No. 16-687

In The
Supreme Court of the United States

SONOCO PRODUCTS COMPANY, *et al*.,

Petitioners,

v.

DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Michigan

PETITIONERS' REPLY BRIEF

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RULE 29.6 STATEMENT

Petitioners have no amendments to the Rule 29.6 Statement contained in their Petition for a Writ of Certiorari other than the following:

Petitioner Ingram Micro Inc. & Subsidiaries consists of Ingram Micro Inc. and its wholly owned subsidiaries. Ingram Micro Inc.'s parent corporation is GCL Investment Holdings, Inc. Both Tianjin Tianhai Investment Company, Ltd. and Hubei Biocause Pharmaceutical Co., Ltd. are publicly traded and indirectly own more than 10% of the stock of Ingram Micro Inc.

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ARGUMENT

I. Michigan's 2014 Retroactive Repeal of the Compact Was Retroactive and Respondent's Attempt to Rely Upon the Adequate and Independent State Ground Doctrine Is Baseless.

In Respondent's Brief in Opposition ("Brief in Opp."), Respondent makes the incredible argument that 2014 Mich. Pub. Acts 282 (the "2014 Act"), which purported to repeal the Multistate Tax Compact (the "Compact") effective January 1, 2008, was not retroactive as a matter of Michigan law. Respondent never made this argument below, it was not adopted by the courts below, and it is contrary to the language of the 2014 Act, which expressly provides that the Compact "is repealed retroactively and effective beginning January 1, 2008." Respondent relies upon language in the 2014 Act that states:

> It is the intent of the legislature that the repeal of [the Compact] is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36 . . . and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301. . . .

Thus, Respondent apparently believes that a state legislature may immunize retroactive legislation from

scrutiny by this Court by merely claiming that it is expressing the intent of a prior legislature.

Respondent confuses the unremarkable fact that a Court may retroactively apply a statutory amendment, in circumstances in which constitutional rights are not violated, with the belief that this result means no retroactivity has occurred. For example on page 18 of the Brief in Opp., Respondent cites *Trinova Corp. v. Dep't of Treasury*, 421 N.W.2d 258, 262 (Mich. Ct. App. 1988) for the proposition that a "later statement of legislative intent by the Legislature is binding upon this Court." The *Trinova* court, however, did not hold that this did not mean there was no retroactivity. Indeed, the *Trinova* court held that the statutory amendment at issue "has retroactive effect." 421 N.W.2d at 262. Similarly, the Michigan Court of Appeals noted numerous times in its opinion below that the 2014 Act was retroactive. See, e.g., App. at 20, 34, 41-42, and 49.

Respondent's citation of authority on page 17 of the Brief in Opp. for the proposition that statutory amendments enacted "soon after a controversy arises" are construed as a legislative interpretation of the original act is bizarre given that there was no such promptness here. In this case, the 2014 Act was enacted: (1) almost five years after taxpayers began filing tax returns relying upon the Compact; (2) four years after many taxpayers began litigating the issue; (3) four years after the 2010 Legislature first considered repealing the Compact; and, (4) over three years after the 2011 Legislature enacted legislation precluding Compact apportionment for tax years after January 1,

2011. Respondent apparently believes that the Legislature acted "promptly" because it acted within 59 days of the Michigan Supreme Court's decision in *Int'l Bus. Machines Corp. v. Dep't of Treasury*, 852 N.W.2d 865 (Mich. 2014) ("*IBM*"). Waiting until litigation has been conclusively resolved by a state's highest court, however, is not acting "soon after a controversy arises."

Respondent's attempt to rely upon the adequate and independent state ground doctrine is misplaced. Brief in Opp. at 19-20. The Michigan Court of Appeals below analyzed the federal claims presented in Petitioners' Petition using precedent of this Court, such as *United States v. Carlton*, 512 U.S. 26 (1994). The adequate and independent state ground doctrine is not implicated "when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law. . . ." *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). Furthermore, a state should not be able to avoid constitutional challenges to a retroactive law by attempting to impose a unique definition of the term "retroactive" upon this Court. Indeed, such concerns are the reason that the Court has held on numerous occasions that the adequate and independent state ground doctrine does not preclude constitutional challenges such as those presented here. In the context of a challenge under the Contract Clause, for example, the Court has held that "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and obligations, and whether the State has, by later

legislation, impaired its obligation." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). See also *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930) ("Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not thus be evaded").

II. Respondent's Brief in Opposition Is Misleading.

On pages 5, 11 and 19 of the Brief in Opp., Respondent claims that, from the enactment of the Michigan Business Tax ("MBT") until the Michigan Supreme Court's July 14, 2014 decision in *IBM*, no Michigan Court had held that the Compact applied to the MBT. That statement is untrue. On June 6, 2013, the Michigan Court of Claims held that the Compact applied to the MBT, that the Compact had not been repealed by implication, and that a taxpayer was permitted to elect to apportion its MBT business income tax base using the Compact's three-factor formula in *Anheuser-Busch, Inc. v. Michigan Dep't of Treasury*, Michigan Court of Claims No. 11-85-MT. Commentators noted that this created a split of authority in Michigan regarding the application of the Compact to the MBT. See, e.g., Christopher Young, *Expert Insight: Recent MTC Trends, States Begin to Respond to 'Gillette'*, http://www.bna.com/expert-insight-recent-b17179874734.

On pages 13 and 37 of the Brief in Opp., Respondent argues that there was no reliance by taxpayers on the Compact because some taxpayers filed original tax returns using single sales factor apportionment and then filed amended returns using the Compact election years later. There are many reasons why those taxpayers did so and none of them negate reasonable reliance upon the Compact election. First, any taxpayer that had filed its original MBT return using the Compact election and paid only the resulting lower tax liability would have had penalty imposed upon it for underpayment of tax. See, e.g., *Solo Cup Operating Corp. v. Dep't of Treasury*, 2016 WL 7401899 (2016) (noting that penalty was imposed upon a taxpayer that utilized the Compact apportionment election). Second, if a publicly traded company had filed an original return using the Compact apportionment election position, it would have had to have disclosed an "uncertain tax position" in its securities filings,[1] which are generally disfavored by investors. Finally, once a taxpayer had filed a return taking the Compact election, Respondent would issue a Notice denying the election, which had to be appealed to the Michigan Court of Claims within 90 days. MICH. COMP. LAWS. §205.22(1). Some taxpayers, therefore, delayed filing returns electing to utilize the Compact in order to delay incurring litigation costs in the hopes that the issue would be resolved by other taxpayers.

[1] See, e.g., *Wells Fargo & Co. v. U.S.*, 112 AFTR 2d 2013-5380 (DC MN, 6/4/2013) (describing accounting for uncertain tax positions).

Thus, the peculiarities of tax law, not a lack of reliance, explains why many taxpayers filed amended returns taking the Compact election.

On page 15 of the Brief in Opp., Respondent claims that two Justices of the Michigan Supreme Court would have granted review of the decision below "based on two state-law questions . . . that petitioners do not present in their petitions." Respondent intimates that those Justices believed there were only issues of state law presented. In fact, those Justices also wished to resolve whether the 2014 Act "is . . . consistent with federal due-process protections" or "violate[s] either the federal or state prohibitions against the impairment of contracts. . . ." See App. 148-149.

III. Respondent's Brief in Opposition Demonstrates That a Writ of Certiorari Should Be Issued.

On pages 25 and 26 of the Brief in Opp., Respondent provides citations to a dozen cases in which this Court has denied Certiorari regarding retroactive changes to state tax laws since 1997. These citations demonstrate that, as many *amici* have stated, retroactive state tax law changes are occurring more frequently and guidance is needed from the Court. Furthermore, Petitioners do not believe any of the cases cited by Respondent involved a retroactive change to

a state tax law that only disadvantaged out-of-state businesses operating in interstate commerce.[2]

Respectfully submitted,

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[2] On page 5 of the Brief in Opp., Respondent claims that only out-of-state companies could elect to use the Compact apportionment election. That is not true. "Any taxpayer" subject to apportionment (i.e., generally any taxpayer operating in interstate commerce) could make the election. App. 213. Under the circumstances presented in this case, however, only out-of-state taxpayers would have benefited from the election.