UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 00-2425

PHILLIP MORRIS, INCORPORATED, ET AL.,
Plaintiffs-Appellees,

v. **THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.,**
Defendants-Appellants.

No. 00-2449

UNITED STATES TOBACCO COMPANY, ET AL.,
Plaintiffs-Appellees,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Brief *Amicus Curiae* of Environmental Defense, Consumer Federation of America, Calvert Group, Ltd., OMB Watch, Working Group on Community Right to Know and Atlantic States Legal Foundation in Support of Appellants and Urging This Court to Reverse the District Court Judgment

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CORPORATE DISCLOSURE STATEMENT

The parent of amicus Calvert Group Ltd. is the Acacia Financial Corporation, which in turn is owned by Ameritas Acacia Mutual Holding Company. No publicly traded company owns 10% or more of the stock of Calvert Group, Ltd.

The other amici are not-for-profit corporations or, in the case of the Working Group on Community Right to Know, a project of a not-for-profit corporation. It is my understanding that these not-for-profit organizations have no parent corporations and issue no stock.

Dated: February 8, 2001.

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STATEMENT OF INTERESTS OF AMICI CURIAE

The amici curiae are Environmental Defense, Consumer Federation of America, Calvert Group Ltd., OMB Watch, Working Group on Community Right to Know, and Atlantic States Legal Foundation. The amici have an interest in this case because it has important implications for government's ability to require public disclosure of information about potentially harmful ingredients in products sold to the public. The Calvert Group Ltd., a manager of private investment funds, makes investment decisions based in part on whether a firm's products may contain harmful ingredients and, therefore, has an interest in supporting public disclosure of information about potentially harmful ingredients in commercial products. The other amici, which are non-profit public interest organizations, support public disclosure of product information as a valuable policy tool for protecting public health, safeguarding the environment, and empowering citizens to make informed choices about risks to their individual well being. SUMMARY OF ARGUMENT

In Ruckeslhaus v. Monsanto Company, 467 U.S. 986, 1016 (1984), the Supreme Court recognized that disclosure of information about products sold to the public "can provide an effective check on the decision-making processes [of government] and allows members of the public to determine the likelihood of individualized risks peculiar to their use of the product." The Massachusetts ingredient disclosure law serves these valuable purposes by promoting public access to information about the ingredients in tobacco products, the deadliest products marketed to American consumers by far. The District Court's ruling that the Massachusetts law violates the Takings Clause of the Fifth Amendment not only invalidates this law, but also threatens to undermine the use of information disclosure across the country as a "check" on government and as tool to help citizens make informed choices affecting their health.

The ruling by the District Court represents an extraordinary and, as far as we can determine, unprecedented departure from settled law.[1] The ruling contradicts the Supreme Court's Monsanto decision and numerous other Supreme Court (and lower court) decisions upholding government's ability to impose reasonable information disclosure requirements on manufacturers of products

sold to the public. The District Court's reasoning would invalidate both federal and state "right to know" laws across the country.

The District Court's analysis is mistaken. In Monsanto the Supreme Court held that a requirement that a manufacturer disclose trade secret information does not effect a taking so long as the requirement is "rationally related" to a legitimate government interest in protecting public health. The Massachusetts ingredient disclosure law is, at a minimum, rationally related to protecting the public health of Massachusetts citizens.

Contrary to the District Court's view, neither Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1983), nor Nollan v. California Coastal Council, 483 U.S. 825 (1987), undermines or alters the Monsanto standard. The Court in Lucas held that a regulation that eliminates economically viable use of **real property** will generally result in a taking. However, the Lucas Court carefully distinguished and preserved the longstanding principle that the government can strictly regulate **personal property** (including intangible property), even to the point where the value of the property destroyed, in order to protect public health. The District Court erred by ignoring this crucial distinction.

The District Court also erred by embracing the argument that certain language in Nollan changes the meaning of Monsanto. The language in Nollan actually reaffirms the conclusion in Monsanto that commercial businesses can be required to disclose certain trade secret information in exchange for the benefit of being able to sell their products to the general public. In addition, even if there were merit to the tobacco companies' Nollan argument, that argument cannot by itself support a finding of a taking.

Finally, the taking claim cannot be sustained on the alternative theory that Nollan and the Court's decision in Dolan v. City of Tigard, 512 U.S. 374 (1994), supply appropriate standards for determining whether there is a taking in this case. The District Court rejected this theory and, therefore, made no findings that would support a taking determination under the Nollan/Dolan standards. Furthermore, the Supreme Court ruled in City of Monterey v. Del Monte Dunes Ltd., 526 U.S. 687 (1999), that the Dolan "rough proportionality" test -- and, by overwhelming implication, the Nollan "essential nexus" test -- are limited to the context of land use "exactions." Finally, even if the Nollan "essential nexus" test could properly be applied in this case, the ingredient law would satisfy that test.[2]

ARGUMENT

1. THE SUPREME COURT'S MONSANTO DECISION AND OTHER, SIMILAR U.S. SUPREME COURT DECISIONS REQUIRE REJECTION OF THIS TAKINGS CLAIM.

Monsanto requires rejection of this takings claim. The case involved a suit brought by the Monsanto Company under the Takings Clause challenging provisions of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) authorizing the Environmental Protection Agency (EPA) to utilize and publicly disclose certain data submitted by pesticide manufacturers. Like the tobacco companies in this case, Monsanto alleged that it invested millions of dollars in developing the data, that the information would be valuable to its competitors, and that the company had gone to elaborate lengths to protect the confidentiality of the data. Id. at 998.

Because the statutory framework had changed over time the Court analyzed the takings claim separately for different periods of time. The Court found that during one period the EPA had made "explicit assurances" and "explicitly guaranteed" that it would not publicly disclose the data. Id. at 1011. As to that period, the Court concluded, EPA disclosure of the data to the public would constitute a taking. Id. During the other two periods the statute had either been silent about the

issue of confidentiality or explicitly indicated the data would be disclosed to the public. Id at 1005-10. As to these two periods, the Court concluded that the company lacked "reasonable investment-backed expectations" in the confidentiality of the data and, therefore, rejected the taking claim. Id.

Like the tobacco companies in this case, Monsanto argued that the disclosure requirement constituted a type of "unconstitutional condition." The Court rejected the argument:

> "[M]onsanto has not challenged the ability of the Federal Government to regulate the marketing and use of pesticides. Nor could Monsanto successfully make such a challenge, for such restrictions are the burdens we all must bear in exchange for the advantage of living and doing business in a civilized country.... This is particularly true in an area, such as pesticide sale and use, that has been the source of public concern and the subject of government regulation.... [A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." Id. at 1007 (internal citations omitted).

The Massachusetts ingredient law plainly does not effect a taking under this analysis. Tobacco products, like pesticides, are a "source of public concern and the subject of government regulation." The Massachusetts law, like FIFRA, informs the companies that if they wish to sell their products they will be required to submit certain information which may subsequently be disclosed to the public. Finally, the ingredient disclosure requirement, like FIFRA, is "rationally related" to the Commonwealth's legitimate interest in protecting the health of its citizens. The law allows the Department of Health to carefully evaluate the health risks associated with specific tobacco products. To the extent the Department releases ingredient information to the public, the law will permit individual citizens to evaluate the risks posed by ingredients in the products and take steps to avoid those risks. The disclosure of this information also will operate as a check on government by providing citizens information they can use to develop new public or private strategies to address the hazards posed by tobacco products. Broad public disclosure of ingredient information is especially appropriate in the case of cigarettes and other tobacco products given that these products are highly addictive and are already known to contain certain ingredients which are extremely harmful to human health.[3]

Monsanto is consistent with a long line of U.S. Supreme Court precedent. For example, in Corn Prods. Refining Co. v. Eddy, 249 U.S. 427 (1919), the Court rejected, unanimously, the claim that the State of Kansas effected a "taking" by requiring a manufacturer of table syrup to publicly disclose the percentage of each ingredient in the syrup. The Court said.

> [I]t is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth.

Id. at 431-32. The Monsanto Court relied upon and quoted from Corn Products. See 467 U.S. at 1007-08.

Corn Products represents an a fortiori precedent supporting the ruling in Monsanto and for rejecting the takings claim in this case. In Corn Products, the Kansas ingredient disclosure law was designed to inform consumers about the "wholesomeness or food value" of the syrup. 249

U.S. at 431. The plaintiff syrup manufacturer defended its alleged property right to keep ingredient information from the public by arguing that a different, more compelling case for public disclosure would be presented if the product contained "deleterious or injurious ingredients." Id. In contrast to table syrup, there is a high likelihood that tobacco product additives are deleterious and injurious. If there was no taking in Corn Products, there clearly can be no taking in this case.

Similarly, in National Fertilizer Assn v. Bradley, 301 U.S. 178 (1937), the Supreme Court rejected the argument that a South Carolina law deprived fertilizer manufacturers of their property rights by requiring them to publicly disclose the ingredients in fertilizer sold to the public. In another unanimous opinion, the Court said: "In response to the assertion that compliance with the 'Open Formula' amendment would require complainants to reveal secret formulas and thus unwittingly deprive them of property, it is enough to refer to [Corn Products]." Id. at 182, quoting Corn Products. National Fertilizer actually extended the ruling in Corn Products by stating that "the same principle is broad enough to meet the further claim of right to sell products manufactured prior to the passage" of the law. Id.

Federal and state court decisions subsequent to Monsanto also recognize that reasonable public health legislation compelling companies to disclose "trade secret" information does not effect a taking. In New Jersey State Chamber of Commerce v. Hughey, 600 F.Supp. 606 (D.N.J,1985), aff'd in relevant part, 774 F.2d 587 (3rd Cir. 1985), the court rejected the claim that the New Jersey Worker and Community Right to Know Act effected a taking by requiring employers to disclose the presence of certain hazardous chemicals in a fashion that would reveal trade secret information. Invoking the standard articulated in Monsanto, the court said: "[A]s long as the employer is aware of the conditions under which the data are submitted and as long as the conditions are rationally related to a legitimate government interest, a submission under the Right to Know Act does not constitute a taking." Id. at 628. See also Manufacturers Assn of Tri-County v. Knepper, 801 F.2d 130 (3rd Cir. 1996) (affirming the rejection of a similar takings challenge to the Pennsylvania Community Right to Know Act). Cf. State of Alaska v. Arctic Slope Regional Corp., 834 P.2d 134 (Alaska 1992) (compelled disclosure of well drilling data not a taking). In fact, we are not aware of a single post-Monsanto ruling (other than the ruling in this case) that an information disclosure law or regulation effects a taking.[4]

The rule applied in Monsanto, Corn Products and other cases is based on the broader principle that intensive regulation of the manufacture and sale of commercial products does not offend the Takings Clause. In appropriate circumstances, the Supreme Court has recognized, government can ban the manufacture or sale of specific products to protect public health. In Mugler v. Kansas, 123 U.S. 623 (1887), the Court stated:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interest."

Id. at 668-69. The Court has applied this principle on numerous occasions to uphold bans on the sale of commercial products. See, e.g., Purity Extract & Tonic Co v. Lynch, 226 U.S. 192 (1912) (Mississippi prohibition against the sale of malt liquors not a violation of the Fourteenth Amendment); Powell v. Pennsylvania, 127 U.S. 678 (1888) (Pennsylvania ban on the sale of oleomargarine not a violation of the Fourteenth Amendment); Pierce Oil Co. v. City of Hope, 248 U.S. 498, 499 (1919) ("A State may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States"), citing Patterson v. Kentucky, 97 U.S. 401 (1878).[5]

Given the overwhelming evidence of the deleterious effects of tobacco

products on human health, the Commonwealth could ban the sale of all or most tobacco products without effecting a taking. See Brief of Phillip Morris Incorporated et al. 22 n.10 (filed in the U.S. Court of Appeals for the First Circuit, May 12, 1998) ("We assume arguendo, but do not concede, that the Commonwealth of Massachusetts could ban the sale of cigarettes within its borders."). As the Supreme Court explained in FDA V. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000):

> [The] FDA... [has] detail[ed] the deleterious health effects associated with tobacco use. It found that tobacco consumption was the single leading cause of preventable death in the United States. According to the FDA, [m]ore than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease.'"

Id. at 127-28 (internal quotations and citations omitted). The FDA also has reported that each year smoking kills more people than AIDS, alcohol, drug abuse, automobile accidents, murders., suicides and fires combined. 61 Fed. Reg. 44,398 (May 28, 1996). Tobacco products are infinitely more harmful to public health than numerous other products the banning of which has previously been upheld by the Supreme Court.

If the Commonwealth could ban the sale of tobacco products to protect public health without offending the Takings Clause, the Commonwealth can certainly take the lesser step of requiring public disclosure of ingredients in tobacco products to achieve the same objective. As Justice Holmes stated, the "general rule" is that the "greater power" to ban an activity includes the "lesser power" to allow the activity subject to certain conditions. Rippey v. Texas, 193 U.S. 504, 510 (1904). See also Seaboard Air Line Railway v. State of North Carolina, 245 U.S. 298, 304 (1917) (state power to ban sale of alcohol implies the lesser power to require shipper to maintain public record of every shipment of liquor). Monsanto recognizes that the greater power to ban a product to protect public health includes the lesser power to impose an information disclosure requirement that is "rationally related" to the same objective. As explained above, that standard is easily met in this case.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT RECENT SUPREME COURT TAKINGS DECISIONS OVERRULE MONSANTO AND OTHER SUPREME COURT PRECEDENTS.

The District Court, embracing arguments advanced by the tobacco companies, concluded that it could disregard Monsanto (and the long line of authority upon which it is based), on the ground that Monsanto had been effectively overruled by the Court's subsequent decisions in Lucas v. South Carolina Coastal Council, 505 U.S. 1005 (1993), and Nollan v. California Coastal Council, 483 U.S. 825 (1987). In fact, neither decision undermines Monsanto in any respect.

A. THE LUCAS DECISION IS ENTIRELY CONSISTENT WITH MONSANTO.

The District Court upheld the taking claim based principally on the takings test articulated in Lucas and the factual finding that the law would deprive tobacco companies of the "economically viable use" of the "secrecy of the information" required to be submitted to the Department of Public Health. See 113 F.Supp. at 143. In fact, it is unlikely the Massachusetts law would destroy the economic value of tobacco company trade secrets. See Brief of Appellant, at 21-26. But the more fundamental legal point is that, even if the Massachusetts law would have this effect, Lucas does not apply to this case and, therefore, does not support the District Court ruling.[6]

The sweeping character of the District Court ruling cannot be overstated. Different federal and state laws require, according to various standards and procedures, that firms disclose certain

trade secret information as a condition of doing business within a particular state or the nation as a whole.[7] Based on the reasoning of the District Court, all of these laws are now open to challenge under the Takings Clause. The District Court ruling is wrong and should be reversed.

Lucas involved a takings challenge to a South Carolina coastal protection law that prohibited Mr. Lucas from developing two coastal lots he had purchased a few years earlier. According to the uncontested findings of the trial court, the new law rendered the property "valueless." 505 U.S. at 1007. The Supreme Court reversed the lower court's rejection of the takings claim, ruling that destruction of the economic value of the property established a taking. The State could rebut the finding of a taking, the Court said, only if the coastal law could be justified based on the narrow exception for regulations that parallel "background principles" of nuisance or property law. Id. at 1031-32.

The critical point for present purposes is that Lucas only applies to takings challenges to regulation of real property interests. In the course of its opinion, the Court observed that every property owner "necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." 505 U.S. at 1027. But then, drawing a sharp distinction between real and personal property, the Court said: "And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." Id. at 1027-28 (emphasis added). The Court then explained the significance of this distinction for the purpose of takings analysis: "In the case of land..., we think the notion pressed by the council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." Id. at 1028. By contrast, in the case of personal property, the Court's discussion indicates, personal property is held subject to the "implied limitation" that government regulation can in some cases destroy "all economically valuable use" of the property without violating the Takings Clause The trade secrets at issue in this case are obviously a form of intangible personal property used in the manufacture of products sold in commerce. Lucas, which establishes a rule for regulation of land, does not apply to this case.

The fact that different standards apply to personal versus real property does not mean personal property is not protected by the Takings Clause. A naked appropriation of property, whether the property is real or personal, whether the appropriation is effected through regulation or by other means, can result in a taking. The language in Lucas simply means that the Court has preserved a broader scope for the legitimate exercise of the police power in the case of personal property than in the case of real property. Under Lucas, a police power justification is not sufficient to save a regulation that destroys the value of real property from a finding of a taking. On the other hand, a police power justification can preclude the conclusion that a similarly stringent regulation of personal property effects a taking.

This reading of Lucas is confirmed by a review of the issues actually at stake in the case as it was presented to the Supreme Court. As discussed, the Mugler Court said that a prohibition on "the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking." In subsequent cases, the Court applied this rule to support the rejection of takings claims. See, e.g., Keystone Bituminous Coal Assn v. DeBenedictis, 480 U.S. 470, 489 (1987); Miller v. Schoene, 276 U.S. 272, 279 (1928). On the other hand, the Court also frequently said that a taking occurs when a regulation eliminates all of the property's economically beneficial use. See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316-17 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). In Lucas the Court confronted the task of reconciling these conflicting lines of precedent. One specific issue raised by this task, as discussed in the amicus brief filed by the Unites States,[8] was how to reconcile the apparent rule

for "total takings" with numerous decisions (some of which are discussed in section I of this brief) granting government wide latitude in regulating the manufacture and sale of foods, drugs, and other personal property sold in commerce. The Lucas Court carefully carved out regulation of personal property interests from the "total taking" rule in order to avoid disturbing the settled principle that the government has broad police power authority to regulate the manufacture and sale of commercial goods. See 505 U.S. at 1027-28.

Thus, the District Court erred in believing that Lucas could support the finding of a taking in this case.[9]

B. THE NOLLAN DECISION DOES NOT SUPPORT THE DISTRICT COURT'S ATTEMPT TO REWRITE MONSANTO.

In addition to relying on the Lucas decision, the District Court also concluded that the tobacco companies' takings claim was supported by the Supreme Court's 1987 decision in Nollan. See 113 F.Supp. at 144. This, too, was error.

As discussed, in Monsanto the Court rejected the takings challenge to the disclosure of trade secret information, stating in part that "a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." In Nollan the court described the ruling in Monsanto as follows: "In Monsanto... we found... that the Takings Clause was not violated by giving effect to the Government's announcement that application for 'the right to the valuable Government benefit' of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application." 483 U.S. at 833, n.2. The Court distinguished the "benefit" received by the company in Monsanto from the "right" to seek permission to develop real property in Nollan. Id.

According to the tobacco companies' argument, which the District Court embraced, the language from Nollan quoted above demonstrates that the Court believes the taking claim in Monsanto failed because a specific quid pro quo, the EPA registration, was offered by the government in exchange for the disclosure of trade secrets. In this case, the argument continues, the tobacco companies are receiving no quid pro quo in exchange for their trade secret information. The opportunity to sell tobacco products, the tobacco companies maintain, is analo-gous to the "right" to develop real property at issue in Nollan, but not to the "benefit" of an EPA registration as in Monsanto. Thus, the argument concludes, Monsanto, at least as reinterpreted by Nollan, is distinguishable from this case.

In fact, the tobacco companies enjoy exactly the same "benefit" described in Nollan. Nollan contains no indication that the Court regards receipt of the EPA registration in Monsanto as qualitatively different from legal authority to sell other commercial products to the general public. Massachusetts obviously could enact some kind of technical licensing procedure for tobacco companies wishing to do business in the Commonwealth. But it is implausible that the takings analysis should turn on whether a state has adopted that kind of procedure. Thus, even if it were plausible that the analysis in Monsanto could be superseded based on footnote language in Nollan, which after all dealt with land use rather than information disclosure, the actual language in Nollan does not support the argument.[10]

This interpretation is further supported by the Monsanto Court's discussion of information disclosure as a legitimate condition imposed on pesticide manufacturers wishing to do business in the United States. The Court said that information disclosure was an appropriate requirement in exchange "for the ability to market pesticides in this country," id. at 1007, and represented the type of burden "we all must bear in exchange for the advantage of living and doing business in a civilized society." Id. The Court observed that if a company valued the confidentiality of its trade secrets more than the opportunity to market its products in the United States, it "could decide to

forgo registration in the United States and sell a pesticide only in foreign markets." Id. at 1007 n11. Rejection of the takings claim did not turn on the receipt of any quid pro quo, other than the opportunity to sell pesticides in the United States.

Before the District Court, the tobacco companies tried to bolster their revisionist reading of Monsanto by identifying various specific "benefits" which the company ostensibly received in exchange for submitting trade secret information. The companies pointed to various provisions of FIFRA discussed in Monsanto which granted pesticide manufacturers, for different periods of time, either exclusive rights to use their data or a right to compensation for others' use of their data. This argument is wholly unpersuasive. The fact that government does not deprive an owner of the use of certain sticks in her bundle of rights can hardly be termed a benefit received "in exchange" for the deprivation of the use of other sticks in the bundle.

The tobacco companies' attempt to reinterpret Monsanto also is refuted by the precedents upon which Monsanto relies. There is not the slightest suggestion in Corn Products or National Fertilizer, for example, that the Supreme Court rejected the takings challenges to the information disclosure requirements in those cases because the Court believed the firms were receiving a quid pro quo. Rather, the Court believed that information disclosure was an appropriate condition imposed on the opportunity to do business in the states involved.

Finally, even if there were some merit to the argument that the tobacco companies are not the recipients of the same kind of benefit at issue in Monsanto, this argument does not by itself support a finding of a taking. In Nollan itself, which described the opportunity to develop real property as a "right," the Court did not conclude that conditioning the Nollans' land use permit necessarily effected a taking. The Court ruled that the condition imposed in that case (the requirement that the Nollans grant public access to their beach) effected a taking because the Council could not demonstrate an "essential nexus" between the condition and a legitimate Council regulatory policy. Thus, even if the opportunity to sell tobacco products were a "right" within the meaning of Nollan, and assuming the tobacco companies were otherwise entitled to invoke Nollan, they could not prevail on a taking claim based on that ruling unless the Massachusetts ingredient law also failed to satisfy the essential nexus test.

As we discuss below, Nollan does not in fact apply to this type of case and, if it did, the Commonwealth could easily establish an essential nexus.

3. DOLAN AND NOLLAN

DO NOT INDEPENDENTLY SUPPORT THIS TAKINGS CLAIM

Before the District Court, the tobacco companies attempted to establish a taking based on Nollan's "essential nexus" test and the "rough proportionality" test from Dolan v. City of Tigard, 512 U.S. 374 (1994). The District Court declined to accept this alternative theory and made no findings that would support a taking under these tests. In any event, this Court should reject this theory as a matter of law.

In City of Monterey v. Del Monte Dunes Ltd, 526 U.S. 687 (1999), the Supreme Court expressly declined to "extend[] the rough-proportionality test of Dolan beyond the special context of exactions--land-use decisions conditioning approval of development on the dedication of property to public use." Id. at 702. The present case obviously does not involve a challenge to "exactions" as the Supreme Court has defined that term. Thus, the Del Monte Dunes ruling, which was handed down after the parties filed their cross-motions for summary judgment in the District Court, requires rejection of the Dolan claim.

Del Montes Dunes also effectively disposes of any Nollan claim. The Supreme Court in Del Monte Dunes cited Nollan in its discussion of this issue, see 526 U.S. at 702, signaling its understanding that its ruling on the scope of Dolan applied to Nollan as well. Both cases deal with the constitutionality of land use exactions and it is only logical to conclude that Dolan and Nollan have the same limited scope. See Tahoe Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 216 F3rd 764, 772 (9th Cir. 2000), cert. petition pending on unrelated issues ("The [Supreme] Court has held [in Del Monte Dunes] that the Nollan/Dolan test is inapposite to regulatory takings cases outside the context of excessive exactions.") (emphasis added).

Furthermore, it is clear why, as matter of first principles, the Dolan and Nollan tests are confined to the exactions context and cannot properly be extended to this type of case. Both Dolan and Nollan deal with the use of land which, as discussed in section II.A., is subject to stricter protection under the Takings Clause than the sale of commercial goods, such as tobacco products. In addition, both cases deal with conditions that, standing alone, would have resulted in per se physical- occupation takings. See Nollan, 483 U.S. at 831; Dolan, 512 U.S. at 384. The per se physical occupation doctrine does not apply to the type of intangible property interests involved in this case. See note 6, supra. In sum, Dolan and Nollan are designed to address special issues in the takings field which simply are not raised by this case.

Finally, even if Nollan could properly be applied more broadly than Dolan after Del Monte Dunes, there is an "essential nexus" between the ingredient disclosure law and the Commonwealth's legitimate interest in protecting public health. As discussed in section I, the Commonwealth could (if it chose to do so) ban the sale of tobacco products in order to protect public health without violating the Takings Clause. There is clear nexus between the public health goal that would be served by the total ban and the public health goal that will be served by requiring tobacco companies to submit information about the ingredients in their products to the Department of Public Health. [11] **CONCLUSION**

For the foregoing reasons, the Court should reverse the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(B) and (C), John D. Echeverria, Counsel for Amici Curiae, an attorney who has filed an application to practice before the United States Court of Appeals for the First Circuit, hereby certifies that:

1. The Brief Amicus Curiae of Environmental Defense, et al., complies with the type and volume limitations of F.R.A.P. 32(a)(7).

2. The Brief Amicus Curiae of Environmental Defense, et al. contains 6,996 words as measured by the word-processing system used to prepare this brief.

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Footnotes:

[1] The Court addressed some of the issues in this case in Philip Morris Inc. v. Harshbarger, 159 F.3d 670 (1st Cir. 1998). Given the posture of the case at that time, however, the Court emphasized that it "need not rule definitively." Id. at 678. The Court also said "we are comfortable in concluding that [the Commonwealth's argument] probably will bear no fruit," but acknowledged that "we cannot entirely dismiss the Commonwealth's argument." Id. See also Id. at 675 (observing that the Commonwealth had not yet "developed any independent 'police power' rationale to justify its position"). The tobacco companies urged the Court not to scrutinize the legal arguments on the ground that review of a preliminary injunction did "not provide a suitable occasion for this Court to give plenary review to the important, novel and complex constitutional issues that are presented in this case." Brief of Plaintiff-Appellees Phillip Morris Incorporated, et al., at 3 (filed May 12, 1998). Now, of course, is the time for "plenary review" of the tobacco companies' novel constitutional theories. In addition, as we discuss below, the Supreme Court's 1999 decision in City of Monterey v. Del Monte Dunes Ltd, 526 U.S. 687, seriously undermines some of the tobacco companies' earlier arguments.

[2] The amici agree with the Commonwealth that the Commerce Clause and the procedural Due Process claims are without merit. The amici also support the Commonwealth's position that this facial challenge is not ripe. The ingredient law requires the Department of Health to exercise judgement about what information submitted by the tobacco companies to disclose to the public. Given that the Department has not yet implemented the statute, the claim that every possible application of the law will result in taking cannot be sustained. In advance of the Department's actual implementation of the statute, the judiciary cannot be asked to speculate about what ingredient information the Department might or might not disclose to the public or about whether such disclosure might or might not destroy trade secrets.

[3] Another threshold question is whether the tobacco companies are entitled to pursue this claim for injunctive relief. In general, equitable relief is not available for an alleged taking unless the compensation remedy is plainly unavailable. See Monsanto, 467 U.S. at 1016. See also Preseault v. ICC, 494 U.S. 1, 11 (1990). Cf. Eastern Enterprises v. Apfel, 524 U.S. 498, 520 (1998) (plurality opinion) (recognizing a narrow exception to the general rule in order to avoid requiring the government, in circular fashion, to pay money to firms required to pay money to a government-created fund). There is no reason to believe the courts of Massachusetts are not available to hear a claim for financial compensation based on the ingredient law. The fact that the ingredient law does not include a mechanism for providing compensation, or the fact that the Massachusetts legislature obviously did not intend the public to pay tobacco companies to submit

ingredient information to the Department of Health, cannot expand the limited relief available under the Takings Clause. See Monsanto, 467 U.S. at 1017.

[4] Before the District Court, the tobacco companies stressed that they have operated for many years under a legal regime that did not require them to disclose the ingredients in their products to the same extent as now required by Massachusetts law. But the Takings Clause does not immunize a property owner from legal change. As the Supreme Court observed years ago in Mugler v. Kansas, 123 U.S. 623, 664 (1887), simply because Kansas law previously allowed the manufacture of intoxicating liquors, "the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged." See also Donnelly & Sons v. Campbell, 639 F.2d 6, 14-15 (1st Cir. 1980).

[5] Apart from the decision by the District Court for the Eastern District of Missouri which the Supreme Court overruled in Monsanto, every other federal court that considered the constitutionality of FIFRA's information disclosure provision apparently rejected the taking claim See 467 U.S. at 1000 (collecting cases).

[6] Numerous federal regulatory programs rest on the premise that federal agencies can ban the manufacture or sale of products without infringing on constitutionally protected property rights. See, e.g., 15 U.S.C. 2057 (Consumer Product Safety Act provision authorizing prohibition on sale of product that "presents an unreasonable risk of injury"); 21 U.S.C. 355 (Food, Drug and Cosmetic Act provision barring the sale of any new drug not determined to be "safe and effective"); 21 U.S.C. 610 (Federal Meat Inspection Act provision prohibiting the sale of animal meat products which are "adulterated or misbranded" or which have not undergone mandatory inspection).

[7] The tobacco companies also argued below, but the District Court did not embrace the theory, that the ingredient disclosure law would effect a taking because it would result in a "physical occupation" of the tobacco companies' trade secrets under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) See also 159 F.3d at 674 n. 4, where this Court, in the first preliminary appeal in this case, declined to accept the tobacco companies' per se physical occupation theory, observing that the theory "present[ed] a difficult question as to the circumstances under which a trade secret may be subject to such a taking." An interest in intangible property cannot be "physically invaded" within the meaning of the Supreme Court's per se rule for physical occupations. That rule is specifically grounded in the idea that "a physical occupation of real property [is] the quintessential deprivation of property." Id. at 430 n. 7 (emphasis added) See State of Alaska v. Arctic Slope Regional Corp., 834 P.2d 134, 142 (Alaska. 1992) (government disclosure of information "does not involve the kind of physical interference with real property at issue in the cases in which the United States Supreme Court has found a per se taking"). Cf. United States v. Sperry, 493 U.S. 52 (1989) (rejecting argument that government deduction of a fee from amounts recovered by American claimants before the Iran-United States Claim tribunal effects a "per se" physical taking). Monsanto, which post-dates the Supreme Court's Loretto decision by only a few years, contains not a whisper of a suggestion that the per se takings doctrine for physical occupations applies to information disclosure.

[8] See, e.g., 15 U.S.C. 2613(a)(3) (provision of Toxic Substances Control Act authorizing disclosure of trade secrets when "necessary to protect public health or the environment against an unreasonable risk of injury to health or the environment"); 46 U.S.C. 4310(e) (provision of federal recreational boating legislation authorizing the Secretary of Transportation to "disclose any information that contains or relates to trade secrets" if the Secretary "decides that the information is necessary to carry out" the law); N.J. Stat. 34:5A-5 (provision of New Jersey Right to Know Act prohibiting assertion of trade secret protections with respect to substances included on a "workplace hazard substance list").

[9] The United States' amicus brief observed: "It is clear as an initial matter that there exists some category of governmental authority that may result in the substantial diminution of property values, and yet not require payment of compensation as a condition to its lawful exercise. For example, the government may seize and destroy unwholesome foods and unsafe drugs, and may destroy goods to prevent the spread of disease. Similarly, under the Controlled Substances Act, 21 U.S.C. 801 et seq., it may be lawful to manufacture, possess and sell a certain drug one day and a felony to do so the next (see, e.g., Touby v. United States, 111 S. Ct. 1752 (1991)), with the result that existing stocks are rendered valueless. The government's ability to protect the public through such measures is historically well established and thus has not been conditioned upon payment of compensation to those who would inflict the harm." Brief of the United States as Amicus Curiae, in Lucas v.. South Carolina Coastal Council (filed in the U.S. Supreme Court, January 2, 1992).

[10] Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992), upon which the tobacco companies relied below, does not support the District Court ruling. The claim in that case rested on the per se physical occupation theory, which the District Court properly rejected in this case. See note 6, supra. Nixon addressed whether the physical occupation rule could be applied to government seizure of the former President's papers. That issue is distinguishable from the tobacco companies' argument in this case that the Lucas regulatory takings rule can be extended to intangible property interests used in connection with manufacture of commercial goods. Furthermore, in Nixon the government advanced no police power justification for the seizure of Nixon's papers. By contrast, the Commonwealth has a substantial police power justification for its ingredient law.

[11] Before the District Court, the tobacco companies sought to distinguish this case from Monsanto on the ground that they have sold their products for many years whereas the pesticide manufacturers in Monsanto were seeking to register pesticides that they had "no prior right to sell." This alleged distinction is a mirage. The right to sell one's property, personal or real, tangible or intangible, does not spring from some government authorization. Monsanto's ability to sell pesticides did not depend on government permission to any greater or less degree than does the tobacco companies' ability to market their products. At the same time, the manufacture and sale of both products are subject to appropriate regulation to protect public health.

The tobacco companies may repeat the argument they made in the District Court that the general concept of "unconstitutional conditions" independently supports their taking claim. As discussed, Monsanto considered and rejected an "unconstitutional conditions" argument. The Nollan and Dolan tests are grounded in the concept of "unconstitutional conditions," see Dolan, 512 U.S. at 385-86, but these tests are inapposite to this case. Apart from these specific applications of the unconstitutional conditions idea in the takings arena, there is no separate, free floating unconstitutional conditions