business elsewhere to avoid jurisdictional overreach, which will limit the choices that consumers have for goods and services. And increased litigation costs from high-stakes cases in unexpected forums would invariably be borne by consumers in the form of higher prices and workers in the form of lower wages or reduced benefits.

Acute Burden for Smaller Businesses

Third, the burdens—and corresponding pressure to depart from the state—are particularly acute for small and medium businesses. In explaining why "Pennsylvania's scheme injects intolerable unpredictability into doing

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business across state borders," Justice Alito observed that while "[l]arge companies may be able to manage the patchwork of liability regimes, damages caps, and local rules in each [s]tate," "the impact on small companies, which constitute the majority of all U.S. corporations, could be devastating."[64]

Because states generally employ a very low threshold for registration, small and medium-sized businesses will nearly always be subject to consent-by-registration statutes. For example, in Pennsylvania, more than an "isolated" amount of in-state activity likely suffices to trigger the registration requirement.[65] Other states use similar *de minimis* tests.[66]

As a result, "[s]mall [and medium] companies may prudently choose not to enter an out-of-state market due to the increased risk of remote litigation."[67] At a minimum, those companies "may forgo registration altogether, preferring to risk the consequences rather than expand their exposure to general jurisdiction."[68]

"Importantly, the adoption of these statutes could have a domino effect that will be especially burdensome for small and medium-sized businesses. A single state may find it politically expedient to enact a consent-by-registration statute because by definition such a statute affects only foreign companies. But enacting such a statute will encourage other states to do the same."

And forgoing registration, even if rational, harms companies and businesses alike—"corporations must manage their added risk, and plaintiffs face challenges in serving unregistered corporations."[69]

Importantly, the adoption of these statutes could have a domino effect that will be especially burdensome for small and medium-sized businesses. A single state may find it politically expedient to enact a consent-by-registration statute because by definition such a statute affects only foreign companies. But enacting such a statute will encourage other states to do the same. As a result, the first state's decision will end up harming its local businesses—and so on.

The potential outcome: every company will be subject to suit everywhere on any claim, opening the door to abusive forum shopping on a massive scale and imposing huge costs on businesses and consumers.

Undermining Federalism

Finally, and critically, that domino effect will deprive states of the ability to adjudicate claims based on conduct and parties within their borders. As the Pennsylvania Supreme Court observed in *Mallory,* if Pennsylvania can lawfully require consent by registration, then "all states could enact [similar laws], rendering every national corporation subject to the general jurisdiction of every state."[70]

That result violates the "basic principle of federalism" that "each [s]tate may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each [s]tate alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."[71] When a state asserts jurisdiction over unrelated lawsuits, it thwarts its sister states' constitutional authority to regulate their own citizens and in-state conduct.

Overbroad assertions of jurisdiction also allow a state to displace its sister states' policy judgments. For example, states take starkly different approaches to punitive damages and statutes of limitations. Some states reject punitive damages altogether; others permit punitive damages but impose monetary caps; and still others impose no limits on punitive damages (other than those supplied by the federal Constitution).[72] Similarly, states take diverse approaches to statutes of limitations and repose, reflecting each state's policy judgment about how best to balance predictability and the avoidance of stale claims with the ability to obtain redress.[73]

Widespread general jurisdiction over foreign corporations through consent by registration undermines these diverse policy approaches by creating opportunities for plaintiffs to simply choose the most plaintiff-friendly jurisdictions on these and other issues.[74] Choice-of-law rules are an insufficient answer to this problem, because a state may view its own public policy determinations as sufficiently important to override its sister states' competing policy judgments.

A state should thus consider whether by enacting registration-based general jurisdiction it wants to open the door to its sister states doing the same, and thereby overriding its policy judgments and exporting lawsuits against its local businesses to different forums with different legal regimes reflecting different policy choices.

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Conclusion

The fractured set of opinions and the narrow issues decided in *Mallory*—as well as the many important issues not decided—caution strongly against reading *Mallory* as giving the green light to consent by registration.

Consent-by-registration statutes are bad policy and still very questionable as a matter of law. State legislatures should therefore reject invitations by the plaintiffs' bar to adopt such statutes, and state courts should reject invitations by the plaintiffs' bar to expand *Mallory* beyond its narrow contours.

Endnotes

1 600 U.S. 122 (2023).

2 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

3 *BNSF Ry. v. Tyrrell*, 581 U.S. 402, 413-14 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)).

4 *Daimler*, 571 U.S. at 122, 127.

5 *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

6 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

7 15 Pa. Cons. Stat. § 411(a); *see also Mallory*, 600 U.S. at 164 (Barrett, J., dissenting) (observing that "every [s]tate" requires "a corporation to register to conduct business there").

8 15 Pa. Cons. Stat. § 401.

9 15 Pa. Cons. Stat. § 403(a); *see also id.* 2022 Committee Comment ("In general terms, any conduct more regular, systematic, or extensive than that described in section 403(a) constitutes doing business and requires the foreign association to register to do business.").

10 42 Pa. Cons. Stat. § 5301(a), (b).

11 600 U.S. at 172. The Georgia Supreme Court recently treated registration to do business in Georgia as sufficient for general personal jurisdiction, but that decision was based on prior judicial decisions establishing the link between registration and general jurisdiction, rather than explicit statutory text. *See Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 92 (Ga. 2021); *see also Mallory*, 600 U.S. at 172 n.2 (Barrett, J., dissenting). In addition, a few jurisdictions have pre-*Daimler* decisions treating registration or appointment of an agent for service of process to be the equivalent of consenting to jurisdiction, but without statutory text making that link. *See, e.g., Knowlton v. Allied Van Lines, Inc.,* 900 F.2d 1196, 1200 (8th Cir. 1990) (Minnesota); *Read v. Sonat Offshore Drilling, Inc.*, 515 So.2d 1229, 1230 (Miss. 1987), *abrogated by statute*, Miss. Code Ann. § 79-35-15 (2013).

12 45 U.S.C. §§ 51-60.

13 *Mallory*, 600 U.S. at 126.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 126-27 & n.3.

18 *Id.; see* 266 A.3d 542 (Pa. 2021).

19 243 U.S. 93 (1917).

20 600 U.S. at 135-36.

21 *Id.* at 127 n.3.

22 *Id.* at 137; *see Int'l Shoe,* 326 U.S. 210.

23 600 U.S. at 137-38.

24 *Id.* at 144-45.

25 *See Marks v. United States*, 430 U.S. 188, 193 (1977).

26 600 U.S. at 153.

27 *Id.* at 154.

28 *Id.* at 160.

29 *Id.* at 163.

30 *Id.* at 164.

31 *Id.* at 166, 176.

32 *Id.* at 172.

33 *Id.* at 176-78.

34 *Id.* at 164, 180.

35 *Id.* at 154.

36 *Compare In re Aqueous Film-Forming Foams Prods. Liab. Litig.,* 2023 WL 6846676, at *5 (D.S.C. Oct. 17, 2023) (rejecting an argument that registration to do business under South Carolina's registration statute authorized general jurisdiction, because "*Mallory* is limited to the situation where a state's business registration statute provides that a foreign corporation must consent to personal jurisdiction within the state as a condition of doing business"); *Lumen Techs. Serv. Grp., LLC v. CEC Grp., LLC*, 2023 WL 5822503, at *6 (D. Colo. Sept. 8, 2023) (similar for Colorado's registration statute), *with Espin v. Citibank, N.A.*, 2023 WL 6447231, at *3 (E.D.N.C. Sept. 29, 2023) (interpreting *Mallory* to revive long-dormant North Carolina law treating registration to do business as consent to personal jurisdiction, notwithstanding the court's acknowledgment that North Carolina's statutes "do not expressly confer general personal jurisdiction over corporate entities registered to do business here"); *In re Abbott Labs. et. al. Preterm Infant Nutrition Prods. Liab. Litig.*, 2023 WL 4976182, at *3 (N.D. Ill. Aug. 3, 2023) (determining that "the Missouri laws at issue in this case mirror the Pennsylvania statutes at play in *Mallory,*" notwithstanding the absence of a textual link between registration and personal jurisdiction).

37 Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002) (public remarks by Dickie Scruggs), reproduced in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5.

38 600 U.S. at 154.

[39] *Id.* at 152-54.

[40] *Id.* at 150.

[41] *Id.* at 164, 180.

[42] *Id.* at 153.

[43] *Id.*

[44] *Id.*

[45] *See generally Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369-70, 377 (2023).

[46] *Mallory*, 600 U.S. at 161 & n.7.

[47] *Id.* at 161.

[48] *Id.* at 161.

[49] *Id.* at 162.

[50] Plaintiffs' lawyers may try to counter that this argument is precluded by the Supreme Court's recent dormant Commerce Clause decision in *National Pork Producers*. But Justice Alito explained that his reasoning was consistent with that case, 600 U.S. at 158, and the "substantial burden" test was endorsed by at least five Justices in that case. *See Nat'l Pork Producers*, 598 U.S. at 391 (Sotomayor, J., concurring in part) (Justices Sotomayor and Kagan); *id.* at 395 (Roberts, C.J., concurring in part and dissenting in part) (Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson).

[51] *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir. 1997).

[52] Richard Y. Schauffler and Matthew Kleiman, *State Courts and Budget Crisis: Rethinking Court Services*, The Book of the States 2010, 290.

[53] Andrew Cohen, *At State Courts, Budgets Are Tight and Lives Are in Limbo*, The Atlantic, Sept. 23, 2011.

[54] *See id.*

[55] *See, e.g.*, Andrew Strickler, *State Court Budget Forecast: Stormy, With Rising Backlogs*, Law360 (Nov. 23, 2020) (discussing budget cuts in Florida, California, and New York).

[56] National Conference of State Courts, *Pandemic Impact on Weighted Caseload Models – Executive Summary* 3 (Mar. 31, 2022), https://www.ncsc.org/__data/assets/pdf_file/0033/75588/Pandemic-Executive-Summary.pdf.

[57] Marc Harwell and Laura Keily, *Litigation Proliferation Adds To Court Backlog*, New York Law Journal (Dec. 9, 2022).

[58] *See* Philip S. Goldberg, et al., *The U.S. Supreme Court's Paradigm Shift To End Litigation Tourism*, 14 Duke J. of Const. Law & Pub. Policy 51, 84-85 (2019).

[59] Hon. Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 Clev. St. L. Rev. 385, 403 (1984).

[60] *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

[61] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion).

[62] Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1346 (2005).

[63] *See, e.g., BNSF Ry. v. Tyrrell*, 581 U.S. 402, 413-14 (2017); *Daimler*, 571 U.S. at 137.

[64] 600 U.S. at 161-62; *see also id.* at 162 n.8 (citing 2015 data showing that "62% of S corporations and 55% of C corporations had fewer than five employees").

[65] *See* pages 4-5 & notes 8-9, *supra*.

[66] *See, e.g.*, Cal. Corp. Code §§ 191, 17708.03 ("repeated and successive transactions," in contrast to exclusion for "[c]onducting an isolated transaction that is completed within 180 days and is not in the course of a number of repeated transactions of a like nature"); *Highfill, Inc. v. Bruce & Iris, Inc.*, 50 A.D.3d 742, 744 (N.Y. App. Div. 2008) (interpreting "doing business" under New York Business Corporation Law § 1312 to mean "regular and continuous course of conduct in the state," contrasted with "just casual or occasional" conduct).

[67] *Mallory*, 600 U.S. at 162 (Alito, J., concurring).

[68] *Id.*

[69] *Id.*

[70] 266 A.3d at 570.

[71] *State Farm Mut. Auto. Ins Co. v. Campbell*, 538 U.S. 408, 422 (2003); *see Magnolia Petrol. Co. v. Hunt*, 320 U.S. 430, 436 (1943) ("[E]ach of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders.").

[72] *See, e.g.*, U.S. Chamber of Commerce Institute for Legal Reform, *Unfinished Business: Curbing Excessive Punitive Damages Awards*, at 21-22 (Sept. 2023), https://instituteforlegalreform.com/research/unfinished-business-curbing-excessive-punitive-damages-awards/.

[73] *See* David Crump, *Statutes of Limitations: The Underlying Policies*, 54 U. Louisville L. Rev. 437, 450-53 (2016).

[74] "If a plaintiff has a large number of states from which to choose, the plaintiff and his counsel would be foolish—indeed, might be committing malpractice in the latter's case—not to base the choice upon obtaining plaintiff-friendly legal rules, including the availability of punitive damages." Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 La. L. Rev. 529, 536 (2010); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 326 (7th Cir. 1995) (noting forum shopping to avoid application of "New York ban on punitive damages").

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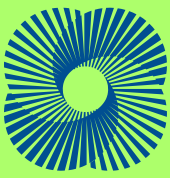

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