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

Supplemental 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.

_____

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The amici curiae Environmental Defense, Calvert Group, Ltd., OMB Watch, Working Group on Community Right to Know, and Atlantic States Legal Foundation respectfully submit this supplemental brief amicus curiae to assist the Court in its *en banc* consideration of this case. This supplemental brief focuses on issues raised by the majority and dissenting opinions issued October 16, 2001, the respondents' petitions for rehearing en banc, and the amicus briefs filed in support of the petitions for rehearing.

STATEMENT OF INTEREST OF AMICI CURIAE

The amici curiae are Environmental Defense, 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.

The amici curiae previously filed a brief in this case, dated February 8, 2001, in connection with the panel's consideration of this case. The amici strongly

believe that the panel correctly resolved the issues presented by this appeal and have a strong interest in seeing this en banc Court affirm the panel decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Following extensive briefing and opinion writing, this case has been distilled to two basic issues. The first is whether the Massachusetts tobacco products ingredient disclosure law should be viewed as a direct appropriation of the companies' property interests or whether, instead, the law should be viewed as involving a potentially unconstitutional condition imposed on the companies business operations. The panel majority viewed the case as involving an allegedly unconstitutional condition; on the other hand, the dissent viewed the case as involving a direct appropriation. The *amici* respectfully submit that the panel majority has adopted the correct position on this point. The tobacco companies are free under Massachusetts law to decide whether or not to market one or more tobacco products in the Commonwealth; if they choose to market their products, they must do so subject to the condition that they disclose product ingredient information to the Department of Public Health, which in turn may disclose all or some of this information to the public. The conclusion that the panel majority properly characterized this case as involving a challenge to an allegedly unconstitutional condition, not a direct appropriation, is strongly supported by Supreme Court precedent, including Ruckeslhaus v. Monsanto Company, 467 U.S. 986 (1984), Nollan v. California Coastal Council, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994).

The second issue – assuming the en banc Court accepts the position that this case involves an allegedly unconstitutional condition, not a direct appropriation – is what standard should govern the review of the condition at issue in this case?

The Supreme Court has supplied the answer in Monsanto: A requirement that a company disclose trade secret information relating to the products it sells to the public will not be held to be a taking so long as the requirement is "rationally related" to a legitimate government purpose. In this case, the disclosure of information about the ingredients in tobacco products is, at a very minimum, rationally related to the legitimate government interest in protecting public health.

The different, more demanding standards established in Nollan and Dolan for the evaluation of certain kinds of conditions do not apply to this case. Those cases involved requirements that real property owners accept a physical occupation of their property as a condition of receiving permission to develop their land. The Court ruled that the imposition of such a condition would not be a taking if it satisfied relatively demanding "essential nexus" and "rough proportionality" tests. Nollan and Dolan are distinguishable from this case for two independent reasons.

First, they involved regulation of an owner's right to use real property. The Supreme Court has clearly stated that the government has a qualitatively different, broader authority to regulate personal commercial property, such as retail tobacco products, than it does to regulate real property. Second, these cases involved conditions which invaded a landowner's right to exclude third parties from his land. While trade secrets can represent protected property rights within the meaning of the Takings Clause, they do not enjoy the same level of protection under the Court's takings jurisprudence as a land owner's right to exclude third parties from his property. For either of these reasons -- and certainly for both reasons in combination – Dolan and Nollan cannot be viewed as supplying the relevant tests for the purpose of resolving this case. Monsanto is the controlling authority and unquestionably supports the conclusion that the reasoning of the

panel majority was sound and should be embraced by this Court *en banc.*

ARGUMENT

I. This Case Involves a Takings Challenge to an Allegedly Unconstitutional Condition, not a Direct Appropriation of Private Property.

The primary issue which divided the panel majority from the dissent is whether the Massachusetts law should be viewed as imposing a condition on the tobacco companies' voluntary choice to sell their products within the Commonwealth or whether, instead, it should be viewed as a direct appropriation of the companies' property interests in their ingredient formulas. Compare Philip Morris, Inc. v. Reilly, 267 F.2d 45, 55 (1st Cir. 2001) (the majority) ("the Disclosure Act establishes a regulatory scheme conditioning the ability to sell tobacco products in Massachusetts on the reporting for public disclosure of trade secret information, deemed by the legislature to serve the interest of public health") with Id. at 68 (the dissent) (criticizing the majority's above-quoted characterization of the case and stating, "we must analyze a state's enforced disclosure of a trade secret without regard to the product in which that trade secret is embodied"). We respectfully submit that the majority's characterization of the Massachusetts law is, as matter of fact, accurate and, as matter of law, consonant with Supreme Court precedent.

The government does, of course, sometimes appropriate private property directly, whether through an express exercise of the power of eminent domain, an outright physical appropriation, or a regulatory enactment which is tantamount to an appropriation. The appropriative nature of the governmental action is unmistakable because the government acts unilaterally to compel the owner to surrender property to the public. See, e g., Lucas v. South Carolina Coastal

Council, 505 U.S. 1003 (1992) (unilateral government decision to deprive an owner of opportunity to develop property).

The character of the government action is entirely different when the government imposes a requirement with which a property owner must comply only if the owner chooses to engage in an activity which triggers application of the condition. The tobacco companies are free to sell their products in Massachusetts, or not, as they wish. Unlike with a direct appropriation, the Massachusetts law will have no effect whatsoever on the companies' property interests if they choose not to sell their products in the Commonwealth. The Massachusetts law only applies to those specific brands of tobacco products "sold in the commonwealth." Mass. Gen. law ch. 94, section 307B. Even if the company chooses to proceed with the sale of some or all of its products in the Commonwealth, the Department's regulations require that it give the company 60 days written notice of the information to be disclosed. Mass. Reg. Code, tit. 105, sections 660.200(A)-(C). "The [company] may then cease sales in Massachusetts or remove the product from the Massachusetts market in order to reformulate it without the constituent(s) identified as problematic by the Department." 267 F.23d at 49, citing Mass. Reg. Code, tit. 105, section 660.200 (F).

The Massachusetts law involves the imposition of a condition – not a direct appropriation - in precisely the same sense that the data disclosure requirement in Monsanto involved the imposition of a condition. As the Monsanto Court explained, that case involved the question of whether FIFRA's information disclosure requirements imposed an "unconstitutional condition" on the Monsanto company. 467 U.S. at 1003. FIFRA did not directly appropriate the company's trade secret information, but rather imposed a disclosure requirement on those

firms which voluntarily sought an EPA registration in order to engage in the sale of pesticides in the United States. The Court observed that "Monsanto could forego registration in the United States and sell a pesticide only in foreign markets. Presumably it will do so in those situations where it deems the data to be protected from disclosure more valuable than the right to sell in the United States." Id. at 1008 n. 11. If Monsanto was an "unconstitutional conditions" case, as it was, then this is an unconstitutional conditions case too.

Similarly, the Massachusetts law involves the imposition of a condition in the same sense that the regulatory requirements at issue in Nollan and Dolan involved conditions. Those cases involved requirements that land owners permit the public to pass across their property. The government did not unilaterally impose such a requirement on all land owners. It only imposed the requirement on those land owners who voluntarily sought regulatory permission to develop their property. The Court, therefore, did not consider the access requirement a direct appropriation of the owner's "right to exclude," an approach which would have led to an automatic finding of a taking under the per se rule for physical occupations. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Instead, because the government imposed the access requirements as a condition of authorizing development, the Court treated the cases as raising an unconstitutional conditions problem. Nollan and Dolan – like Monsanto – confirm that the panel majority correctly concluded that this case involves an allegedly unconstitutional condition, not a direct appropriation.

Nollan and Dolan also demonstrate the fallacy in the position that the Massachusetts law should be deemed a taking under the Supreme Court's per se doctrine. See 267 F.2d at 69-72. It is debatable whether a government regulation

which directly impaired the value of trade secrets in order to protect the public health and safety would effect a per se taking. See pp. 15-16, infra. But even if direct governmental restriction or appropriation of a trade secret were a per se taking, Dolan and Nollan demonstrate that per se takings analysis would not be appropriate in this case. In Dolan and Nollan, the Court made clear that the requirements that the owners accept physical occupations, if imposed directly, unquestionably would have resulted in per se takings. See Nollan, 483 U.S. at 831; Dolan, 512 U.S. at 284. However, because the physical occupations at issue in those cases only applied to landowners who voluntarily sought to develop their property, the Court did not apply per se analysis. Similarly, even assuming an appropriation of a trade secret in the public health context would be a per se taking, per se analysis would not apply in this case because the tobacco companies are only required to disclose trade secret to the extent that they choose to sell particular products in Massachusetts.

In response to this reasoning and this precedent, the tobacco companies and their *amici* have argued that the voluntary choice offered by the Massachusetts law is chimerical because (1) compliance with the Massachusetts law would threaten their trade secrets in every jurisdiction in which they do business; and (2) the law threatens to deprive them of valuable business opportunities they have enjoyed in the past under Massachusetts law.

The short answer to the first argument is that the tobacco companies are free to safeguard their ingredient formulas by confining their product sales to those nations, and those States within the United States, which have adopted less stringent policies on this subject. In Monsanto, the Supreme Court treated FIFRA as imposing a condition, not a direct appropriation, because the Monsanto

company could safeguard its trade secrets by avoiding the EPA registration process altogether and selling its pesticides exclusively in foreign nations. If putting a major U.S. manufacturer such as Monsanto to the choice of either disclosing trade secret information or quitting the U.S. domestic market does not amount to a direct appropriation of trade secrets, then it is clear that the Massachusetts law, which only affects the tobacco companies' ability to market their products in a single state, cannot be viewed as a direct appropriation of trade secrets.

The answer to the second point is that the Constitution is hardly an absolute barrier to the adoption of new rules and regulations based on new scientific knowledge and changed social values. As the Supreme Court observed many years ago in Mugler v. Kansas, 123 U.S. 623, 664 (1887), simply because Kansas had previously allowed the manufacture of intoxicating liquors, "the State did not thereby give any assurance, or come under any obligation, that its legislation on the subject would remain unchanged." The Supreme Court has recognized and applied this principle many times. See Penn Central Transportation Co. v. New York, 438 U.S. 104, 130 (1978) ("the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable"). See also Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993) ("our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking"), citing, inter alia, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (where the Court upheld a regulation requiring the closure of an otherwise lawful brick-making business and destroyed over 90% of the value of the owner's property); and Goldblatt v. Hempstead, 369 U.S. 590 (1962) (regulation requiring

closure of longstanding sand and gravel operation not a taking).

Furthermore, and in any event, that this instance of increased regulation of tobacco products may impose a potentially significant economic burden on the tobacco companies does not alter the fact the Massachusetts law only involves a conditional obligation to disclose trade secret information, an obligation which the companies can avoid, or not, as they choose. Cf. National Fertilizer Assn. v. Bradley, 301 U.S. 178, 182 (1937) (stating that the general principle that marketers of commercial products can be compelled to publicly disclose the ingredients in their products is "broad enough to meet the further claim of right to sell products manufactured prior to the passage of the law"). In sum, the Massachusetts law involves an allegedly unconstitutional condition, not a direct appropriation, and must be analyzed as such.

II. Viewed as an Allegedly Unconstitutional Condition, the Massachusetts Law Does Not Effect a Taking Because the Disclosure Requirement is Rationally Related to the Legitimate Government Interest in Protecting Public Health.

Viewing the Massachusetts law as imposing a requirement which falls under the rubric of potentially unconstitutional conditions, the next issue is what standard applies to the review of such conditions under the Takings Clause, and whether the tobacco companies can sustain their constitutional claims based on this standard.

Monsanto, again, is the controlling authority. In the Court's words, "as 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 advantage of a registration can hardly be called a taking." Id. at 1007, citing Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1917). So far as we are aware,

every lower federal court which has had the opportunity to interpret Monsanto has applied the plain language of that decision and concluded that conditional information disclosure requirements must be analyzed based on whether they are "rationally related to a legitimate Government interest." See, e.g., New Jersey State Chamber of Commerce v. Hughey, 600 F.Supp. 606, 628 (D.N.J. 1983), aff'd in relevant part,774 F.2d 587 (3rd Cir. 1985).

The Massachusetts law easily satisfies this standard, which obviously reflects broad deference to the legislature's primacy on matters of social and economic policy. The disclosure of ingredient information, not simply to government agents, but to the public itself, serves an important function in protecting public health. Government agencies are all too subject to improper special interest influences; thus, as the Supreme Court said in Monsanto, public disclosure of information "can provide an effective check on the decision-making process of government." 467 U.S. at 1016. In addition, public disclosure "allows members of the public to determine the likelihood of individual risks peculiar to their use of the product." Id. The Massachusetts law so plainly meets the Monsanto "rational relationship" test that the respondents have never even attempted to argue that they could prevail under this test.

The tobacco companies and their amici have suggested that the relatively more demanding "essential nexus" and "rough proportionality" tests of Nollan and Dolan should be applied to this case. See, e .g., Brief of Washington Legal Foundation, at 12. This suggestion should be rejected. First, Monsanto is unquestionably the most directly relevant precedent and establishes a distinctly more deferential standard. There is no suggestion in Nollan and Dolan, which involved land use regulations, not trade secrets, that the Court intended for those

rulings to alter or supplant Monsanto's "rational relationship" test. Second, the relatively more stringent standards adopted in Dolan and Nollan are inextricably related to the special factual contexts in which those cases were decided. The factual differences between Dolan and Nollan, on the one hand, and Monsanto and this case, on the other, explain the differences between the standards of review which apply in each type of case.[1]

First, Dolan and Nollan involved regulatory restrictions on the use of land whereas Monsanto and this case involve regulation of the sale of commercial personal property, i.e., cigarettes and other tobacco products. The Supreme Court has drawn a clear and distinct line between these two types of property interests, indicating that government possesses broader regulatory authority under the Takings Clause with respect to personal property than with respect to real property.

The panel majority quotes from the Lucas decision, see 267 F.3d at 54, where the Court explained this distinction at length, stating that "in the case of personal property, by reason of the State's high degree of control over commercial dealings, he 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)". 505 U.S. at 1027-28. This description of the limitations on commercial personal property interests differs dramatically from the Court's characterization of real property interests. "In the

[1] The District Court did not apply the Dolan/Nollan tests in this case. If this Court rejects the tobacco companies' per se takings theory, but determined that the Dolan/Nollan tests do apply, this Court would presumably vacate the District Court judgment in order to allow the District Court to apply those standards in the first instance. Amici submit, of course, that such a remand is unnecessary, because Monsanto supplies the governing legal test and the Massachusetts law clearly does not result in a taking under that test.

case of land," the Court stated, "we think the notion... that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically viable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." Id.

The Court's more recent decision in City of Monterey v. Del Monte Dunes Ltd, 526 U.S. 687 (1999), confirms that the relatively exacting standards of Nollan and Dolan are limited to the context of real property regulation. In that case the Court rejected a broad reading of the decision, refusing to extend Dolan and Nollan "beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use." Id. at 702 (emphasis added).

Likewise, the Supreme Court's analysis in Nollan emphasizes the distinction between commercial personal property and real property. The Nollan Court reaffirmed the validity of the holding in Monsanto, stating that in that case "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. By contrast, the Court said, the right to develop real property "cannot remotely be described as establishing the voluntary 'exchange' that we found to have occurred in Monsanto." Id. Thus, far from undermining Monsanto, as the tobacco companies have previously suggested, the analysis in Nollan expressly endorses and reaffirms the analysis in Monsanto. By emphasizing that there is a constitutional difference between the "benefit" of selling commercial products and the "right" to use land, Nollan supports the

conclusion in Monsanto that conditions attached to permission to sell commercial products should be evaluated using a standard which is more deferential to the government than the standard which applies to conditions attached to the use of land.

The dissent contends that Nollan's interpretation of Monsanto actually turns on the fact that the Monsanto company, at least during the post-1978 FIFRA implementation period, received implicit compensation for the alleged taking of its trade secrets, because the FDA granted the company certain exclusive use rights in its trade secrets and also required later applicants to reimburse the company for the use of its trade secrets for a limited period. See 267 F.2d at 73. This argument does not scan. It is clear from the language in Nollan that the Court did not rely on the grant of these "rights" to reject the taking claim; as discussed, the decisive point in the Court's analysis is that obtaining permission to sell a commercial product, unlike the right to use land, is a "privilege." Second, the grant of these "rights" cannot possibly be viewed as granting the company something of value; they only allowed the company to retain what it already had to begin with. See 267 U.S. at 59 n.13. Finally, as the dissent acknowledges, the value of these "rights" did not rise to the level of "just compensation" in any event. See id. at 73 ("[t]hough the benefit was limited in scope and duration, Monsanto at least received something over and above the status quo") (emphasis in original).[2]

A second – and independent – reason why the Dolan and Nollan tests cannot

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[2] The dissent's dramatic reinterpretation of Corn Products, see id., at 70 is derived from the dissent's mistaken view that the holding in Monsanto, at least as reinterpreted by Nollan, rested on the fact that the company supposedly received implicit compensation for the alleged taking of its trade secrets. The dissent's reading of Nollan is incorrect, as is its reinterpretation of Corn Products.

logically be extended to this case is that the property rights affected by the challenged conditions are quite different in each type of case. The condition at issue in Dolan and Nollan related to a landowner's right to exclude third parties from his property, "traditionally... considered one of the most treasured strands in the owner's bundle of property rights." Loretto, 458 U.S. at 35. Again, as the Court made clear in both cases, the requirement that an owner accept a physical occupation, if imposed directly, unquestionably results in a per se taking. See Nollan, 483 U.S. at 831; Dolan, 512 U.S. at 284.

On the other hand, trade secrets are subject to a different level of protection under the Supreme Court's takings jurisprudence. To be sure, Monsanto recognized that trade secrets can represent property rights within the meaning of the Takings Clause, and that public disclosure of trade secrets can result in a taking, at least when government officials obtain access to trade secret information with an express promise of confidentiality. However, the Supreme Court in no way suggested that government disclosure of trade secret information was akin to a per se physical-occupation taking; indeed, Monsanto does not even cite Loretto, which was decided just two years earlier. Furthermore, Monsanto emphasized the primacy of state law in defining the scope of any property interest in trade secrets – and hence the scope of protection afforded trade secrets by the Takings Clause. See Id. at 1003 (indicating that the trade secrets at issue in that case were protected under the Takings Clause only "to the extent that Monsanto has an interest in its health, safety and environmental data cognizable as a trade-secret property right under Missouri law.")

As the panel majority explained, under Massachusetts law (and under the law of other states) private property rights in trade secrets are far from absolute in

relation to the traditional police power authority to protect the public health and welfare. See 267 F.2d at 60, citing Mass. Gen. Laws ch. 4, section 7, cl. 26 (g) (exempting from protection trade secrets submitted as required by law). This reflects the fact that the law of trade secrecy has its origins in the law of unfair competition, and is primarily designed to prevent one firm from obtaining an improper competitive position by purloining the commercially valuable secrets of a competitor. See generally Mary L. Lyndon, "Secrecy and Innovation in Tort Law and Regulation, 23 N.M.L.Rev. 1 (1993). Consistent with this understanding of the purpose of trade secret protection, state trade secrecy law grants, at most, less than absolute protection against governmental demands for information necessary to protect the public health and safety. See Gen. Chemical Corp. v. Dept. of Envtl. Quality Eng'g, 474 N.E.2d 183 (Mass. App. 1985); see also Restatement (Third) of Unfair Competition, section 40 comment c (1995) (commenting that a privilege to disclose trade secrets is likely to be recognized for "information that is relevant to public health or safety").

In sum, while trade secrets may represent property for some purposes, and may be protected from public disclosure under the Takings Clause under some circumstances, rights in trade secrets are not comparable to the "treasured" right to exclude third parties from real property. For this additional -- and independent – reason, the Nollan and Dolan tests cannot be extended to this type of case.

III. Public Policy Considerations, to the Extent They Are Relevant At All, Strongly Support Rejection of this Takings Challenge.

It is apparent that the dissenter from the panel ruling did not think much of the wisdom or the efficacy of the Massachusetts law. See 267 F.2d at 67 (describing the law as a "creative, but at best marginally effective response to a

public health problem"); see also id. at 68 (describing the majority's reading of Monsanto as "bad policy"). The amici respectfully disagree with the assessment that the Massachusetts law represents either misguided or ineffectual public policy.

But the crucial point for present purposes is that the issue before the Court is whether the legislation effects a taking, not whether it represents the best public policy. As Justice Oliver Holmes famously observed:

> Some.. laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. State of New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting)

Moreover, to the extent policy considerations are relevant to the resolution of this takings issue, they support rejecting the claim. The dissent expressed the concern that the ruling by the panel majority would "allow states to ransack the trade secrets of virtually any business without providing even minimal recompense." Id. at 67. There is no basis for such grave concern. As discussed in detail in the amici's initial brief, at pp. 6 - 10, a long line of Supreme Court decisions has granted government broad latitude to require public disclosure of trade secret information to protect public health and safety. Yet, federal and state laws addressing trade secrecy reflect a careful balancing of private and public interests to protect important business assets while also protecting the public. See, e.g., New Jersey Chamber of Commerce v. Hughey, supra (requiring public disclosure of trade secret data related to specified "hazardous" chemicals). If the

sky would fall if this Court followed Monsanto, the sky would have fallen some years ago. The fact that the sky has not fallen undermines this policy argument for attempting to change settled law.

Furthermore, Massachusetts obviously has a logical basis for enacting a disclosure statute which focuses on tobacco products, given that the Food and Drug Administration has "found that tobacco consumption was the single leading cause of preventable death in the United States." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 127 (2000). The fact that the government has used its available powers to require greater public disclosures regarding tobacco products provides no basis for assuming that similar measures are necessarily appropriate or will be enacted in other contexts.

On the other hand, adoption of the tobacco companies' per se takings approach would have disastrous public policy implications. Under this legal standard, every publication of consumer information which results in the disclosure of trade secrets would automatically lead to a finding of a taking and could therefore be enjoined.[3]

[3] In principle, a per se claim would be subject to the defense that the information disclosure is necessary to prevent a public nuisance or to vindicate a principle of state property law. See Lucas, 505 U.S. at 1027. The tobacco companies have not acknowledged how if at all these defenses based on "background principles" of state law might support disclosure of trade secret information.

The result would be that the government would be powerless to require the disclosure of the ingredients in any consumer product, no matter how deadly or otherwise detrimental to public health, simply on the ground that the ingredient formula itself represents a trade secret. Based on the tobacco companies' position in this case, this reasoning would apply to disclosures to the general public, and sometimes to disclosures to the government itself, on the theory that the government cannot generally be trusted to safeguard secret information. In short, private firms would have a nearly impregnable property right to sell the public any and all products they want without any opportunity for the public to learn what is in the products. The audacity of this argument is simply breathtaking. Many years ago, the Supreme Court said that "it 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." Corn Prods. Refining Co. v. Eddy, 249 U.S. 427, 431 (1919). This position is not only the law, it makes eminent good sense as a matter of public policy.

CONCLUSION

For the foregoing reasons, the amici curiae urge the en banc Court to adopt the reasoning of the panel majority and to reverse the judgment of the District Court.[4]

Respectfully submitted,

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November 29, 2001

[4] As the panel majority recognized, see 267 F.3d at 51, n. 6, the Supreme Court decision in Monsanto indicates that a claim for compensation, not an injunction, is the proper remedy for a claim that trade secrets have been taken under the Takings Clause. See 467 U.S. at 1016. The panel found it unnecessary to reach the issue of whether the tobacco companies could properly pursue an injunction in this case, because the panel rejected the taking claim on the merits. If the en banc Court were to conclude that the tobacco companies have presented a legitimate taking claim, the en banc Court would need to decide this issue.

CERTIFICATE OF COMPLIANCE

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

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

2. The Supplemental Brief *Amicus Curiae* in Support of Appellants of Environmental Defense, et al. contains 5,435 words as measured by the word-processing system used to prepare this brief.

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Dated: November 29, 2001.