No. 12-401

IN THE

Supreme Court of the United States

KIMBERLY-CLARK CORPORATION AND
KIMBERLY-CLARK WORLDWIDE, INC.,
Petitioners,

v.

ALABAMA DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Civil Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* OF THE COUNCIL ON STATE TAXATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Council On State Taxation ("COST") and the National Association of Manufacturers ("NAM") respectfully request leave to file a Brief *Amici Curiae* in support of Petitioners. The interests of COST and the NAM as *amici curiae* are described *infra* at Brief, pp. 1. Counsel for Petitioners has consented to *amici*'s filing of an *amicus* brief. Despite *amici*'s qualifications to submit a brief *amici curiae*, Respondent has refused to consent to the filing of such a brief. There are two distinct reasons why *amici* should be allowed to file an *amicus* brief in this case.

First, with respect to the Petition filed in this case, *amici* make additional observations concerning the constitutional implications of the decision of the Alabama Court of Civil Appeals. A full exposition of the constitutional controversies stemming from this case by all interested and eligible *amici* is ultimately to the benefit of the Court in its administration of writs of *certiorari*.

Second, *amici*'s members have a compelling interest in the issues presented by this case. *Amici* and their members are uniquely familiar with the potential effect of the Alabama court's decision on state tax litigation beyond the borders of Alabama.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* OF THE COUNCIL ON STATE TAXATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

This brief *amici curiae* in support of Petitioner Kimberly-Clark Corporation ("KC") is filed on behalf of two trade associations representing the largest businesses in our nation's state and local economies.[1]

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amici's* intent to file this brief. Petitioner consented to the filing of this brief and

The Council On State Taxation ("COST") is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

As *amici*, COST or the NAM have participated in many of this Court's significant state tax apportionment cases over the past 40 years, including *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U.S. 425 (1980); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992); *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000); and *MeadWestvaco Corp. v. Illinois Dep't. of Revenue*, 553 U.S. 16 (2008).

Amici's membership has a vital interest in ensuring that no state unfairly or unconstitutionally taxes income earned beyond its borders by a business engaged in commerce in the national market. The

their letter has been filed with the Clerk of this Court. Respondent denied consent.

income tax gain in question here stems from KC's disposition of timberland and a pulp mill that KC had operated for 34 years as part of a vertically integrated business. Few fact patterns better typify a unitary relationship than the long-term operation of one piece of a vertical enterprise. Yet, in rendering its decision to allow Alabama to allocate 100% of the gain to Alabama, the Court below never considered the foundational question of whether KC's Alabama paper mill was actually unitary with KC's overall paper business from a constitutional perspective, thereby making the gain apportionable among the states in which the Petitioner conducts its unitary enterprise rather than entirely allocable to Alabama. As fully discussed below, this Court has consistently held the "unitary-business principle" is the fundamental constitutional standard used to determine whether income is apportionable or allocable. *Amici* are concerned that the failure of the Alabama court to consider this overarching constitutional constraint could result in precedent allowing states to bypass the Court's longstanding jurisprudence on the apportionability of unitary business income, thereby allowing states to tax extraterritorial income.

ARGUMENT

I. The Decision of the Alabama Court of Civil Appeals Should be Reviewed Because it Ignores this Court's Long-Standing Rules that Govern the Apportionment of Unitary Income

In cases spanning more than a century, this Court has carefully delineated the basis on which individual states can tax the value created by multistate business entities, including the limits of such taxation. The concept of apportionment—and the requirement that each state may apportion and tax only part of the property or income of a multistate enterprise—arose initially in the context of state property taxes on telegraph companies and railroads, where this Court recognized that "what makes such a business valuable is the enterprise as a whole, rather than the track or wires that happen to be located within a State's borders."[2] For that reason, this Court has stated, "we permit States to tax a corporation on an apportionable share of the multistate business carried on in part in the taxing State. This is the unitary business principle."[3]

The critical issue in this case is whether Alabama can tax the entire gain from the disposition of assets by a multistate taxpayer engaged in interstate commerce without considering the relationship between the taxpayer's assets and its overall enterprise from a "unitary business" perspective. The Alabama Court of Civil Appeals determined that Alabama could allocate, and therefore tax, 100% of the gain by sole reference to an interpretation of an Alabama statute. However, the court failed to consider the single most apposite constitutional standard that restricts the ability of Alabama to tax value earned beyond its borders—the unitary business principle.

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[2] *Allied Signal v. Director, Div. of Taxation*, 504 U.S. 768, 778 (1992). *See*, *e.g.*, *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220-21 (1897); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-21 (1920).

[3] *Id*. *See also Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 460 (1959) ("[T]he entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs.").

Permitting the taxation of multistate businesses by apportionment to each state with which the business has the requisite minimum contacts precludes the possibility of one state taxing the entirety of the business. This overarching principle governing state taxation of multistate businesses under the U.S. Constitution was succinctly stated in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-447 (1979):

> In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full.

This Court has declared on numerous occasions that "the linchpin of apportionability in the field of state income taxation is the unitary-business principle." *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 439 (1980). *Mobil* is the seminal case considering the constitutional limitations on a nondomiciliary state's power to tax the income of a multistate taxpayer. In *Mobil*, the Court considered whether the Due Process Clause prohibited Vermont from including dividends received from Mobil's foreign subsidiaries and affiliates in its apportionable tax base. This Court held:

> [W]e may assume, for present purposes, that the State of commercial domicile has the authority to lay some tax on appellant's dividend income as well as on the value of its stock. But there is no reason in theory why that power should be exclusive when the dividends reflect income from a

> unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States.

The *Mobil* Court said "there is no reason in theory" for allowing New York, the state of Mobil's "commercial domicile," to allocate and tax all of the dividends from Mobil's subsidiaries, because the "benefits and privileges conferred by several States" upon Mobil's unitary business entitles those other states to tax that same income. If New York could allocate all of those dividends to itself and tax them, impermissible multiple state taxation of those dividends would result, because each of the other states where Mobil conducted its unitary business was also constitutionally entitled to tax the respective amount reasonably apportioned of those same dividends.

Mobil was engaged in an integrated petroleum business, ranging from exploration for petroleum reserves to production, refining, transportation, and distribution and sale of petroleum and petroleum products. Mobil's business activities in Vermont were confined to wholesale and retail marketing of petroleum and related products. Mobil had no oil or gas production or refineries in the state.

Mobil argued that the Due Process Clause precluded Vermont from including dividends received from Mobil's foreign subsidiaries and affiliates in its apportionable tax base on the ground that there was no "nexus" between Vermont and either Mobil's management of its investments or the business activities of the dividend-paying corporations.

In reviewing Mobil's challenge, the Court stated its oft-cited rule that the "linchpin of apportionability in the field of state taxation is the unitary business principle." *Id.* To demonstrate that Mobil's dividend income was not apportionable to Vermont under that principle, the Court reasoned that Mobil would have had to show that the income was earned in the course of some discrete business enterprise unrelated to Mobil's sale of petroleum products in Vermont.

Accordingly, the Court ruled that so long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, the dividends are income to the parent earned in a unitary business and are therefore subject to apportionment. In so doing, the Court cautioned that if the business activities of the dividend-payer have nothing to do with the activities of the recipient in the taxing state, the Due Process Clause precludes a state from including the dividend income in the apportionable tax base.

The Court addressed the unitary business principle again during the same term in *Exxon Corp. v. Dep't. of Rev. of Wisconsin*, 447 U.S. 207 (1980) when it repudiated Exxon's use of separate accounting as an alternative to Wisconsin's income tax apportionment formula. After the two separate 1980 cases, the Court continued to offer more insight about what kinds of intercompany relations might signify a unitary business relationship in a number of cases. *See, e.g., ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982); *F.W. Woolworth Co. v. Taxation and Rev. Dep't. of New Mexico*, 458 U.S. 354 (1982); *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983); *Allied-Signal Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992); and *MeadWestvaco Corp. v. Illinois, Dep't. of Rev.*, 553 U.S. 16 (2008).

Under the unitary business principle refined by the Court in these cases, when a state seeks to impose an income-based tax upon a multistate corporation, the strictures of the Due Process and Commerce Clauses compel it to confine its taxing powers to income fairly attributable to activities carried on within its borders. In determining what activity occurs within its borders, a state need not "isolate the intrastate income-producing activities from the rest of the business" but "may tax an apportioned sum of the corporation's multistate business if the business is unitary." *Allied-Signal* at 772 and J. Hellerstein & W. Hellerstein, State Taxation ¶ 8.07 [1], p. 8-61 (3d ed. 2001-2009). Thus, any court deciding whether a state can tax all of a gain, none of a gain, or an apportioned part of a gain must determine whether "intrastate and extrastate activities formed part of a single unitary business," *Mobil Oil Corp.* at 438-39, or whether the out-of-state values that the State seeks to tax "'derive[d] from 'unrelated business activity' which constitutes a 'discrete business enterprise,''" *Allied-Signal* at 773 (quoting *Exxon Corp.* at 224, in turn quoting *Mobil Oil Corp.* at 439).

In each of this Court's prior unitary business principle cases, this Court was asked whether a state could tax an apportioned share of unitary operations that occur outside of the state. This case raises the near reverse of that question, yet implicates the same key concepts. In this case Alabama is taxing 100% of a unitary gain simply because the assets that produced the gain were located in Alabama.

This Court's unitary business principle cases teach that apportionment is the constitutionally permissible method to divide the income of a unitary business operating in multiple states. Thus, a key step to decide whether the gain at issue here was either apportionable among all states or allocable to Alabama was the determination of whether the taxpayer's remaining enterprise was unitary with the mill and timberland that formed the basis for the gain. Yet the Alabama court undertook no analysis of the relationship between the remaining enterprise and the mill and timberland. Rather, the court only looked at the facts related to the disposition of the properties and the frequency and character of similar dispositions.

This Court should review this case to square the important constitutional concept of the unitary business principle with how the Alabama Court of Civil Appeals interpreted the Alabama statutory nonbusiness income test. The Alabama Court allowed the Alabama Department of Revenue to seize the entire gain from a transaction undertaken by integrated multistate operations that is subject to apportionment in other states.

II. The Question Presented in this Case Is of National Significance

Determining the constitutional parameters that limit the allocation and apportionment of income earned by a multistate business is an issue of law that will undoubtedly arise over and over in the future. Tens of thousands of businesses across the United States engage in interstate commerce, and each business engages in thousands, if not millions, of transactions every year, any one of which could become subject to 100% allocation by any one state under Alabama's logic, while at the same time subject to apportionment in other states.

Many states have encouraged this Court to continue, and perhaps increase, its role as the safekeeper of what constitutes apportionable income. There has been a legislative trend in the states over the last few years to define apportionable income simply as income that is "treated as apportionable business income under the Constitution of the United States."[4] As a consequence, the instant case presents the perfect opportunity for this Court to reaffirm its long-standing precedent for the evaluation of apportionable income.

CONCLUSION

For the reasons set forth above, *amici* respectfully request that the Petition for Writ of Certiorari be granted.

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[4] *See*, *e.g.*, Il. St. Ch. 120 ¶ 15-1501(a)(1) (2012). *See also* Kan. Stat. Ann. § 79-3271(a) (2012); Minn. Stat. § 290.17 Subd.4.(a) (2012); N.C. Gen. Stat. §105-130.4(a)(1) (2012); Pa. Stat. Ann. tit. 72 § 7401(3)2.(a)(1)(A)(2012).