

# Ohio East Palestine Disaster: Biden DOJ Backing Norfolk Southern's Bid to Block Lawsuits

The company whose train derailed in Ohio is asking the Supreme Court to kill a suit by a sick rail worker — and help the firm block future lawsuits

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*A looming Supreme Court decision could end up making it easier for the railroad giant whose train derailed in Ohio this month to block lawsuits, including from victims of the disaster.*

In the case against Norfolk Southern, the Biden administration is siding with the railroad in its conflict with a cancer-stricken former rail worker. A high court ruling for Norfolk Southern could create a national precedent limiting where workers and consumers can bring cases against corporations.

The lawsuit in question, filed initially in a Pennsylvania county court in 2017, deals with a state law that permits plaintiffs to file suit against any corporation registered to do business there, even if the actions that gave rise to the case occurred elsewhere.

In its fight against the lawsuit, Norfolk Southern is asking the Supreme Court to uphold the lower court ruling, overturn Pennsylvania's law, and restrict where corporations can be sued, upending centuries of precedent.

Oral arguments in the case were held last fall, and a ruling is expected from the Supreme Court in the coming months.

If the court rules in favor of Norfolk Southern, it could overturn plaintiff-friendly laws on the books in states including Pennsylvania, New York, and Georgia that give workers and consumers more leeway to choose where they take corporations to court — an advantage national corporations already enjoy, as they often require customers and employees to agree to file litigation in specific locales whose laws make it harder to hold companies accountable.

Limiting lawsuits is exactly what the American Association of Railroads (AAR), the industry's primary lobbying group, wants. The organization filed a brief on the side of Norfolk Southern in the case, arguing that a ruling in favor of the plaintiff would open up railroads to more litigation.

It is also apparently what the Biden administration wants — the Justice Department filed [its own brief](#) in favor of Norfolk Southern.

Should Norfolk Southern prevail, the company could use the ruling to challenge other lawsuits on the grounds that they're filed in the wrong venue, said Scott Nelson, an attorney with the Public Citizen Litigation Group, which filed a [brief](#) backing the plaintiff in the Pennsylvania case.

Such a decision could affect lawsuits filed by residents exposed to hazardous chemicals as the result of accidents in other states — such as the East Palestine, Ohio, derailment disaster, which occurred five miles west of the Pennsylvania state line.

"[Norfolk Southern] might say, 'You can only sue us in Ohio or Virginia [where Norfolk Southern is headquartered],' even if you were injured at your home in Pennsylvania from an accident that took place five miles away in Ohio," Nelson said.

### **"Railroads Particularly Susceptible"**

In 2016, former Norfolk Southern carman Robert Mallory was diagnosed with colon cancer. In a lawsuit [filed the following year](#), Mallory alleged that his illness resulted from exposure to asbestos and other toxic chemicals on the job — and that the railroad failed to provide safety equipment and take other steps to protect him.

Mallory filed the suit in the Philadelphia County Court of Common Pleas, even though he had never worked in the state. He did so, according to Keller, the lawyer representing him before the Supreme Court, because "his lawyers were from Pennsylvania and he thought he would get the fairest access to justice there."

Pennsylvania has what's known as a "consent-by-registration" statute — something states have had on the books since the early 19th century — which stipulates that when corporations register to do business in the state, they are also consenting to be governed by that state's courts. Norfolk Southern asserts that being forced to defend the case in Pennsylvania would pose an undue burden, thereby violating its constitutional right to due process.

Even though Norfolk Southern owns thousands of miles of track in the Keystone State, the Philadelphia county court sided with the railroad and dismissed the case. Mallory appealed, and the case wound its way through state and federal courts before landing at the U.S. Supreme Court last year.

Corporate lobbying groups including the U.S. Chamber of Commerce, the National Association of Manufacturers, and the American Trucking Association have weighed in on the case on behalf of Norfolk Southern. Many have warned that a ruling in favor of the former railroad worker could allow people to sue corporations in whatever venue they'd like — a practice known as "forum shopping."

The AAR, the railroad lobbying group of which Norfolk Southern is a member, used this argument to claim that the railroad industry would be particularly victimized by a ruling in favor of the sickened worker. Mallory had filed his lawsuit under the Federal Employers' Liability Act (FELA), a law protecting railroad workers injured on the job.

"The characteristics that made railroads easy targets for forum shopping in the past — significant operations in multiple states and the unique features of FELA — will remain, leaving railroads particularly susceptible to suit in jurisdictions having little connection to the parties or the underlying cause of action," noted the AAR in an [amicus brief](#). "If this court reverses and other states elect to follow Pennsylvania's lead, FELA plaintiffs suing those railroads could have a wide range of jurisdictions to choose from."

But groups weighing in on Mallory's side pointed out that "forum shopping" is the norm for corporations. For example, many corporations choose to register in Delaware for tax purposes even if they have no physical presence in the state.

Similarly, the infamous opioid manufacturer Purdue Pharma [chose to file its bankruptcy case](#) in White Plains, New York, in order to secure a friendly judge, a move that was allowed because one of the company's units had changed its address to that location just six months earlier.

On [its website](#), Norfolk Southern informs users that they must submit to the jurisdiction of the city courts of Norfolk, Virginia, where the company's headquarters are located.

"The idea that it's somehow fundamentally unfair to pose the burden of defending a lawsuit in a particular jurisdiction on a corporation — as applied to these multi-state and multinational corporations — is a fiction," said Nelson of Public Citizen.

The Academy of Rail Labor Attorneys, an association of plaintiffs' attorneys who represent rail workers, also pointed out that Norfolk Southern has often filed lawsuits in Pennsylvania courts.

"These examples illustrate that Norfolk Southern freely utilizes the Pennsylvania courts to enforce its rights," the organization said [in an amicus brief](#). "The railroad certainly is not prejudiced in any way by defending lawsuits in the state. For purposes of jurisdiction, there is no valid reason that a corporation such as Norfolk Southern should be treated differently than an individual within the state."

## **Biden Administration Sides With Norfolk Southern**

The Biden administration also [weighed in](#) on the side of the corporate lobbying groups — a fact that apparently confounded **Justice Elena Kagan**, who was appointed by President Barack Obama. During oral arguments last fall, she specifically asked **Deputy Solicitor General Curtis Gannon** why the government had chosen to get involved in the case.

"Mr. Gannon, the Solicitor General has a choice whether to participate in this suit or not, and so please don't take this as at all a criticism," Kagan [said](#). "It's genuine interest and curiosity. What is it about this suit that has made you decide to participate?"

Gannon responded saying,

"We pointed out not just that... the excessive availability of general jurisdiction could

cause international concerns for trade with the United States and our commercial interests, but also the petitioner had called into question the constitutionality of a federal statute, and so we thought that it was important to make sure that the court's decision here wouldn't implicate the constitutionality of federal statutes."

The federal government said in its amicus brief that Pennsylvania's law amounted to an overreach of the state's authority.

"[The law] subverts interstate federalism by reaching beyond Pennsylvania's borders and allowing state courts to hear cases in which Pennsylvania has no legitimate interest," Justice Department lawyers [wrote](#), adding: "It imposes unfair burdens on defendants. And it serves no legitimate countervailing interest of the forum state or of plaintiffs."

Keller, the plaintiff's lawyer, said this argument is nonsense. He told *The Lever* that the federal government relies on consent-by-registration statutes like Pennsylvania's to make jurisdictional claims, and that there is no evidence that these state laws interrupt international commerce.

"The United States relies on consent-by-registration statutes [like the Pennsylvania law] to obtain personal jurisdiction over various foreign entities," said Keller. "If it's unconstitutionally coercive when Pennsylvania does it, why isn't it unconstitutionally coercive when the United States does it?"

Keller added,

"To be clear, I think both sets of statutes are constitutional, but there is no good reason — and I respectfully don't think Mr. Gannon supplied one — that it's 'due process of law' when America does it but not when Pennsylvania does. There is zero evidence that consent-by-registration statutes have impeded a single dollar's worth of commerce."

The Justice Department did not respond to a request for comment.

## **Ruling Could Be Used To Block Cases After Derailment**

The high court's ruling could have implications for the still-unfolding disaster in East Palestine, Ohio, which sits just miles from the Pennsylvania border.

While residents of East Palestine have been told it's safe to return home, [questions remain](#) about the possible long-term health effects from exposure to known carcinogens released during the disaster, including vinyl chloride. The Environmental Protection Agency [has detected](#) chemicals from the accident in storm drains, nearby creeks, and the Ohio River — raising concerns about downstream water contamination as far away as [Louisville, Kentucky](#).

Already, at least five [class-action negligence lawsuits](#) have been filed in Ohio against Norfolk Southern.

If Norfolk Southern prevails in the *Mallory* case, the company could use the ruling to block lawsuits related to the derailment in Pennsylvania and other nearby states, arguing that they were filed in the wrong venue.

While that argument is unlikely to hold up in court, according to Nelson, it could still pose an additional barrier to those seeking justice, opening up “a litigation sideshow before you ever even get to the merits of a lawsuit.”

Norfolk Southern’s attorneys have [succeeded previously](#) in moving injury suits against the company to new venues.

A spokesperson for Norfolk Southern told *The Lever* that the company could not comment on ongoing litigation.

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