No. 16-565

IN THE
Supreme Court of the United States

KIMBERLY-CLARK CORPORATION AND SUBSIDIARIES,
Petitioners,
v.

MINNESOTA COMMISSIONER OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.[1]

Thousands of the NAM's members engage in interstate commerce, and do business in states that are party to the Multistate Tax Compact. Accordingly, the enforceability of the Compact is an issue of significant importance to the NAM.

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[1]No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the NAM, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of the NAM's intent to file this brief at least 10 days before it was due and have consented to its filing in letters that have been lodged with the Clerk.

SUMMARY OF ARGUMENT

The Multistate Tax Compact requires its member states to provide multistate taxpayers the option of apportioning their income according to a three-factor, equally weighted formula. Since the Compact took effect in 1967, businesses across the nation have relied on that formula in making key decisions, like where to expand their sales or open a manufacturing plant. They have also relied on that formula in making sure that their income is apportioned in the same, consistent way among multiple states.

The Minnesota Supreme Court nevertheless held that when a state becomes a member of the Compact, it makes no "unmistakable promise" to abide by all of the Compact's terms. Pet. App. 14a. The court therefore concluded that, despite joining the Compact in 1983, *id.* at 28a, Minnesota had no "contractual obligation" to make the equally weighted formula available to its taxpayers. *Id.* at 15a. Because that erroneous decision has immense practical consequences for American manufacturers and other businesses, this Court should grant the petition for a writ of *certiorari* and reverse. If allowed to stand, the decision below would seriously undermine the predictability and uniformity of state taxation—the very things the Compact was supposed to promote.

None of this is to say that a state can never withdraw from the Compact. But under Article X of the Compact, a state may withdraw only by repealing the Compact *in its entirety*. The requirement of complete withdrawal serves a number of important purposes. It assures Congress that joining the Compact is a true commitment, making federal legislation in the area unnecessary. It avoids the

unfairness of a state enjoying all of the benefits of membership without bearing all of the obligations. And it ensures that when a state is considering whether to break from the Compact, the issue gets the close scrutiny from affected businesses it deserves. So unless and until a member state actually withdraws from the Compact, the state must give taxpayers the option of using the equally weighted formula, just as it unmistakably promised to do upon joining the Compact.

When the issue of the enforceability of the Compact last arose in *Gillette Co.* v. *California Franchise Tax Board*, No. 15-1442, dozens of *amici*, including the NAM, filed briefs urging this Court to grant the petition for *certiorari*. That broad showing of *amicus* support confirms the nationwide significance of the question presented by the petition here. Although the NAM could have simply rested on its brief in *Gillette*, it has decided to file a brief in this case to drive home the importance of this Court's review. *See* Pet. 3 (arguing that "the case for review is stronger here than in *Gillette*").

ARGUMENT

I. THE ENFORCEABILITY OF THE COMPACT IS OF IMMENSE PRACTICAL IMPORTANCE TO BUSINESSES ACROSS THE NATION

The Multistate Tax Compact sets forth a number of rules governing the "proper determination of State and local tax liability of multistate taxpayers." Pet. App. 89a (Compact art. I(1)). Among them is the provision at issue here: the requirement that member states give businesses the option of apportioning their income according to an "equally weighted"

apportionment formula. *Id.* at 6a; *see also id.* at 91a (Compact art. III(1)). That formula determines how much of a business's nationwide income should be attributed to a particular state—and thus how much in income taxes the business must pay there—by giving equal weight to three factors: (1) the amount of property the business holds in the state (the property factor); (2) the amount of compensation the business pays employees in the state (the payroll factor); and (3) the amount of sales the business makes in the state (the sales factor). *See id.* at 96a-98a (Compact art. IV(9)-(15)).

The petition asks this Court to decide whether "Compact States are contractually bound to offer the taxpayer election unless they withdraw from the Compact according to its terms." Pet. 21 (italicization removed). This Court should grant the petition and hold that the answer is yes. Manufacturers and other businesses across the nation have relied on the Compact as a source of predictable and uniform rules governing the amount of income taxes they owe not just in Minnesota but in other member states. The petition thus presents an issue of far-reaching importance, warranting this Court's review.

A. Businesses Have Relied On The Compact As A Source of Predictable Taxation Rules

To appreciate the significance of the question presented, consider the following example. A company manufactures and sells widgets in State A, which is a member of the Compact. The company is growing and wants to expand its sales into a neighboring state—but which one? After reviewing the tax regimes of the surrounding states, it decides to

expand into State B. The rationale for that decision is simple: State B is also a member of the Compact, and so is obligated to let the company allocate its income according to the equally weighted apportionment formula. Unless State B withdraws from the Compact, the amount of income taxes the company owes in State B will never exceed what that formula yields. And that sort of certainty is important to the company, which is deciding where to sell for the long term.

After it has already expanded into State B, however, the company is told that the Compact was never enforceable. Without going through the process of "withdraw[ing] from th[e] compact," Pet. App. 111a (Compact art. X(2)), State B amends its tax code to eliminate the equally weighted formula as an option. Under a different formula imposed by the state, the company owes State B more in income taxes than it had ever anticipated. If the company had known that State B could simply disregard the Compact as unenforceable, it would have never expanded there in the first place; it decided to grow its business in State B only because it thought State B was committed to following the Compact.

The decision below makes this hypothetical a reality. Thousands of American manufacturers and other businesses engage in commerce across state lines. Indeed, "[m]ost companies engaged in interstate commerce make sales into many more States than the number in which they have places of business, and probably into many more States than the number in which they have payroll." H.R. Rep. No. 88-1480, vol. 1, at 528-529 (1964). American companies thus make decisions all the time about the states in which they should do business.

Those decisions are often affected by the potential tax consequences of expanding into one state versus another. State and local taxes, after all, represent a "significant" part of a business's overall costs. Tax Found. & KPMG, *Location Matters: The State Tax Costs of Doing Business* 1 (2015).[2] In fiscal year 2012 alone, manufacturers paid nearly $90 billion in taxes to state and local governments. Mfg. Inst., *State & Local Taxes by Funding Source*.[3] It should come as no surprise, then, that "business location decisions for new manufacturing facilities, corporate headquarter relocations, and the like are often influenced by assessments of relative tax burdens across multiple states." Tax Found. & KPMG, *supra*, at 1.

The Compact was supposed to make those assessments more predictable by "requir[ing]" member states to "make the [equally weighted apportionment formula] available to any taxpayer wishing to use it." Council of State Gov'ts, *The Multistate Tax Compact: Summary and Analysis* 1 (1967); *see also id.* at 6 ("The Multistate Tax Compact provides that the [equally weighted apportionment formula] will be available in all party States to any multistate taxpayer wishing to use it."). The availability of that formula was supposed to help manufacturers and other businesses make sound, long-term decisions—like where to build a new factory, or where to hire more salespeople. A business could expand its sales in a member state, confident that those sales would be weighted equally in determining how much in taxes it would have to pay.

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[2]*Available at* http://goo.gl/rq45QZ.

[3]*Available at* http://goo.gl/JMAI9M.

The decision below, however, threatens to disrupt the settled expectations of countless manufacturers and other businesses that have relied on the availability of the equally weighted formula. Like the hypothetical company above, many businesses now find themselves potentially owing much more in taxes than they had originally anticipated, if (as the decision below holds) a member state has no "contractual obligation" to offer the formula. Pet. App. 15a. The amounts at stake are large. The question presented implicates not just Minnesota, but eight other states that have refused to offer the formula without actually withdrawing from the Compact. Pet. 29. When all nine states are taken into account, the question presented could affect a total tax liability of $3 billion nationwide. *Id.*

B. Businesses Have Relied On The Compact As A Source Of Uniform Taxation Rules

The consequences of the decision below do not end there. The Compact was intended to make income taxes not only more predictable, but also more uniform. *See* Pet. App. 89a (Compact art. I(2)) ("The purposes of this compact are to * * * [p]romote uniformity or compatibility in significant components of tax systems."). By opting for the equally weighted apportionment formula in each member state, a business could ensure that each of those states apportioned its income in the same way. *See* Council of State Gov'ts, *supra*, at 6.

Such uniformity, in turn, would serve another key purpose: "[a]void[ing] duplicative taxation." Pet. App. 89a (Compact art. I(4)). "[S]ome risk of duplicative taxation exists whenever the States in which a corporation does business do *not* follow identical

rules for the division of income." *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 278 (1978) (emphasis added). When states *do* follow identical rules, by contrast, the "possibility of double taxation" goes away. Council of State Gov'ts, *supra*, at 1.

Consider a company that does business across state lines. The company holds all of its property and pays all of its employees in State A, while also making $10 million in sales there. In State B, the company holds no property and pays no employees, but makes $15 million in sales. If both states applied the same equally weighted formula, 80% of the company's income would be taxable in State A, while 20% of its income would be taxable in State B.[4] By contrast, if State A applies an equally weighted formula and State B applies a formula "based exclusively on the sales factor," Pet. App. 5a n.3, 60% of its income would be taxable in State B—resulting in 40% of its income being taxed twice.[5] Uniformity avoids double taxation—and by avoiding double taxation, promotes fairness. *See* Pet. App. 89a (Compact art. I(1)) (identifying "the equitable apportionment of tax bases" as one of the purposes of the Compact).

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[4]Because the company has 100% of its property, 100% of its payroll, and 40% of its sales in State A, the equally weighted formula apportions 80% of the company's income (240% ÷ 3) to State A. Because the company has 0% of its property, 0% of its payroll, and 60% of its sales in State B, the equally weighted formula apportions 20% of the company's income (60% ÷ 3) to State B.

[5]Because the company has 60% of its sales in State B, a formula based exclusively on the sales factor apportions 60% of the company's income to State B.

If allowed to stand, the decision below would undermine these goals. Companies that engage in interstate commerce would no longer be able to guarantee that each member state applied the same formula in apportioning their income. Absent that guarantee, companies would face a serious risk of duplicative taxation as they do business across state lines.

In short, whether member states must offer the equally weighted formula until they actually withdraw from the Compact is of immense practical importance to manufacturers and other businesses nationwide. The petition should be granted to resolve, once and for all, the meaning of the Compact.

II. A STATE SHOULD NOT BE PERMITTED TO EVADE THE COMPACT'S WITHDRAWAL PROVISION

Because the Compact unmistakably commits each member state to abide by the Compact's terms, Minnesota was obligated to give petitioners the option of having their incomes apportioned according to the equally weighted formula. If Minnesota no longer wished to be bound by that obligation, it could have withdrawn from the Compact. Article X of the Compact sets forth the means for doing so: "Any party State may withdraw from this compact by enacting a statute repealing the same." Pet. App. 111a.

At the time of the tax years in question—2007, 2008, and 2009—Minnesota had *not* withdrawn from the Compact. *Id.* at 3a, 6a. To be sure, Minnesota enacted a statute in 1987 purporting to repudiate *some* of the Compact's provisions—including the requirement that taxpayers be given the option of

electing the equally weighted formula. *See* Act of May 28, 1987, ch. 268, art. 1, § 74, 1987 Minn. Laws 1039, 1098. But Article X allows only for "*complete* withdrawal" from the Compact. Pet. 26. The statute that Minnesota enacted in 1987 did not effect any such withdrawal.

That Article X requires a complete withdrawal is not just a formalism. There are important reasons why withdrawing from the Compact requires repealing the Compact *as a whole*.

First, requiring a complete withdrawal is key to one of the principal purposes of the Compact: staving off federal legislation regulating state taxation of interstate businesses. Fifty years ago, a report commissioned by Congress decried the "diversity and multiplicity" of state tax regimes. H.R. Rep. No. 89-952, vol. 4, at 1133 (1965). In light of that report, members of Congress proposed legislation to "mandate uniformity in state taxation." Pet. 5; *see also* Council of State Gov'ts, *supra*, at 4-5 (summarizing proposed legislation). This movement toward federal legislation prompted concerns among states that Congress would "curtail[] State and local taxing authority." Council of State Gov'ts, *supra*, at 2. California, for example, feared losing up to $100 million in state tax revenue. A.B. 1304 (Russell) (Cal. 1974), The Multistate Tax Compact: Summary Argument for the Bill 1.

The Compact was developed as an alternative to federal legislation. *See* Council of State Gov'ts, *supra*, at 1 ("The threat of federal action imparts a high degree of urgency to the undertaking."). The idea was that if enough states joined the Compact, a baseline level of uniformity would be achieved with-

out the need for federal intervention. But the idea would work only if, by joining the Compact, states committed to following *all* of its provisions. If states could simply pick and choose which provisions of the Compact to follow, the Compact would be considered a poor substitute for binding federal legislation. *See id.* at 5 (explaining that the Compact had "to assure taxpayers and public officials that multistate machinery exists to cope with any multistate aspects of the State and local tax problem").

There are good reasons to believe that Article X of the Compact played a crucial role in forestalling congressional intervention. Because Article X permitted only complete withdrawal, member states had to abide by *all* of the Compact's provisions, even ones they did not like. Joining the Compact was thus a true commitment, and Congress ultimately saw no need for federal legislation. Instead, "[f]ollowing the Compact's adoption, none of the proposed federal bills became law." Pet. 6. The decision below would nevertheless allow member states to repudiate the Compact one provision at a time, as Minnesota did here. By depriving Article X of any real meaning, the decision below would allow states to back out on the very commitment that helped stave off federal intervention.

Second, making withdrawal an all-or-nothing proposition ensures that a state cannot reap the benefits of the Compact without bearing the obligations. Contrary to the Minnesota Commissioner of Revenue, the Compact is more than just a "model law." Pet. App. 37a. By joining the Compact, a state receives various benefits beyond incorporating "model" provisions into its tax code. For example, every state that joins the Compact becomes a voting mem-

ber of the Multistate Tax Commission. *Id.* at 100a (Compact art. VI(1)). As voting members, states may exercise influence over the development of tax laws, *id.* at 103a (Compact art. VI(3)), as well as the adoption of regulations for administering such laws. *Id.* at 105a (Compact art. VII(1)). In addition, member states may ask the Commission to conduct audits of multistate taxpayers. *Id.* at 106a-108a (Compact art. VIII). A single audit, performed by the Commission, could thus "suffice to verify [the taxpayer's] returns to all jurisdictions," saving member states time and expense. Council of State Gov'ts, *supra*, at 7.

These are no small benefits. And yet, when Minnesota purported to eliminate the equally weighted formula as an option in 1987, it did not relinquish any of them. In the years that followed, Minnesota even enjoyed the privilege of serving as vice-chair and chair of the Commission. Pet. App. 29a. If Minnesota was to continue reaping all of the benefits of the Compact, it should have been required to continue bearing all of its obligations—including the requirement that it make the equally weighted formula available to taxpayers. Article X thus prohibits the sort of piecemeal withdrawal that Minnesota sought to accomplish.

Third, requiring a complete withdrawal ensures that a state's decision to break from the Compact gets the close scrutiny it deserves. In each member state, the Compact's provisions affect countless manufacturers and other businesses. If a state is to consider eliminating those provisions, it should give those businesses adequate notice. Requiring the state to repeal the entire Compact does just that, guaranteeing that those affected will be aware of

what is happening. Those businesses can then make their voices heard, either for or against that wholesale change. The process required by Article X thus fosters an open and deliberative debate over whether to withdraw. *See* Pet. 26.

In short, the Minnesota Supreme Court should have required Minnesota to go through the Article X process to break from the Compact. Instead, the court allowed the state to selectively repudiate just some of the Compact's many provisions. Because the enforceability of the Compact is vitally important to American manufacturers and other businesses, this Court should grant the petition and reverse the judgment below.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.

Respectfully submitted,

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