IN THE SUPREME COURT OF PENNSYLVANIA

NO. 7 EAP 2019

PATRICIA L. HAMMONS,

Plaintiff-Appellee,

v.

ETHICON, INC. and JOHNSON & JOHNSON, GYNECARE; SECANT MEDICAL; SECANT MEDICAL, INC.; PRODESCO, INC.; and SECANT MEDICAL, LLC,

Defendants.

Appeal of: ETHICON, INC. and JOHNSON & JOHNSON

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE INSURANCE FEDERATION OF PENNSYLVANIA, INC., AND THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Appeal from the Judgment of Superior Court entered on June 19, 2018 at No. 1526 EDA 2016 affirming the Judgment of the Court of Common Pleas, Philadelphia County, Civil Division entered on April 14, 2016 at No. 3913 May Term, 2013

Robert L. Byer (Pa. I.D. 25447)
rlbyer@duanemorris.com
Andrew R. Sperl (Pa. I.D. 311467)
arsperl@duanemorris.com
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
Phone: (215) 979-1000
Fax: (215) 979-1020

Of Counsel:
Evan M. Tager
Andrew E. Tauber
Matthew A. Waring
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
Phone: (202) 263-3000
Fax: (202) 263-3300

(additional Of Counsel on following page)

Steven P. Lehotsky
Jonathan Urick
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
Phone: (202) 463-5337
Fax: (202) 463-5346

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

STATEMENT OF IDENTITY OF *AMICI CURIAE*, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. One of the Chamber's most important responsibilities is to represent its members' interests before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The Insurance Federation of Pennsylvania, Inc., is the Commonwealth's leading trade organization for commercial insurers of all types. It consists of nearly 200 member companies and it speaks on behalf of the industry in matters of legislative and regulatory significance. It also advocates on behalf of its members and their insureds in important judicial proceedings.

The Pennsylvania Chamber of Business and Industry (the "PA Chamber") is the largest, broad-based business association in Pennsylvania. It has close to ten thousand member businesses throughout Pennsylvania, who employ more than fifty percent (50%) of the Commonwealth's private workforce. Its members range

[1] No person or entity other than the *amici curiae*, their members, or counsel paid in whole or in part for the preparation of this *amicus curiae* brief or authored in whole or in part this *amicus curiae* brief.

from small companies to mid-size and large business enterprises. The PA Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

Many of *amici*'s members conduct business in states other than their states of incorporation and principal places of business. They therefore have a substantial interest in the rules governing whether, and to what extent, a nonresident corporation may be subjected to specific personal jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Superior Court's decision is directly contrary to binding precedent. The U.S. Supreme Court has repeatedly made clear that the appropriate test for determining whether a state court may exercise specific personal jurisdiction over an out-of-state defendant consistent with due process is whether the defendant's in-state conduct "give[s] rise to the liabilities sued on." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). But the Superior Court failed to apply that straightforward requirement, allowing Mrs. Hammons to maintain a lawsuit against appellants in Pennsylvania even though *none* of the conduct that gave rise to her claims occurred there. The Superior Court also appears to have placed the burden on appellants to disprove the existence of specific jurisdiction, and violating the

well-established rule that the plaintiff always bears the burden of establishing jurisdiction. In short, the Superior Court's decision flatly conflicts with U.S. Supreme Court precedent on the limitations of specific personal jurisdiction, including the Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017) ("*BMS*"), and with many other federal and Pennsylvania precedents. This Court should reverse the Superior Court's manifest errors of law.

The approach to specific jurisdiction reflected in the Superior Court's decision is not only erroneous as a matter of law—it also threatens serious practical harms to this Commonwealth and its residents. Out-of-state businesses may hesitate to invest in Pennsylvania, or do business here, if doing so would subject them to specific jurisdiction for claims that have nothing to do with their activities here. The result would be reduced economic opportunities for the people of Pennsylvania. Reversal of the Superior Court's decision approving the overbroad exercise of personal jurisdiction here is thus warranted as a matter of both settled doctrine and sound policy.

ARGUMENT

I. The Superior Court Improperly Put The Burden On Appellants To Disprove The Existence Of Personal Jurisdiction.

The Superior Court committed a serious error at the very outset of its analysis, erroneously declaring that a "defendant" who "challenge[s] the court's

personal jurisdiction has, as the moving party, the burden of supporting its objection to jurisdiction." *Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1261 (Pa. Super. 2018) (internal quotation marks omitted). Placing the burden on a *defendant* to prove the absence of specific jurisdiction turns the personal-jurisdiction inquiry on its head.

The "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). The requirement of personal jurisdiction protects defendants against both the possibility of having judgment entered against them by states with which they have "no contacts, ties, or relations" (*Int'l Shoe*, 326 U.S. at 319) and against the practical harm of "litigating in a distant or inconvenient forum" (*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

Given these due-process concerns, "it has been held uniformly in the lower federal courts that the burden of making a prima facie showing of the existence of personal jurisdiction falls on the plaintiff." 4 Charles A. Wright et al., Federal Practice & Procedure § 1067.6 (4th ed. 2019). Consistent with this national consensus, it is settled law in the Third Circuit, and in the federal district courts for Pennsylvania, that "the plaintiff bears the burden of showing that personal jurisdiction exists." *Marten v. Godwin*, 499 F.3d 290, 295-96 (3d Cir. 2007);

accord, e.g., *Action Mfg. Co. v. Simon Wrecking Co.*, 375 F. Supp. 2d 411, 418 (E.D. Pa. 2005) (same); *Comerota v. Vickers*, 170 F. Supp. 2d 484, 487 (M.D. Pa. 2001) (same).

Prior to the Superior Court's decision here, the Superior Court itself had also held repeatedly that the burden is on the *plaintiff*—not the defendant—to prove personal jurisdiction. To be sure, a defendant has the initial "burden of supporting its objection to [personal] jurisdiction" (*see, e.g.*, *De Lage Landen Fin. Servs., Inc. v. Urban P'ship, LLC*, 903 A.2d 586, 589 (Pa. Super. 2006) (internal quotation marks omitted))—but "[o]nce the moving party [*i.e.*, the defendant] supports its objections to personal jurisdiction, the burden of *proving* personal jurisdiction is upon the party asserting it," *i.e.*, the plaintiff. *Mendel v. Williams*, 53 A.3d 810, 816-17 (Pa. Super. 2012) (emphasis added) (quoting *Schiavone v. Aveta*, 41 A.3d 861, 865 (Pa. Super. 2012)); *Gaboury v. Gaboury*, 988 A.2d 672, 675 (Pa. Super. 2009) (same).

The Superior Court conflated appellants' initial burden of production with Mrs. Hammons's ultimate burden of proof, imposing on appellants the burden of proving that they were not subject to specific jurisdiction in Pennsylvania. Shifting the burden in this way was legal error. This Court should take this opportunity to clarify once and for all that in Pennsylvania—as everywhere else—the burden of proving personal jurisdiction rests on the plaintiff.

II. The Superior Court's Approach To Specific Jurisdiction Conflicts With Binding U.S. Supreme Court Precedent.

The Superior Court's decision also squarely conflicts with several decisions of the U.S. Supreme Court regarding the limitations on personal jurisdiction established by the Due Process Clause of the Fourteenth Amendment. The Supreme Court has held—in no uncertain terms—that specific jurisdiction is permissible only when the claims in the lawsuit are themselves *directly connected* to the defendant's in-forum conduct. The Superior Court's approach to specific jurisdiction flouts this black-letter rule.

A. Specific Jurisdiction Must Rest On In-State Contacts Directly Related To The Plaintiff's Claims.

Since its seminal decision in *International Shoe*, which first defined the modern "minimum contacts" approach to specific jurisdiction that still governs today, the U.S. Supreme Court has consistently required a connection between the plaintiff's claims and the defendant's in-state activities for specific jurisdiction to exist. Explaining why such contacts satisfy the due-process requirements for specific jurisdiction, the Supreme Court observed that when "a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." 326 U.S. at 319. "The exercise of that privilege," the Court reasoned, "may give rise to obligations; and, so far as those obligations *arise out of or are connected with the activities* within the state, a

procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Id.* (emphasis added). The Court went on to conclude that the exercise of specific jurisdiction over the defendant was permissible because the defendant had engaged in activities within the forum state and "[t]he obligation which is here sued upon arose out of *those very activities*," making it "reasonable and just . . . to permit the state to enforce *the obligations which [the defendant] ha[d] incurred there*." *Id.* at 320 (emphases added).

The *International Shoe* framework thus rests on the principle that due process permits a state to subject an out-of-state defendant to the jurisdiction of the state's courts *only* with respect to claims that arise out of "the very activities" that the defendant engaged in within the forum State. That principle necessarily forbids state courts from exercising specific jurisdiction with respect to claims that do *not* arise out of in-state activities or obligations.

The U.S. Supreme Court's more recent decisions have reaffirmed that the exercise of specific personal jurisdiction requires a direct connection between the plaintiff's claims and the defendant's in-state conduct. In *J. McIntyre Machinery, Ltd. v. Nicastro*, for example, the plurality opinion contrasted specific jurisdiction with general jurisdiction, which allows a state "to resolve both matters that originate within the State and those based on activities and events elsewhere." 564

U.S. 873, 881 (2011) (plurality op.). Specific jurisdiction, the plurality explained, involves a "more limited form of submission to a State's authority," whereby the defendant subjects itself "to the judicial power of an otherwise foreign sovereign *to the extent that power is exercised in connection with the defendant's activities touching on the State.*" *Id.* (emphasis added).

Then, in a pair of decisions outlining the limitations on general (or all-purpose) personal jurisdiction, the Court reiterated the very different, "more limited" role played by specific personal jurisdiction. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court explained that whereas general personal jurisdiction can be exercised with respect to claims arising anywhere, an exercise of specific jurisdiction "depends on an affiliation between the forum and the underlying controversy, principally, *activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation*." 564 U.S. 915, 919 (2011) (emphasis added; brackets and internal quotation marks omitted). Thus, specific jurisdiction exists only when a defendant engages in continuous activity in the state "and *that activity gave rise to the episode-in-suit*" (*id.* at 923), or when the defendant commits "'single or occasional acts' in a State [that are] sufficient to render [it] answerable in that State with respect to those acts, *though not with respect to matters unrelated to the forum connections*" (*id.* (emphasis added; quoting *Int'l Shoe*, 326 U.S. at 318)). The Court emphasized that under

either scenario, for there to be specific personal jurisdiction, the plaintiff's suit must be one that "'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Id.* at 923-24 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

Similarly, in *Daimler AG v. Bauman*, the Court reaffirmed that specific jurisdiction is available only when the defendant's in-state activities "g[i]ve rise to the liabilities sued on" or when the suit "relat[es] to that in-state activity." 571 U.S. 117, 126-27 (2014) (internal quotation marks omitted).

Then, in *BMS*, the Court made it unmistakably clear that a court may not exercise specific jurisdiction unless the defendant has itself engaged in in-state activity that gives rise to the particular plaintiff's own claims. The plaintiffs in *BMS* included both California and non-California residents who sued a pharmaceutical manufacturer in California on product-liability claims arising from their use of a particular drug. Although their claims, like those of the in-state plaintiffs, arose from the defendant's nationwide marketing of the drug, including in California, the Court held that the out-of-state plaintiffs could not obtain specific personal jurisdiction over the defendant in California, because "all the conduct giving rise to [their] claims occurred elsewhere" inasmuch as the specific doses that they received, unlike those received by the California plaintiffs, had been prescribed, purchased, and ingested outside California. 137 S. Ct. at 1782. The

Court explained that specific jurisdiction requires a connection between the plaintiff's claims and the defendant's conduct in the forum and that, "*[w]hen there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.*" *Id.* at 1781 (emphasis added).

Finally, in its latest decision regarding personal jurisdiction, the Court reiterated that a corporate defendant's "in-state business … does not suffice to permit the assertion of general jurisdiction over claims … that are unrelated to any activity occurring in" the forum state. *BNSF Ry. v. Tyrrell,* 137 S. Ct. 1549, 1559 (2017). Thus, absent general personal jurisdiction, which typically exists only in those states where a corporate defendant is either incorporated or has its principal place of business, doing business in a particular state "is sufficient" only "to subject the [defendant] to specific personal jurisdiction in that State on claims related to the business it does in [that State]." *Id*.

In short, the Supreme Court has repeatedly held that specific jurisdiction is available *only* for claims that relate directly to a defendant's in-state activities. A state cannot exercise specific jurisdiction with respect to claims that do not directly relate to a defendant's contacts with the forum state.

B. The Contacts Relied On By The Superior Court Lack A Direct Relationship To Mrs. Hammons's Claims.

In the Superior Court's decision, the Superior Court correctly recognized that Pennsylvania lacks general personal jurisdiction over appellants. It held,

however, that Pennsylvania could exercise specific personal jurisdiction over appellants based on their contacts with a supplier and a researcher located there. That conclusion is inconsistent with the test for specific personal jurisdiction articulated by the U.S. Supreme Court. The Prolift product that is the subject of this lawsuit was not designed in Pennsylvania: On the contrary, the Pennsylvania supplier merely followed appellants' design specifications developed out of state. The specific device used to treat Mrs. Hammons was not sold in Pennsylvania. Nor was Mrs. Hammons treated in Pennsylvania. Nor was her physician—the proper recipient of any warnings from appellants about the mesh under the learned-intermediary doctrine (*see, e.g.*, *Taurino v. Ellen*, 579 A.2d 925, 927 (Pa. Super. 1990))—located in Pennsylvania. Her design-defect and failure-to-warn claims thus arise entirely from appellants' *out-of-state* conduct—and therefore fail to satisfy the constitutional requirement of a direct connection between the defendant's in-state activities and the claims in the lawsuit.

The Superior Court held that specific jurisdiction was proper, in part, because appellants "repeatedly communicated [their] requirements for mesh design and development, manufacturing, quality control, testing, and certification to Secant [an in-state manufacturer that wove mesh for appellants]—all issues central to this litigation." *Hammons*, 190 A.3d at 1263. But the claims on which Mrs. Hammons went to trial are design-defect and failure-to-warn claims: She alleges

that appellants were negligent in designing the Prolift product and that they failed to warn doctors and patients about all of the risks of the product. By definition, these claims arise from the product's design and the warnings that accompanied it; they have nothing to do with how the product was manufactured. In *BMS*, the Supreme Court held that a relationship with an in-state distributor did not subject the defendant to specific jurisdiction because there was no *connection* between that relationship and the product-liability claims in suit. *BMS*, 137 S. Ct. at 1783. So too here: The mere act of sending Secant instructions on how it was to manufacture the mesh does not support the exercise of specific personal jurisdiction over Mrs. Hammons's claims against appellants, which do not allege manufacturing defects.

The same is true of appellants' purported retention of a Pennsylvania doctor to perform clinical studies for the Prolift product. The Superior Court noted that this doctor performed clinical studies related to Prolift, but that circumstance by itself would not support specific jurisdiction. Large companies like appellants often gather study data from many states in order to inform the design process for new products. *See, e.g.*, *M.M. ex rel. Meyers v. GlaxoSmithKline LLC*, 61 N.E.3d 1026, 1033 (Ill. App. Ct. 2016) (clinical trials for defendant's drug "took place in 44 states and abroad"). Or they may source parts or other resources from numerous states. Subjecting them to "specific" jurisdiction in each one of those

states would effectively create a new form of general jurisdiction, undermining decisions like *Daimler* that hold that general jurisdiction should be limited to the fora in which a defendant is truly at home. *See, e.g.*, *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014) (noting that finding specific jurisdiction over a company based on contacts that exist in every state "would violate the principles on which *Walden* and *Daimler* rest"); *cf. BMS*, 137 S. Ct. at 1781 (reversing lower court for applying specific jurisdiction test that "resemble[d] a loose and spurious form of general jurisdiction").

In short, the in-state activities of appellants upon which the Superior Court relied to find specific personal jurisdiction lacked the requisite connection to Mrs. Hammons's claims and thus do not permit Pennsylvania courts to exercise specific personal jurisdiction over those claims. If the activities invoked by the Superior Court were sufficient, then any plaintiff who was treated with one of appellants' products anywhere in the country could sue in Pennsylvania or any other state where appellants performed studies or testing. That is not how the Due Process Clause works. The U.S. Supreme Court has consistently held that for specific personal jurisdiction to exist in a given forum, the defendant's in-state conduct must be *directly* related to a plaintiff's claims—or, in the Court's words, the plaintiff's suit must be one that "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 923-24 (internal quotation marks

omitted); *accord, e.g.*, *BMS*, 137 S. Ct. at 1782. In this case, the conduct giving rise to Mrs. Hammons's claims did *not* occur in Pennsylvania. The decision below should therefore be reversed.

III. The Approach To Specific Jurisdiction Adopted By The Superior Court Would Have Serious, Harmful Consequences.

The Superior Court's decision will have negative practical consequences for the citizens and economy of Pennsylvania. An approach to specific jurisdiction that does not require a direct connection between the plaintiff's claim and the defendant's in-state activity will make it less attractive for out-of-state corporations to do business in Pennsylvania, thereby threatening investment here. For this reason, the Superior Court's decision threatens to impose serious costs on the Commonwealth and its citizens.

The U.S. Supreme Court has observed that due process limits on personal jurisdiction confer "'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297). As Justice Ginsburg has explained, a corporation's place of incorporation and principal place of business—the jurisdictions in which a corporation is subject to general jurisdiction—"have the virtue of being unique." *Daimler*, 571 U.S. at 137. "[T]hat is, each ordinarily

indicates only one place"—a forum that is "easily ascertainable." *Id.* The rule articulated by the Supreme Court in *Daimler* thus allows corporations to anticipate that they will be subject to general jurisdiction in only a few (usually one or two) well-defined jurisdictions. Such "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (explaining benefits of clear jurisdictional rules in the context of the diversity-jurisdiction statute).

The approach to specific jurisdiction embodied in the Superior Court's decision undermines that predictability, making it impossible for corporations to structure their affairs to limit the number of jurisdictions in which they can be sued on any claim by any plaintiff residing anywhere. Many product manufacturers source components and materials from suppliers in a large number of states. If doing business with these suppliers were deemed sufficient to give rise to specific jurisdiction on any claim related to the end product no matter where it was sold or used—even claims that, like design-defect and failure-to-warn claims, have nothing to do with the manufacturing process—then a corporation could be sued throughout the country regardless of whether its in-state activity had any connection to a particular claim.

That is exactly the result that the Supreme Court rejected in *Daimler*. The Court made clear in *Daimler* that merely doing some business—even a

"substantial, continuous, and systematic course of business"—in a state is not enough to subject a defendant to personal jurisdiction there on claims that have nothing to do with its in-state activity. *Daimler*, 571 U.S. at 761 (internal quotation marks omitted). But the Superior Court's approach to specific jurisdiction permits the very result that the Supreme Court's holding on general jurisdiction in *Daimler* sought to foreclose—in effect, creating a new, ersatz form of general jurisdiction. On the Superior Court's theory, for example, Mrs. Hammons could have sued appellants in a number of other states besides the ones where she was treated with Prolift or where the product was designed. That approach stretches specific jurisdiction beyond its proper limits. *See, e.g.*, *State ex rel. Norfolk S. Ry. v. Dolan*, 512 S.W.3d 41, 49 (Mo. 2017) (rejecting an approach to specific jurisdiction that would imply that "every state would have specific jurisdiction over every national business corporation," which would "go[] even further than the pre–*Daimler* approach to *general* jurisdiction that *Daimler* rejected").

Indeed, under the Superior Court's reasoning, a company could face litigation in Pennsylvania courts over nearly any claim relating to its products anywhere in the nation—irrespective of whether it has any connection to the company's activities in Pennsylvania. Any rational business would have little choice but to weigh carefully the benefits of investing in Pennsylvania against the substantial risk of being sued here on claims that have nothing to do with its in-

state conduct. That risk will likely result in the movement of jobs and capital investment away from Pennsylvania and an aversion to future investment in the state. As the Delaware Supreme Court recently explained in declining to subject out-of-state corporations to general personal jurisdiction based on their registration to do business in Delaware:

> Our citizens benefit from having foreign corporations offer their goods and services here. If the cost of doing so is that those foreign corporations will be subject to general jurisdiction in [this state], they rightly may choose not to do so.

Genuine Parts Co. v. Cepec, 137 A.3d 123, 142 (Del. 2016).

There are no countervailing benefits to Pennsylvania from imposing these significant costs on the Commonwealth's economy. If a nonresident corporation has meaningful contacts with Pennsylvania and its in-state conduct is alleged to harm a Pennsylvania resident, it can be sued in Pennsylvania on a specific-jurisdiction theory. *See, e.g.*, *Walden*, 571 U.S. at 284. The broader approach taken by the Superior Court is therefore not necessary to ensure that companies that conduct business in Pennsylvania may be held accountable for their conduct *in Pennsylvania*. Rather, it serves only to consume the resources of the courts of this Commonwealth in deciding disputes that—like this case—have only random or "fortuitous" connections to Pennsylvania. *World-Wide Volkswagen*, 444 U.S. at 295.

CONCLUSION

The Court should reverse the Superior Court's judgment and order that Mrs. Hammons's claims be dismissed for lack of personal jurisdiction.

June 21, 2019

Respectfully submitted,

/s/ Robert L. Byer
Robert L. Byer (Pa. I.D. 25447)
rlbyer@duanemorris.com
Andrew R. Sperl (Pa. I.D. 311467)
arsperl@duanemorris.com
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103
Phone: (215) 979-1000
Fax: (215) 979-1020

Of Counsel:
Evan M. Tager
Andrew E. Tauber
Matthew A. Waring
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
Phone: (202) 263-3000
Fax: (202) 263-3300

Steven P. Lehotsky
Jonathan Urick
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
Phone: (202) 463-5337
Fax: (202) 463-5346

Attorneys for *Amici Curiae*

CERTIFICATE OF WORD COUNT

I certify that this brief contains 3,984 words and therefore complies with Pa.R.A.P. 531(b)(3).

June 21, 2019

/s/ Robert L. Byer

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Appeal of: Ethicon, Inc. and Johnson & Johnson		

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I hereby certify that this 21st day of June, 2019, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Charles Lyman Becker
Service Method:	eService
Email:	charles.becker@klinespecter.com
Service Date:	6/21/2019
Address:	Kline & Specter, P.C. 1525 Locust Street, 19th Floor Philadelphia, PA 19102
Phone:	215--77-2-1000
Representing:	Appellee Patricia L. Hammons

Served:	Dorothy Alicia Hickok
Service Method:	eService
Email:	alicia.hickok@dbr.com
Service Date:	6/21/2019
Address:	28 Linden Ave. Rutledge, PA 19070
Phone:	215-988-3364
Representing:	Appellant Ethicon, Inc. and Johnson & Johnson

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Joe H. Tucker Jr.
Service Method:	eService
Email:	jtucker@tlgattorneys.com
Service Date:	6/21/2019
Address:	Tucker Law Group 1617 JFK Blvd., Suite 1700 Philadelphia, PA 19103
Phone:	215--87-5-0609
Representing:	Appellee Gynecare; Secant Medical, et al.

Served:	Lee Barry Balefsky
Service Method:	eService
Email:	danielle.serad@klinespecter.com
Service Date:	6/21/2019
Address:	861 Colony Road Bryn Mawr, PA 19010
Phone:	610-662-4003
Representing:	Appellee Patricia L. Hammons

Served:	Ruxandra Maniu Laidacker
Service Method:	eService
Email:	andra.laidacker@klinespecter.com
Service Date:	6/21/2019
Address:	1525 Locust St. Floor 19 Philadelphia, PA 19102
Phone:	215--77-2-1000
Representing:	Appellee Patricia L. Hammons

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Courtesy Copy

Served:	James Michael Beck	
Service Method:	eService	
Email:	jmbeck@reedsmith.com	
Service Date:	6/21/2019	
Address:	2500 One Liberty Place 1650 Market Street Philadelphia, PA 19103	
Phone:	215--85-1-8168	
Representing:	Appellant Amicus Curiae	Pennsylvania Defense Institute
	Appellant Amicus Curiae	Philadelphia Association of Defense Counsel
	Appellant Amicus Curiae	Product Liability Advisory Council, Inc.

/s/ Robert L. Byer

(Signature of Person Serving)

Person Serving:	Byer, Robert L.	
Attorney Registration No:	025447	
Law Firm:		
Address:	Duane Morris Llp 600 Grant St Ste 5010 Pittsburgh, PA 15219	
Representing:	Amicus Curiae	Chamber of Commerce of the United States of America
	Amicus Curiae	The Insurance Federation of Pennsylvania, Inc.
	Amicus Curiae	The Pennsylvania Chamber of Business and Industry