

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DAVID C. FREDERICK, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	IRVING L. GORNSTEIN, ESQ.	
7	On behalf of the United States, as amicus	
8	curiae, supporting the Petitioners	19
9	ORAL ARGUMENT OF	
10	THEODORE B. OLSON, ESQ.	
11	On behalf of the Respondents	26
12	REBUTTAL ARGUMENT OF	
13	DAVID C. FREDERICK, ESQ.	
14	On behalf of the Petitioners	50
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:18 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in case 05-1284, Watson versus Philip Morris
5 Companies.

6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK

8 ON BEHALF OF THE PETITIONERS

9 MR. FREDERICK: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The Eighth Circuit held that Philip Morris
12 is subject to such specific and detailed regulations by
13 the Federal Trade Commission that it is entitled to
14 remove this purely State law case from State court to
15 Federal court under the Federal officer removal statute.
16 That holding is erroneous and should be reversed for at
17 least three reasons.

18 First, the court articulated the wrong test
19 for determining when a person is acting under a Federal
20 officer.

21 Second, the court misunderstood the Federal
22 Trade Commission's regulatory regime with respect to the
23 marketing of so-called light cigarettes.

24 And third, the court's approach ignores the
25 long history and purposes of the federal officer removal

1 provision to protect the Federal Government operations
2 from interference by State court proceedings.

3 In this case, and in this Court, Philip
4 Morris largely abandons the Eighth Circuit's rationale
5 and offers an alternate ground of affirmance. It should
6 be rejected. The FTC has not delegated authority to
7 conduct testing to Philip Morris, and the complaint in
8 any event challenges only the company's marketing and
9 not its testing of so-called light cigarettes.

10 Now with respect to the first point, the
11 Eighth Circuit applied and articulated the wrong test
12 for determining when a person is acting under a federal
13 officer. The proper test, as this Court's case in the
14 City of Greenwood versus Peacock Casey elucidates, is
15 when the person is aiding or acting on behalf of the
16 Federal officer in a subordinate role in the officer's
17 discharge of official functions. That is not what is
18 happening here.

19 What is happening here is that the Federal
20 Trade Commission for a time conducted testing on the tar
21 and nicotine levels of cigarettes and stopped doing so.
22 Philip Morris asserts that that sequence of events
23 caused, in effect, a delegation of this authority. But
24 what is really happening is that Philip Morris --

25 JUSTICE SCALIA: Do they cite any particular

1 document or statement --

2 MR. FREDERICK: No.

3 JUSTICE SCALIA: -- that constitutes the
4 delegation?

5 MR. FREDERICK: No. There is nothing,
6 Justice Scalia. There is no regulation, this is no
7 order, there is no policy statement, there is no
8 statement by the chairman of the FTC before Congress.
9 There is nothing.

10 CHIEF JUSTICE ROBERTS: So it's perfectly
11 all right for them to adopt a new method of testing tar
12 and nicotine that yields numbers that are far lower than
13 the Government's method, and to publish an ad saying
14 these are our tar and nicotine figures, and the FTC
15 would have no problem with that?

16 MR. FREDERICK: Mr. Chief Justice, the
17 answer to your question is no. And the reason is that
18 what the FTC did at the time was, it determined that
19 this particular Cambridge filter method was the
20 preferred method for ascertaining the level of tar and
21 nicotine in cigarettes. And in the D.C. Circuit
22 opinion of Federal --

23 CHIEF JUSTICE ROBERTS: Not just the
24 preferred method, but presumably the only one they would
25 allow. If you used another one, they would bring a

1 deceptive trade practices action very quickly.

2 MR. FREDERICK: That is correct. But what
3 was clear in the Brown & Williamson case decided by the
4 D.C. Circuit, a panel of Judges Bork, Scalia and
5 Edwards --

6 CHIEF JUSTICE ROBERTS: They still might
7 have gotten it right.

8 (Laughter.)

9 MR. FREDERICK: They most assuredly did get
10 it right, Mr. Chief Justice. What they held was that
11 that method, the Cambridge filter method, had not been
12 done according to rulemaking, a trade regulation rule;
13 and that, therefore, there might be a testing mechanism
14 that would be different and better, but that with
15 respect to undertaking the deception analysis, which is
16 what the FTC is charged by -- with doing under Section 5
17 of the Federal Trade Commission -- Federal Trade Act, it
18 had to determine whether or not there would be some
19 method that the cigarette makers were attempting to use
20 that would be deceptive; and what the court in the D.C.
21 Circuit held was that there was no other method that had
22 been determined at that time. There had been no
23 statement or proposed rule made by the FTC, and so for
24 purposes of determining deception, that was the best
25 that could be done, while leaving open the possibility

1 that the FTC would promulgate the appropriate --

2 CHIEF JUSTICE ROBERTS: Well, I understand
3 you have a dispute about whether that is this case, but
4 there are many areas where the Government requires
5 testing of products. You know, the strength of seat
6 belts and stuff, and they specify very precise means to
7 which those tests have to be conducted.

8 And if someone, a manufacturer is complying
9 with those requirements, and a challenge is brought,
10 saying something to the effect that that test doesn't
11 give you a good measure or something, in that situation
12 would this removal provision apply?

13 MR. FREDERICK: No. Because that's merely
14 compliance with rule and not aiding or acting on behalf
15 of the Government officer in a subordinate relationship
16 in the discharge of function.

17 CHIEF JUSTICE ROBERTS: What if the
18 Government says you've got to test your cars, you know,
19 every three months or something, and you've got to send
20 us the results of a random -- random test?

21 MR. FREDERICK: The reporting of results
22 doesn't change the hypothetical. That's also compliance
23 with the law, and that happens all the time in the
24 Government. The Department of Labor, the Department of
25 Commerce, the Federal Reserve, all of those agencies

1 routinely require reporting on the part of industry.

2 But the reporting of information does not
3 transform a regulated entity into a Federal officer for
4 purposes of these cases. And the court's cases are
5 highly instructive in this regard. Beginning with the
6 act of 1815 that began the Federal officer removal, the
7 court's cases have held that when a person is deemed to
8 be acting under, the person is acting in a subordinate
9 relationship to the Federal officer, merely complying
10 with the law does not transform a regulated entity into
11 someone subordinate to the officer.

12 And that subordinate relationship is what is
13 critical to understanding when in other contexts someone
14 might have a better claim to being a person acting under
15 a Federal officer than Philip Morris can assert in this
16 case.

17 JUSTICE GINSBURG: That is -- this is
18 certainly not your revenue officer needing help from a
19 citizen or the Federal agent going to close down a still
20 during Prohibition. But what about the Government
21 contractor cases that are cited, the Agent Orange was
22 one example?

23 MR. FREDERICK: The Government contractor
24 cases present a quite distinct set of issues that, of
25 course, is not present in this case because there is no

1 contract between the Federal Trade Commission and Philip
2 Morris. But I think that the proper way of looking at
3 Government contractors is to look at contextually what
4 is the nature of the contract? Does the contract
5 provide for ongoing supervision by the Federal officer
6 and give the Federal officer the power to change or
7 alter the conduct of the contracting party? Otherwise,
8 mere specifications, detailed as they might be,
9 constitute simply compliance with the terms of the
10 contract rather than a subordinate relationship.

11 JUSTICE SCALIA: Do all these contracting
12 cases involve the contractor imposing law upon somebody,
13 executing law? On behalf of the Government?

14 MR. FREDERICK: In a couple --

15 JUSTICE SCALIA: Because that's your test.
16 I mean, and if that is the proper test, it ought to
17 apply in the Government contractor situation, too.

18 So, for example, the Government can hire a
19 private company run prisons; but that would be the
20 Government hiring somebody to perform Government --
21 Government functions. Now, do all of those -- a
22 function that remain as Government function, keeping the
23 incarcerated incarcerated. Now do, do all of the
24 contract cases involve that?

25 MR. FREDERICK: No. I think and that's why

1 it would be --

2 JUSTICE SCALIA: Well --

3 MR. FREDERICK: -- a mistake for the Court
4 to either categorically say all Government contractors
5 are in or all Government contractors are out.

6 JUSTICE SCALIA: But that puts a whole new
7 theory on your --

8 MR. FREDERICK: No, it doesn't.

9 JUSTICE SCALIA: Oh.

10

11 MR. FREDERICK: Because my theory is that
12 the person acting under has to be aiding or acting on
13 behalf of a Federal officer in a subordinate
14 relationship in the performance of the officer's
15 official functions. And in the case of some Government
16 contractors, like the chauffeur in Maryland versus
17 Soper, for instance, who was an employee of the Reliable
18 Transfer Company, he was hired by the Maryland Director
19 of Prohibition to serve with the agents when they went
20 out doing their investigations.

21 JUSTICE SCALIA: And he was acting under
22 color of law as you've described that in your petitions?
23 I don't think so.

24 MR. FREDERICK: That's a different question,
25 Justice Scalia. The question of under color of office

1 as the statute defines it depends on the nature of the
2 acts and whether there is a causal relationship between
3 the acts that are charged by the State in the State case
4 and the actions of the people involved.

5 In the Soper case, the problem wasn't the
6 color of office, because the chauffeur was out with the
7 four agents, and when there was a death that they
8 stumbled upon, the question arose what were the nature
9 of the facts, not whether the chauffeur was acting under
10 color of office. That would be a distinct inquiry not
11 related specifically to whether a person is acting
12 under, but that's the third part of this question.

13 JUSTICE SCALIA: Well, I, I it seems to me
14 color of office, you say color of office, it means that
15 its appearance to somebody else is that -- that he is
16 being an official. And I would think that that requires
17 the fact that he's assisting a Government agent in
18 enforcing the law against somebody.

19 MR. FREDERICK: And in the Medicare context
20 this happens. Blue Cross-Blue Shield, hired out by the
21 Government to pursuant to a very detailed contract to
22 engage in intermediary payments, and audits, forming
23 Government functions. I think that is a paradigmatic
24 instance where the Government consists -- and has
25 ongoing supervisory relationship and a control over the

1 conduct as it is implementing the Government's function.

2 The Government employment example, like
3 Soper, where the chauffeur is hired and brought into
4 work with the agents, they're having a ongoing
5 supervisory relationship, telling him where to drive,
6 what to do, where to go. They are able to alter his
7 conduct in the same way.

8 In many procurement instances, that is not
9 true.

10 JUSTICE KENNEDY: How, how do you
11 distinguish your Blue Cross example from the instance
12 where drug companies are doing testing required by the
13 FDA?

14 MR. FREDERICK: That's compliance with the
15 regulation. There are all sorts of instances,
16 Justice Kennedy, where industry is required to do
17 certain things before they can bring their product to
18 market. That's not acting --

19 JUSTICE KENNEDY: Blue Cross is different
20 because there they are acting as an intermediary of the
21 Government?

22 MR. FREDERICK: They are performing a
23 function at the Government's direction for the
24 Government. The Government used to --

25 CHIEF JUSTICE ROBERTS: Well, that doesn't

1 seem to be a distinction. The drug companies -- the
2 Government wants to make sure that drugs are safe and
3 effective and so they issue regulations saying here's
4 how you have to test it. They're just, you could say,
5 delegating the testing to the companies.

6 MR. FREDERICK: No. Compliance doesn't
7 constitute a delegation, Mr. Chief Justice. And the
8 reason is quite clear from the fact that the Code of
9 Federal Regulations is full of all sorts of very
10 specific instructions to industry actors. But when they
11 comply with those rules they are not acting on behalf of
12 the Government. They are simply fulfilling a legal
13 obligation that all Americans have to fulfill when
14 confronted with a question of Federal law.

15 The situation for acting under is different,
16 and in the Medicaid context, there's a very special
17 bureaucracy that has been created under the Secretary of
18 Health and Human Services to perform Government
19 functions that used to be performed that are now
20 contracted out to Blue Cross-Blue Shield, and I
21 acknowledge that that is a very different kind of
22 situation.

23 But the Government, of course, in a
24 multi-trillion-dollar budget purchases all sorts of
25 items all the time. Many of them are off the shelf.

1 And others are subject to very specific and detailed
2 specifications.

3 But the compliance by a contractor with
4 specific and detailed instructions would not itself
5 transform that entity into a person acting under a
6 Federal officer.

7 CHIEF JUSTICE ROBERTS: There's a difference
8 between you are providing products and complying with
9 testing. In other words, and if, in fact, the
10 Government specifies precisely how the testing is
11 supposed to be done to determine whether it, the
12 Government, will approve the marketing of a particular
13 drug, and the challenge, the litigation is to the
14 testing. Somebody sues as drugs company and says you
15 know, you tested this drug wrong, we think you should
16 have tested it some other way, and the drug company says
17 the Government told us how to test it -- why in that
18 situation aren't they acting under a Government
19 official?

20 MR. FREDERICK: Because it would be
21 transforming a preemption defense into an opportunity to
22 use a Federal officer removal to have a case from State
23 court to Federal court. This Court has said many times
24 that preemption is an issue that can be decided by State
25 courts, and the mere fact that someone is complying with

1 detailed Federal regulations, and therefore is able to
2 claim the cause of action is preempted as a result of
3 those Federal regulations, does not transform the person
4 into a person acting under a Federal officer.

5 JUSTICE SCALIA: Just out of curiosity,
6 what, what happens to the, the employees of the private
7 companies that run prisons? Could they removed under
8 this provision?

9 MR. FREDERICK: It depends on the nature of
10 the contract, Justice Scalia. The things that the Court
11 would look at would depend --

12 JUSTICE SCALIA: They either run the prison
13 for a State, or for the Federal Government.

14 MR. FREDERICK: What the Court --

15 JUSTICE SCALIA: -- or the Federal
16 Government.

17 MR. FREDERICK: What the Court would look at
18 is whether there is a ongoing supervisory relationship
19 and whether the Federal officer has the power to
20 transform or alter the conduct. If those circumstances
21 are met, then there would be a very strong argument that
22 the person is acting under the Federal officer.

23 JUSTICE GINSBURG: Well, the prison case,
24 there's not any if about it. A State, municipality, has
25 a contract with a private entrepreneur to run a prison.

1 One question that I think must have come up
2 in that context comes under the 1983 action in --
3 against a, a prison guard, a privately hired prison
4 guard.

5 MR. FREDERICK: Of course, this Court has
6 held that in that context there is not State action in
7 that particular circumstance. In fact, in the Third
8 Circuit, Philip Morris defended its actions against a
9 very similar claim regarding its marketing, that it was
10 not a State actor for purposes of a Bivens action or a
11 Section 1983 claim.

12 JUSTICE SCALIA: Is that the test here? Is
13 that the test here? If it is State action, it is
14 covered by this statute. If it isn't, it is not?

15 MR. FREDERICK: There -- that would
16 certainly be a simple way to determine whether a person
17 is acting under a Federal officer, if it meets the
18 entwinement test articulated by this Court in that case.

19 JUSTICE SCALIA: But suppose it doesn't.

20 MR. FREDERICK: If it doesn't --

21 JUSTICE SCALIA: Should I conclude it
22 therefore is not covered?

23 MR. FREDERICK: No, I think that the proper
24 standard, Justice Scalia, as I've said, is whether there
25 is a ongoing supervisory relationship and the Government

1 has the power to alter the actor's conduct. If those
2 two conditions are met then a person can be said to be
3 acting under the Federal officer within the meaning of
4 this statute.

5 JUSTICE GINSBURG: I don't follow that. The
6 Government is always altering people's conduct when it
7 regulates them.

8 MR. FREDERICK: But not on a basis that is I
9 think appropriate to understand a subordinate
10 relationship. The fact that there is alteration through
11 Government regulation is simply compliance with law.
12 But to be acting under within the meaning of this
13 Court's cases -- and I would direct the Court to the
14 Greenwood case, which the other side basically
15 ignores -- in that case, in footnotes 17 and 20, this
16 Court made clear that the phrase "acting under" is
17 acting in that kind of subordinate relationship in the
18 execution of laws. Compliance is insufficient.
19 Otherwise, it would blow the whole statute apart.
20 Everybody in a regulated industry would be able to remove
21 under the Federal officer statute.

22 JUSTICE GINSBURG: Has it been done? I
23 mean, this is -- I don't recall any case like this. Are
24 there other product liability cases that are removed
25 from State court to Federal Court on a similar basis?

1 MR. FREDERICK: Justice Ginsburg, in our
2 cert papers, and we didn't repeat them in our merits
3 papers, we give examples where a window blinds
4 manufacturer, a medical device manufacturer, a whole
5 series of others, a bank, a credit union, have attempted
6 -- after the Eighth Circuit's decision in this case have
7 removed cases to Federal court on the grounds that they
8 are Federal officers because they are subjected to far
9 more extensive regulations than Philip Morris.

10 In fact, if you turn to volume 16 of the
11 Code of Federal Regulations and turn to part 408,
12 there's a heading, and it says Deceptive Unfair
13 Advertising of Cigarettes For Health Benefits. Then
14 underneath it it says "intentionally left blank." And
15 the argument that these other entities have made is
16 there are no Federal regulations concerning the
17 marketing of "light" cigarettes but there are
18 regulations concerning our products. So therefore, we
19 must be a Federal officer because the regime governing
20 us is far more specific and detailed than it is for
21 cigarettes.

22 If I could reserve the balance of my time.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Frederick.

25 Mr. Gornstein.

1 ORAL ARGUMENT OF IRVING L. GORNSTEIN,
2 ON BEHALF OF UNITED STATES AS AMICUS CURIAE,
3 SUPPORTING PETITIONERS

4 MR. GORNSTEIN: Mr. Chief Justice, and may
5 it please the Court.

6 Manufacturers of cars, drugs, medical
7 devices, pesticides, home appliances and numerous other
8 consumer good market their products in accordance with
9 detailed and specific Federal Government regulation.

10 If that in a colorable preemption defense
11 were sufficient to trigger removal, then it would create
12 the potential for a very major shift of traditional
13 State law litigation from State to Federal court.

14 JUSTICE SCALIA: Do they test their products
15 before they're marketed under rigid Federal testing
16 regulations which are supervised by the Federal
17 Government?

18 MR. GORNSTEIN: Let me talk about -- there
19 are, there are numerous testing requirements. The
20 automobile industry has to test for fuel efficiency; it
21 has to test for crash testing under very specific
22 requirements. The home appliances have to be tested for
23 energy efficiency under Federal requirements --

24 JUSTICE SCALIA: Is the Government
25 supervising those?

1 MR. GORNSTEIN: Is -- the Government often
2 says exactly what the test has to be.

3 JUSTICE SCALIA: Yeah, but is there some
4 Government official who's there to make sure that the
5 testing is being done the way, the way it's supposed to
6 be, which is what, what is argued is the case here?

7 MR. GORNSTEIN: Well, I -- I -- I can't say
8 in every case that somebody is there to make sure --

9 JUSTICE SCALIA: They don't have to be there
10 every day.

11 MR. GORNSTEIN: But -- the Government is --

12 JUSTICE SCALIA: Policing --

13 MR. GORNSTEIN: Policing and enforcing the
14 testing requirements, and there's testing in all these
15 areas. The other thing to say is that there's no --

16 CHIEF JUSTICE ROBERTS: What's -- what's
17 your conclusion? That those are not people acting under
18 Federal officers --

19 MR. GORNSTEIN: They are not people acting,
20 because if they --

21 CHIEF JUSTICE ROBERTS: Because policing
22 sounds like --

23 MR. GORNSTEIN: The Government's policing is
24 enforcing the law. People who are, who are regulating
25 their products in accordance with detailed and specific

1 Federal Government regulation are acting on their own
2 behalf in marketing the products in -- on -- in
3 compliance with Federal law.

4 They are not acting under Federal officers
5 -- within the meaning of the Federal -- within the
6 meaning of this statute.

7 CHIEF JUSTICE ROBERTS: What about -- what
8 about USDA food inspection? Isn't a lot of that
9 delegated to the producers rather than the Government
10 officials?

11 MR. GORNSTEIN: The Government --

12 CHIEF JUSTICE ROBERTS: But you still get a
13 Government stamp.

14 MR. GORNSTEIN: You can have different
15 situations. And I'm not sure about the precise one
16 you're talking about. But you can have situations and
17 the FAA is one, where the FAA has a statute which says
18 you can delegate to third parties inspecting aircrafts,
19 and the Agency certifies through regulation that this
20 person is inspecting as a representative of the FAA.
21 Now that's a varied situation. In that kind of
22 situation the person would acting under. But if the
23 person is simply complying with Federal requirements
24 about how to test, that is private behavior, acting on
25 their own behalf, in order to further the marketing of

1 their products.

2 CHIEF JUSTICE ROBERTS: So if you are a
3 federally certified inspector you are acting under --

4 MR. GORNSTEIN: Certified as a
5 representative of the FAA, yes, you are.

6 CHIEF JUSTICE ROBERTS: What about private
7 transportation of mail? Is the private contractor who's
8 carrying U.S. mail, is that person -- could he remove a
9 case under this provision.

10 MR. GORNSTEIN: The standard for contracts
11 is some contracts are in and some contracts are out in
12 our minds, depending on whether the -- they are subject
13 to the guidance, supervision, or control of federal
14 officers. And so if they are performing a service on
15 behalf of the federal government and they are subject to
16 control or supervision, then they could be acting under
17 federal officers.

18 Now the situation here, the test that the
19 court of appeals used, simply acting in conformity with
20 detailed and specific Federal regulation, is one that
21 would lead, as I said, to a very substantial change in
22 where State court claims have been litigated up until
23 now.

24 JUSTICE SCALIA: I have a contract to
25 provides food to the Senate cafeteria, okay. And the

1 Senate or maybe the Executive Branch, for that matter,
2 closely supervises my preparation and service of that
3 food. Am I acting under, even though I'm not assisting
4 the Government in any governmental function at all?
5 Don't you have to be assisting in the performance of a
6 governmental function?

7 MR. GORNSTEIN: But the problem with that,
8 what you're saying, is the 1948 statute expanded it all
9 Federal officers. So if Federal officers were running
10 that cafeteria, those Federal officers could remove
11 because they are performing a duty under Federal law to
12 provide that service to Federal employees.

13 Now, once the statute expanded out in 1948
14 to cover Federal officers who perform any function, not
15 just enforcement functions, it carried with it persons
16 who act under Federal officers in performing those very
17 same functions. So if the Federal Government hired an
18 employee to serve food who was acting under a Federal
19 officer who was responsible for the delivery of food,
20 that person would be acting under a Federal officer
21 within the meaning of this statute, assuming that the
22 person was subject to the control, guidance, and
23 oversight in the delivery of that food.

24 Now, this case is very far from the
25 historical examples of citizens being called upon by

1 customs officers to assist in the enforcement of the
2 revenue laws or the chauffeur who was, under a Federal
3 employment contract, who then -- assisted revenue
4 officers in carrying out a raid on a distillery, or the
5 military corporal who was involved in assisting Federal
6 officers in making an arrest.

7 Those are the historical examples. They
8 point to the principle that you are talking about people
9 who are in a subordinate position and who are acting on
10 behalf of or otherwise assisting Federal officers in
11 carrying out their duties.

12 As for the alternative ground for affirmance
13 here, that is that there has been a delegation, testing
14 delegation of authority, there has been no delegation of
15 authority. It is unusual for the Government to delegate
16 out its own regulatory responsibilities to the very
17 industry it is regulating and it didn't do that here.
18 What the Government did is that it had at one time its
19 own testing program. It eliminated that testing program
20 altogether, which had not been required by statute but
21 was simply the result of a commission vote. And after
22 that, the industry continued to carry on the very
23 testing that it had been doing all along as a result of
24 an agreement among industry participants. Now, even if
25 --

1 CHIEF JUSTICE ROBERTS: You don't care what
2 kind of testing they do? They can change the method and
3 change the way to resolve --

4 MR. GORNSTEIN: Actually, the Federal Trade
5 Commission cannot require the particular testing method.
6 But even if you assume it could, Mr. Chief Justice, that
7 would simply be a regulatory condition on the marketing
8 of a product. And acting in accordance with a
9 regulatory condition on the marketing of a product is
10 not acting under a Federal officer, for the reasons I've
11 discussed.

12 JUSTICE GINSBURG: Mr. Gornstein, was there
13 any Government litigation against the cigarette
14 companies?

15 MR. GORNSTEIN: There has been Government
16 litigation against the cigarette companies for
17 allegations that are very similar to the complaint in
18 this case except that it is being brought under the RICO
19 statute. That litigation is pending in the D.C. Circuit
20 and the basic allegation, one of the allegations of the
21 complaint, is that the cigarette companies have falsely
22 marketed their products as being less dangerous than
23 other products when, in fact, they are not.

24 Now, the final point to be made is, even if
25 there was a delegation of authority here, it would not

1 affect the disposition of this case because this
2 complaint does not challenge the testing itself.

3 What this complaint says is that these --
4 that the Respondent here engaged in deceptive
5 advertising by essentially designing cigarettes that
6 would cheat the test and then marketing the cigarettes
7 as light when in fact they are not.

8 If the Court has no further questions --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Gornstein.

11 Mr. Olson.

12 ORAL ARGUMENT OF THEODORE B. OLSON

13 ON BEHALF OF THE RESPONDENTS

14 MR. OLSON: Thank you, Mr. Chief Justice,
15 and may it please the Court:

16 The heart of this lawsuit is that official
17 FTC tar and nicotine ratings generated by testing
18 performed by Respondents under the FTC's supervision and
19 transmitted to the public in Respondent's advertising at
20 the FTC's insistence is misleading; therefore, the
21 creation and transmission of the allegedly misleading
22 data for which Respondents are being sued were acts
23 performed by Respondents to assist the FTC in performing
24 its official responsibilities.

25 JUSTICE SOUTER: Did the FTC ever adopt a

1 regulation saying you've got publish these measurements?

2 MR. OLSON: No. The FTC did not do it
3 through a regulation. If the Court were to look at
4 pages 93 to 110 of the Joint Appendix, you would see
5 testimony by the Chairman of the FTC and the head of the
6 consumer protection part of the FTC saying: We chose
7 not to do it by regulation because we found that it was
8 much more efficient, much more fast, and much for
9 effective to force the tobacco companies into what is
10 called a voluntary agreement requiring precisely that
11 information.

12 JUSTICE SOUTER: But if one of the companies
13 had said, we're sick of doing this, we don't like the
14 numbers we're getting, whatever, we're just not going to
15 do it, presumably if we, you know, accept that testimony
16 at face value, the FTC would have moved and said, okay,
17 I guess we're going to have to have a reg or a statute
18 or what-not. During that period of time, the company
19 wouldn't be committing any offense?

20 MR. OLSON: Yes, it would. In a 1978
21 advisory opinion, which is found on pages 202 of the
22 joint appendix, the FTC stated categorically -- and the
23 joint appendix, by the way, Justice Souter, is full of
24 exactly what I'm talking about. The FTC said tar values
25 in cigarette advertising must be consistent with the

1 latest FTC number and stated that it would be deceptive
2 to advertise higher numbers or lower numbers or
3 different numbers. In other words, the enforcement
4 wouldn't be through the enactment of a regulation. The
5 FTC -- again, I refer to the testimony of the Chairman
6 of the FTC: The FTC does things this way because --

7 JUSTICE SOUTER: What is this -- I'm just
8 not following it. What is the source of the so-called
9 "FTC number" to which advertising must conform?

10 MR. OLSON: The source of the FTC number is
11 the FTC test, alternatively called the Cambridge filter
12 test.

13 JUSTICE SOUTER: The Cambridge test, yes.

14 MR. OLSON: But the FTC calls it the FTC
15 test. It was devised by the FTC. It has a specific set
16 of requirements. The FTC itself performed that test for
17 a number of years. Then in 1987 the test was
18 transmitted -- the FTC stopped doing it and allowed the
19 industry to do it itself because the -- again, in that
20 same testimony by the Chairman of the Commission, he
21 said that: It will be more effective and easier for us,
22 and we can use our funds for other purposes if the
23 industry does it.

24 JUSTICE SOUTER: I understand that. But if
25 the -- if a given cigarette manufacturer simply said,

1 we're not going to give any numbers, we're simply going
2 to say "Smoke Marlboros," and the FTC wanted numbers and
3 they wanted the numbers in accordance with the Cambridge
4 testing method, they would then have had to regulate,
5 adopt a regulation, or get Congress to pass a statute.

6 MR. OLSON: It's fairly -- what happened,
7 it's fairly clear from what the FTC has said, they would
8 bring an action for deceptive advertising if there was
9 anything involved in the marketing of those cigarettes
10 that had to do with tar and nicotine levels.

11 JUSTICE SOUTER: Okay. Now, in my hypo they
12 just say: Look, we're just going to say "Smoke
13 Marlboros." We're not going to say the nicotine is low
14 or anything. The FTC would not at that point have any
15 basis to charge a violation?

16 MR. OLSON: No, they wouldn't. But that is
17 not of course this case. This case involves --

18 JUSTICE SOUTER: All I'm getting at is the
19 FTC had no basis other than a voluntary agreement to
20 require them to publish any numbers or to publish any
21 numbers in accordance with the Cambridge --

22 MR. OLSON: The history of that is set forth
23 in the record and it's clear.

24 JUSTICE SOUTER: Right.

25 MR. OLSON: And the answer is that the FTC

1 announced a proposed rule. It then sent a letter to the
2 tobacco companies saying, it would be much easier for us
3 and much easier for you to enter into a voluntary
4 agreement. It gave them 30 days to come up with a
5 voluntary agreement. They produced an agreement which
6 the FTC rejected because it allowed certain flexibility
7 with respect to the testing and didn't adhere
8 specifically to the FTC test that you're referring to.

9 It rejected that first agreement. The
10 tobacco companies came back with another agreement. The
11 FTC accepted that agreement and said that it would
12 enforce the voluntary agreement against the tobacco
13 companies and if they deviated from it they'd return to
14 the rulemaking process.

15 JUSTICE GINSBURG: Again, you're talking
16 about an agency that has set certain standards that the
17 entity its regulating must meet. They must meet all
18 kinds of requirements for certain kinds of tests by
19 OSHA, say, for example. Think of pesticides, think of
20 hazardous substance -- quite precise tests that the
21 Government says you must make this test before you
22 market that dangerous product.

23 I don't see how cigarettes are any different
24 from hazardous wastes, pesticides, just the vast number
25 of potentially dangerous to health products that are

1 marketed and the Government says: We're not going to
2 let you put those things out on the market unless you go
3 through a certain testing regimen. That doesn't make
4 the party an agent of the Government for the testing
5 purposes.

6 MR. OLSON: Let me see if I can answer that
7 question, Justice Ginsburg. This is not merely
8 compliance with the rule. This is not merely testing of
9 products. The FTC created the standard. It created the
10 testing mechanism. It performed the tests according to
11 very detailed criteria. Those tests are now performed
12 by the industry for the FTC. Those test results must be
13 reported to the FTC. The FTC then reports those results
14 to Congress and publishes them in the Federal Register
15 as the official FTC tobacco ratings, and then the FTC
16 requires --

17 JUSTICE SCALIA: They are called FTC
18 ratings?

19 MR. OLSON: Yes.

20 JUSTICE SCALIA: And they are called -- in
21 the regulations it's called the FTC test, even after it
22 has been done by the companies?

23 MR. OLSON: Yes, yes, Justice Scalia. And
24 in the case that you --

25 JUSTICE SCALIA: That's very careless, isn't

1 it?

2 MR. OLSON: It's not careless. They are
3 pronouncing the facts.

4 And in a case that you participated in in
5 the D.C. Circuit, the brief in that case, the Brown and
6 Williamson case that was mentioned before Justice Bork
7 wrote the opinion, in that brief I counted -- I stopped
8 counting about 10 or 12 times after the words "the FTC
9 test methodology," the "FTC official ratings," the FTC
10 this, the FTC that.

11 JUSTICE GINSBURG: But there must be many
12 times when an agency prescribes a test that a regulated
13 party must comply with. It's still a relationship of a
14 regulator, the FTC, sets standards that the regulated
15 party has to meet. I just don't see -- it could be
16 called "the FTC test," but it's a test for what? Are
17 you complying with the law when you're manufacturing and
18 marketing this product?

19 MR. OLSON: Let me try again,
20 Justice Ginsburg. If the FTC had said to four local
21 hospitals, please perform this test according to this
22 specification for us, the FTC, and then give us these
23 results, which we will then publish as the FTC official
24 ratings of cigarettes, and then if those hospitals were
25 sued because the testing and the results were alleged to

1 be misleading, I think even the government would admit
2 that that case could be removed under the Federal
3 officer removal statute. There is nothing --

4 JUSTICE SOUTER: What if in your hypo the
5 Government came along and said, in order to run your
6 hospital, you've got to disclose certain facts.
7 Otherwise we're going to shut it down. And those facts
8 from that point on are like your hypo. Would your
9 conclusion then follow, that they were acting under?

10 MR. OLSON: No. It would be a vastly
11 different situation.

12 JUSTICE SOUTER: Why isn't that the
13 situation that we've got here?

14 MR. OLSON: The difference, the difference
15 is, is that, A, the test is, is -- the FTC and the
16 record is full of this, too; the FTC set a goal for
17 itself very early in the regulatory process. It wanted
18 consumers to purchase lower tar and nicotine cigarettes.
19 Now how was it going to accomplish that, the FTC goal?
20 It devised this test. It made it official FTC test.
21 Official FTC ratings. What this is doing is
22 conscripting in a way or accepting here's what the --

23 JUSTICE GINSBURG: I thought that,
24 Mr. Olson, that the cigarette companies wanted to make a
25 light brand so that they could keep customers who might

1 be tempted to quit if there was only the heavy kind.
2 But to say that, the light cigarettes were forced on the
3 cigarette companies by the FTC certainly --

4 MR. OLSON: Well, in, in 29 -- this is in
5 the record. The FTC set forth goals, it's 29 Federal
6 Register 530, in -- on January 22, 1964, that the FTC
7 described its goal as to encourage the development of
8 less hazardous cigarettes. That was done in conjunction
9 with a earlier or a contemporaneous -- nearly
10 contemporaneous Surgeon General report which is reported
11 at joint appendix pages 57 to 60, that the Government
12 had as its goal the responsible promotion of cigarettes
13 low in tar and nicotine. Now I'm not saying --

14 JUSTICE GINSBURG: Well, any product that
15 the Government supervises, certainly the Government
16 would want to promote a safer -- I mean, think of a jet
17 ski. Think of -- products are marketed because people
18 want them, and off course the Government as supervisor
19 will want to encourage a safer product. But let me ask
20 you a different question, Mr. Olson.

21 The removal area has been really closely
22 guarded by Congress. You know it's not easy to get a
23 case out of State court and move it to the Federal
24 court. In fact, Congress has said if the Federal court
25 shifts it back, no matter how wrong a that decision was,

1 it stays in the State court.

2 One can't remove -- you may have a wonderful
3 Federal defense, a preemption defense. You can't remove
4 on that basis. You may have a counterclaim, so you're
5 really the same as a plaintiff. You can't remove on the
6 basis of a counterclaim.

7 Well, Congress has been so careful to let
8 the State courts do State tort litigation. Then we are
9 supposed to read into a Federal officer removal statute,
10 that kind of, the removal of a State tort case from
11 State court to Federal court? Because that's quite the
12 fashion.

13 MR. OLSON: The Government says that the
14 test is -- is, that if an individual, private actor, is
15 assisting the Federal Government in performing the
16 official Government function, the case is appropriate to
17 be removed. That is what the Government says section
18 1441(a)(1) means. This Court has said that section
19 shall be liberally construed, not narrow or limited in
20 its construction, and not frustrated by a narrow,
21 grudging interpretation.

22 JUSTICE BREYER: Is this right? If I have
23 it -- I'm using sort of a silly example to explain it to
24 myself. But I'm thinking the FDA -- or no, the
25 Agriculture Department decides they're really interested

1 in red apples not being red. So they say we hire
2 thousands of apple lookers, and the apple lookers look
3 at all the apples and they devise a redness test which
4 is really fabulous, you know, very precise.

5 MR. OLSON: The apple lookers' device?

6 JUSTICE BREYER: No. The FDA. The FDA has
7 the apple looking redness test, and the apple lookers
8 apply the test. And if you pass the test, you can say
9 red apple, and if you don't pass the test you don't.
10 Now I'll give you two different things that happen. One
11 day because of budget cuts the FDA hires a lipstick
12 company to look, because they're experts on redness;
13 they know how to perform a test.

14 (Laughter.)

15 JUSTICE BREYER: The other possibility is
16 they say to the apple companies, you do your own
17 looking. Now I think there'd be the difference that
18 you're trying to argue, and I don't think it cuts or
19 you. Because in the first case, what they've done is
20 hire somebody to perform a governmental function. In
21 the second case, what they've done is to the people who
22 are regulated and have the interest, in announcing they
23 have red apples, they've said, you do it yourself.

24 MR. OLSON: Ah, but Justice Breyer, what
25 happens here is they say you do it yourself, and the

1 Chairman of the -- Chairman of the FTC said why. Here's
2 why; he said it's better undertaken by private
3 researchers. It's a mechanism that we can rely on to
4 ensure accurate reporting.

5 Then, what the FTC did is to supervise the
6 performance of the test. It goes into the laboratories.
7 It makes sure it has done it its way. And then it
8 accepts those results --

9 JUSTICE BREYER: That wouldn't be relevant,
10 because the -- the problem with the, with the approach
11 that you're taking, as I see it, would be that, that
12 there are probably a lot of instances where a regulated
13 firm, the regulation meaning yes/no, market/not market;
14 yes/no, advertise/not advertise, performs all kinds of
15 tests to see if it is yes or no.

16 And if you're going to start taking that
17 kind of firm and breaking it apart to say whether it's
18 doing the testing part or some other part, you're really
19 opening the gates.

20 MR. OLSON: But we're -- we're not. We're
21 suggesting -- you're -- what you're doing in your
22 question and your statement is to disaggregate the
23 pieces of the process here. Here it is the FTC's goal,
24 it's FTC's method; it's the FTC's test which is
25 supervised but done by the companies. And then it

1 becomes the FTC official ratings which they then must
2 transmit to the company in their advertising. And now
3 they're sued because those ratings that they've done
4 according, for the FTC, according to the FTC standards,
5 are alleged to be misleading.

6 So it's -- it's not possible to disaggregate
7 it. It is a whole spectrum; the testing itself and the
8 reporting -- is done by the industry because the
9 FTC wants it as its official numbers, and it wants its
10 official numbers given to the consumers. And it is
11 setting an advisory opinion, even if you tell them that
12 your cigarettes have higher tar or lower tar, if you
13 don't report our numbers, you will be sued for deceptive
14 advertising.

15 JUSTICE BREYER: All right. So what you are
16 saying is that this function is so separable and it is
17 so much a FTC function and it is so much like delegating
18 it to the third party that did nothing of the testing,
19 that even if you delegate it to the second party which
20 does testing and then benefits from the testing, that's
21 still not enough to take it out.

22 MR. OLSON: What I was saying in answer --

23 JUSTICE BREYER: Is that -- have I got that
24 right?

25 MR. OLSON: I think so. Let me restate it,

1 because I think I understand what you've said.

2 And I think what I was trying to say with
3 respect to Justice Ginsburg's question, if the -- all
4 those private hospitals did it, I think the Government
5 would admit, the Federal -- and then is there an
6 exception in the statute? If the regulated entity, in
7 this case the tobacco company, does it rather than the
8 hospital? And there's nothing in the statute that says
9 that.

10 JUSTICE BREYER: No. But I -- so, so to use
11 my silly example, I mean, it is like the lipstick
12 company. You're saying, well if they did it to the
13 lipstick company it would be clearly that they're the
14 Government agent. And it is so technical, so
15 governmental, so heavily involved with the Government
16 for testing, that even though you give it to the apple
17 growers themselves, they are still Government agents
18 when they perform it.

19 MR. OLSON: The Agency decided they are any
20 --

21 JUSTICE BREYER: I, I see the argument now.

22 MR. OLSON: Yeah.

23 JUSTICE BREYER: Then is there any, any
24 authority ever, that you found for that?

25 (Laughter.)

1 MR. OLSON: This is, as the Eighth Circuit
2 said, a very unusual situation. But the closest
3 analogies are, are to the Government contractor cases.
4 And by the way, it doesn't require a contract to be
5 acting under the supervision. I heard the Government
6 say that what you had to have is someone supervised by
7 the Government with the Government's power to alter the
8 actor's conduct.

9 JUSTICE GINSBURG: Well there's one
10 different. If you're doing it for the Government, the
11 Government says we want Agent Orange; we know it's a
12 very dangerous substance. So they give you an order;
13 we're going to make very precise specifications. But
14 you're doing it for us. We, the Government, want that,
15 and so we are going to put tight controls on your
16 manufacturing it for us.

17 A little was different from a commercial
18 company going out to sell market goods to the public at
19 large?

20 MR. OLSON: Justice, I understand there's a
21 distinction. Because the Government is the actual
22 consumer of that product. But here the Government
23 announced that its goals were to accomplish a market in
24 lower tar cigarettes. And it said with respect to the
25 testing, it's better undertaken by private researchers.

1 So it was fulfilling the Government's desire to have
2 something they could save the money, if they close down
3 the laboratory, they said in this testimony, we'll use
4 the money for enforcement pumps against the cigarette
5 company. We can regulate and determine, fulfill the
6 official functions of the Government more effectively,
7 more efficiently if we do it this way.

8 So it is the Government's objective. It is
9 the Government's results they are seeking to obtain.
10 And they've conscripted voluntarily the industry to do
11 the thing for it and then it calls it its official
12 results.

13 JUSTICE SCALIA: Have, have they imposed its
14 official -- has it imposed, the FTC, its official
15 results on any company that was not a participant in
16 this -- in this testing lab?

17 MR. OLSON: I don't know the answer to that.
18 I think the answer is no. I think that what, what the
19 FTC was able to accomplish at that time was to get every
20 -- the major players in the marketplace with respect to
21 participation in this. I don't know --

22 JUSTICE SCALIA: Your case would be stronger
23 if they weren't doing it just for themselves. If in
24 fact that they were doing it for the FTC who imposed it
25 even on somebody else.

1 MR. OLSON: That's the private hospital
2 example that we were talking about.

3 JUSTICE SCALIA: Yeah.

4 MR. OLSON: I don't know that it would be
5 stronger. Why would it be weaker --

6 JUSTICE SCALIA: Because here you're doing
7 it for yourself. You want to advertise low -- low --
8 low tar cases. And the FTC says the only way we'll let
9 you do it, the only way we'll let do you that
10 advertising is if you test them pursuant to this, this
11 system that we established.

12 And you say okay. We'll test them pursuant
13 to the system you've established and -- and everybody
14 goes happily away.

15 MR. OLSON: Well, that happens to be --
16 there happens to be a coincidence of what the Government
17 wants to accomplish and what the industry is willing to
18 and wants to accomplish. I'll accept that. So does
19 that mean there's an exception to the Federal officer
20 removal statute, if the person who is asked to help the
21 Government, does help the Government, is sued because
22 his actions in helping the Government occasioned someone
23 to bring a law suit?

24 CHIEF JUSTICE ROBERTS: Mr. Olson , you've
25 been talking a lot about testing. But when you look at

1 the complaint in this case, testing is a small part of
2 it. They're complaining about the modification of the
3 tobacco blend, the weight, rod length, the
4 circumference, use of reconstituted tobacco sheets. In
5 other words there's a lot going on here in the complaint
6 here besides the testing. And if the Government is in
7 no way specifying the tobacco blend, the weight, the
8 length, all these other things that are allegedly part
9 of the manipulation to affect the figures.

10 MR. OLSON: Well, in the first place if
11 there's anything in the complaint that allows a removal
12 then the case can be removed. That's the Exxon versus
13 Allapattah case that the Court decided just a couple of
14 terms ago. But secondly, let me address directly what
15 you are saying.

16 Throughout the complaint, in the complaint
17 itself, I found references to the testing machine or
18 method eight times in the complaint. They say -- they
19 complain about representations that cigarettes contain
20 less tar and nicotine than regular cigarettes. They
21 base that on the test results. They then say as
22 measured by the industry standard testing apparatus.

23 And let me refer to what the Petitioners
24 said in their motion to remand to the State court. They
25 complained -- they said the basis of this complaint is

1 misleading low tar and nicotine ratings as measured by
2 the company's testing procedures. That's in the
3 Petitioners' motion to remand. Furthermore, the
4 district court interpreted the complaint precisely the
5 way we are explaining this to the Court today. The
6 district court said that over and over again, words of
7 the district court at page 42a of the petition appendix,
8 the court concludes that the FTC's regulation of the
9 cigarette companies' testing and advertising cuts to the
10 heart of the plaintiff's lawsuit.

11 Well, the heart of the plaintiff's lawsuit
12 is testing and advertising. The testing is required by
13 the FTC. The results of the testings are the FTC's
14 numbers. And the advertising contains the FTC's numbers
15 because the FTC requires it. The circuit court
16 interpreted --

17 JUSTICE GINSBURG: But the company is doing
18 it so it can stay in business and market this product,
19 not as a service to the U.S. Government.

20 MR. OLSON: I don't deny that the -- the
21 Respondents in this case are engaged in industry. A
22 regulated industry by the FTC. And that's correct,
23 Justice Ginsburg.

24 I don't think there's an exception. And the
25 Government hasn't suggested there's an exception in the

1 Federal officer removal statute because someone happens
2 to be in the industry which is asked to help the
3 Government perform a particular function. There is no
4 logic to that, and it certainly would be not a liberal
5 interpretation of the Federal officer removal statute.

6 The circuit court also said the very -- and
7 I think this is worth noting, at page 15a of the
8 appendix to the cert petition, the very combination the
9 plaintiff challenges as deceptive is the same
10 combination the FTC requires not to be -- to put in your
11 advertising in order not to be deceptive.

12 So what is required by the FTC of the
13 plaintiffs, the advertising of these test -- official
14 test results -- is precisely what the Petitioners say,
15 and the Petitioners say is deceptive. That's the basis
16 for their lawsuit.

17 JUSTICE SCALIA: Well that's a good, that's
18 a good preemption argument.

19 MR. OLSON: If the --

20 JUSTICE SCALIA: I'm not sure it has much
21 bearing upon whether --

22 MR. OLSON: Well, it is a good preemption
23 argument, Justice Scalia. That will be played out
24 either in the State court, depending upon how you rule,
25 or the Federal court. But it's -- that's the nexus and

1 the color of Federal authority that you talked about in
2 your dissenting opinion in that Acker case.

3 The Court in the Acker case, Jefferson
4 County versus Acker, said that the allegations in the
5 petition and in the removal petition must be -- and
6 especially since they weren't challenged in this case,
7 the factual allegations and the characterization of the
8 complaint were not challenged in this case -- must be
9 accepted as true by this Court. And Chief Justice
10 Roberts, it's not only the allegations in the complaint
11 and the characterization in the removal petition, but
12 it's what the district court decided the complaint said.

13 JUSTICE KENNEDY: I know all that's involved
14 here is the forum and removal; but if we were to rule
15 for you that there' is Federal officer status here,
16 would that effect any of the substantive determinations
17 on the preemption question, etcetera?

18 MR. OLSON: No, I don't think so. I think
19 --

20 JUSTICE KENNEDY: It's just a forum
21 question?

22 MR. OLSON: Yes, it is. And this is an
23 appropriate case for evaluation of the conduct of the
24 person acting --

25 JUSTICE BREYER: I have a quick question.

1 Is there anything in the complaint that alleges you
2 didn't perform the tests properly?

3 MR. OLSON: Yes. Yes. There is. But as I
4 said, that is not -- I mean, the part of the complaint,
5 as the district court saw it and the circuit court saw
6 it, is much more than that. It's the testing and so on
7 and so forth. And I don't think it would make any
8 difference because even if there's an allegation, which
9 there is in the complaint, that the test was manipulated
10 or gained or circumvented, it goes back to whether it's
11 a good test or not.

12 CHIEF JUSTICE ROBERTS: I don't understand
13 your response to Justice Kennedy. If we determine that
14 you're acting under the direction of a Federal officer,
15 that would seem to me highly pertinent on the merits of
16 a preemption argument. So it would not be just the
17 forum, but kind of getting into the preemption merits.

18 MR. OLSON: Well, it may perhaps be. But
19 what, it's an interpretation of the statute. I don't
20 think there's any doubt about that anyway, Chief Justice
21 Roberts, because it's clear that what was being done
22 here is something that the FTC wanted done in the way
23 the FTC wanted it done. I don't know how the -- I
24 believe that the preemption argument is very, very
25 strong, because the lawsuit, the substance, the guts,

1 the core, the heart of the lawsuit, as the district
2 court said and the Eighth Circuit said is, you're doing
3 what the FTC required you to do, and the plaintiffs say
4 that it's deceptive.

5 And by the way, it's very clear from the
6 record in the joint appendix and in the district court
7 decision and in the remand in the motion -- the motion
8 to -- the petition to remove, that the FTC knew exactly
9 the deficiencies that are alleged in the complaint.

10 The FTC has been aware of the fact that
11 people smoke differently, that cigarette -- the design
12 of a cigarette may affect the outcome of the test. But
13 what the FTC, knowing that full well, said, well, people
14 might smoke things differently and you might get more
15 tar and nicotine than the FTC ratings produce. And the
16 FTC with full awareness said, we understand all that,
17 but what we want is for the consumers to have an ability
18 to compare this cigarette with this cigarette, and we
19 have devised a test that will allow you to compare an
20 apple to an apple. Now there are other things that will
21 --

22 JUSTICE SCALIA: It all comes back to me
23 now, that case you mentioned. Lip drape, that was the
24 lip drape case, wasn't it, where people smoke
25 differently because some of them cover up the holes in

1 the filter when their lips -- the lip drape. The naked
2 lip drape.

3 MR. OLSON: That is the case. I don't know
4 if you've characterized it the same way I did, but the
5 apples to apples thing is tied in with your
6 hypothetical, Justice Breyer, about the apple
7 inspectors.

8 JUSTICE BREYER: Is it the apple institute
9 who's doing the testing?

10 MR. OLSON: It's the Tobacco Institute
11 testing facility --

12 JUSTICE BREYER: No, I said apple institute.
13 You know, that seemed to me to be the case where it was
14 the apple institute or whatever it was that was the
15 delegate, and then they applied the test, and the people
16 they were applying the test to weren't.

17 MR. OLSON: It's a facility of the tobacco
18 industry. The FTC perceives it as -- these industries
19 -- and these companies, and as I said, even the
20 petitioners in their remand petition are challenging the
21 low tar and nicotine rate measured by the company's
22 testing procedures. So yes, I'd like to have it be
23 something different but it isn't something different.
24 It is what the companies have done, and through this
25 mechanism.

1 This case comes down to the fact that the
2 FTC wanted certain things done. It decided how certain
3 things would be done. It calls the results of those the
4 official FTC ratings. It wants those ratings delivered
5 to the people. And the tobacco companies have done that
6 and they're being sued because they say -- because that
7 information which they're delivering, that they're
8 creating and delivering at the request of the
9 Government, is alleged to be deceptive. This is the
10 perfect case for a removal under the federal officer
11 removal statute.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.

13 Mr. Frederick, two minutes remaining.

14 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

15 ON BEHALF OF THE PETITIONERS

16 MR. FREDERICK: If this is a perfect case
17 for Federal officer removal, there are easily 40,000
18 others in the State courts waiting to be removed.

19 JUSTICE SCALIA: Well, how many others
20 involve the agency calling the result of the private
21 action the FTC figures and the FTC test?

22 MR. FREDERICK: I don't know the answer to
23 that, but I can tell you that in lots and lots of areas,
24 the Federal Government wants safer, cleaner cars, safer
25 refrigerators --

1 JUSTICE SCALIA: But they don't -- they
2 don't put it out to the public as the Federal
3 Government's figures.

4 MR. FREDERICK: They do --

5 JUSTICE SCALIA: That makes a big
6 difference.

7 MR. FREDERICK: It does not make a
8 difference. And the reason it doesn't make a difference
9 is if you look on your refrigerator, if you look on your
10 lawn mower, if you look on your automobile, there are
11 Government standard tests that have to be complied with
12 for an industry to be able to sell its products. And if
13 Philip Morris is correct here, you are going to be
14 announcing a dramatic transformation of the role of
15 Federal and State courts, because every time there is
16 even a colorable argument for preemption, the industry
17 will take the case to Federal court saying we're acting
18 under the Federal officer, and therefore, don't --

19 JUSTICE SCALIA: Just don't call it the
20 Government's test. Don't call it the Government's
21 figures. Call it the industry's figures.

22 MR. FREDERICK: The description shouldn't
23 make a difference, particularly where it is in a
24 voluntary agreement that was not put out for notice and
25 comment rulemaking, and it was done for precisely this

1 reason, Justice Scalia. For decades, the cigarette
2 companies were rightly perceived as deceiving the public
3 about the health content of their products.

4 CHIEF JUSTICE ROBERTS: Now the FTC told us
5 why they did it. They did it because they could save
6 the money by having the industry do it rather than them
7 doing it.

8 MR. FREDERICK: They also said, Mr. Chief
9 Justice, that they expected the companies to police each
10 other, which is exactly what happened when the Barclay
11 cigarette came up. Philip Morris was the one that
12 complained and said that cigarette doesn't comply, it's
13 been manipulating the FTC Cambridge filter method. So
14 the FTC found a cheaper way to do regulation.
15 Compliance with rules does not transform an entity into
16 a Federal officer. Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
18 The case is submitted.

19 (Whereupon, at 12:17 p.m., the case in the
20 above-entitled matter was submitted.)

21
22
23
24
25

A				
abandons 4:4	actor's 17:1 40:8	aircrafts 21:18	appeals 22:19	asked 42:20
ability 48:17	acts 11:2,3	AL 1:3,7	appearance	45:2
able 12:6 15:1	26:22	Allapattah	11:15	assert 8:15
17:20 41:19	actual 40:21	43:13	APPEARAN...	asserts 4:22
51:12	ad 5:13	allegation 25:20	1:15	assist 24:1 26:23
above-entitled	address 43:14	47:8	appendix 27:4	Assistant 1:18
1:12 52:20	adhere 30:7	allegations	27:22,23 34:11	assisted 24:3
accept 27:15	admit 33:1 39:5	25:17,20 46:4	44:7 45:8 48:6	assisting 11:17
42:18	adopt 5:11	46:7,10	apple 36:2,2,5,7	23:3,5 24:5,10
accepted 30:11	26:25 29:5	alleged 32:25	36:7,9,16	35:15
46:9	advertise 28:2	38:5 48:9 50:9	39:16 48:20,20	assume 25:6
accepting 33:22	37:14 42:7	allegedly 26:21	49:6,8,12,14	assuming 23:21
accepts 37:8	advertise/not	43:8	apples 36:1,3,23	assuredly 6:9
accomplish	37:14	alleges 47:1	49:5,5	attempted 18:5
33:19 40:23	advertising	allow 5:25 48:19	appliances 19:7	attempting 6:19
41:19 42:17,18	18:13 26:5,19	allowed 28:18	19:22	audits 11:22
accurate 37:4	27:25 28:9	30:6	applied 4:11	authority 4:6,23
Acker 46:2,3,4	29:8 38:2,14	allows 43:11	49:15	24:14,15 25:25
acknowledge	42:10 44:9,12	alter 9:7 12:6	apply 7:12 9:17	39:24 46:1
13:21	44:14 45:11,13	15:20 17:1	36:8	automobile
act 6:17 8:6	advisory 27:21	40:7	applying 49:16	19:20 51:10
23:16	38:11	alteration 17:10	approach 3:24	aware 48:10
acting 3:19 4:12	affect 26:1 43:9	altering 17:6	37:10	awareness 48:16
4:15 7:14 8:8,8	48:12	alternate 4:5	appropriate 7:1	a.m 1:14 3:2
8:14 10:12,12	affirmance 4:5	alternative	17:9 35:16	
10:21 11:9,11	24:12	24:12	46:23	B
12:18,20 13:11	agencies 7:25	alternatively	approve 14:12	B 1:22 2:10
13:15 14:5,18	agency 21:19	28:11	April 1:10	26:12
15:4,22 16:17	30:16 32:12	altogether 24:20	area 34:21	back 30:10
17:3,12,16,17	39:19 50:20	Americans	areas 7:4 20:15	34:25 47:10
20:17,19 21:1	agent 8:19,21	13:13	50:23	48:22
21:4,22,24	11:17 31:4	amicus 1:20 2:7	argue 36:18	balance 18:22
22:3,16,19	39:14 40:11	19:2	argued 20:6	bank 18:5
23:3,18,20	agents 10:19	analogies 40:3	argument 1:13	Barclay 52:10
24:9 25:8,10	11:7 12:4	analysis 6:15	2:2,5,9,12 3:3	base 43:21
33:9 40:5	39:17	announced 30:1	3:7 15:21	basic 25:20
46:24 47:14	ago 43:14	40:23	18:15 19:1	basically 17:14
51:17	agreement	announcing	26:12 39:21	basis 17:8,25
action 6:1 15:2	24:24 27:10	36:22 51:14	45:18,23 47:16	29:15,19 35:4
16:2,6,10,13	29:19 30:4,5,5	answer 5:17	47:24 50:14	35:6 43:25
29:8 50:21	30:9,10,11,12	29:25 31:6	51:16	45:15
actions 11:4	51:24	38:22 41:17,18	arose 11:8	bearing 45:21
16:8 42:22	Agriculture	50:22	arrest 24:6	began 8:6
actor 16:10	35:25	anyway 47:20	articulated 3:18	Beginning 8:5
35:14	Ah 36:24	apart 17:19	4:11 16:18	behalf 1:16,20
actors 13:10	aiding 4:15 7:14	37:17	ascertaining	1:22 2:4,7,11
	10:12	apparatus 43:22	5:20	2:14 3:8 4:15

7:14 9:13 10:13 13:11 19:2 21:2,25 22:15 24:10 26:13 50:15 behavior 21:24 believe 47:24 belts 7:6 benefits 18:13 38:20 best 6:24 better 6:14 8:14 37:2 40:25 big 51:5 Bivens 16:10 blank 18:14 blend 43:3,7 blinds 18:3 blow 17:19 Blue 11:20 12:11,19 13:20 Bork 6:4 32:6 Branch 23:1 brand 33:25 breaking 37:17 Breyer 35:22 36:6,15,24 37:9 38:15,23 39:10,21,23 46:25 49:6,8 49:12 brief 32:5,7 bring 5:25 12:17 29:8 42:23 brought 7:9 12:3 25:18 Brown 6:3 32:5 budget 13:24 36:11 bureaucracy 13:17 business 44:18	23:10 call 51:19,20,21 called 23:25 27:10 28:11 31:17,20,21 32:16 calling 50:20 calls 28:14 41:11 50:3 Cambridge 5:19 6:11 28:11,13 29:3,21 52:13 care 25:1 careful 35:7 careless 31:25 32:2 carried 23:15 carry 24:22 carrying 22:8 24:4,11 cars 7:18 19:6 50:24 case 3:4,14 4:3 4:13 6:3 7:3 8:16,25 10:15 11:3,5 14:22 15:23 16:18 17:14,15,23 18:6 20:6,8 22:9 23:24 25:18 26:1 29:17,17 31:24 32:4,5,6 33:2 34:23 35:10,16 36:19,21 39:7 41:22 43:1,12 43:13 44:21 46:2,3,6,8,23 48:23,24 49:3 49:13 50:1,10 50:16 51:17 52:18,19 cases 8:4,4,7,21 8:24 9:12,24 17:13,24 18:7 40:3 42:8 Casey 4:14	categorically 10:4 27:22 causal 11:2 cause 15:2 caused 4:23 cert 18:2 45:8 certain 12:17 30:6,16,18 31:3 33:6 50:2 50:2 certainly 8:18 16:16 34:3,15 45:4 certified 22:3,4 certifies 21:19 chairman 5:8 27:5 28:5,20 37:1,1 challenge 7:9 14:13 26:2 challenged 46:6 46:8 challenges 4:8 45:9 challenging 49:20 change 7:22 9:6 22:21 25:2,3 charactered 49:4 characterizati... 46:7,11 charge 29:15 charged 6:16 11:3 chauffeur 10:16 11:6,9 12:3 24:2 cheaper 52:14 cheat 26:6 Chief 3:3,9 5:10 5:16,23 6:6,10 7:2,17 12:25 13:7 14:7 18:23 19:4 20:16,21 21:7 21:12 22:2,6	25:1,6 26:9,14 42:24 46:9 47:12,20 50:12 52:4,8,17 chose 27:6 cigarette 6:19 25:13,16,21 27:25 28:25 33:24 34:3 41:4 44:9 48:11,12,18,18 52:1,11,12 cigarettes 3:23 4:9,21 5:21 18:13,17,21 26:5,6 29:9 30:23 32:24 33:18 34:2,8 34:12 38:12 40:24 43:19,20 circuit 3:11 4:11 5:21 6:4,21 16:8 25:19 32:5 40:1 44:15 45:6 47:5 48:2 Circuit's 4:4 18:6 circumference 43:4 circumstance 16:7 circumstances 15:20 circumvented 47:10 cite 4:25 cited 8:21 citizen 8:19 citizens 23:25 City 4:14 claim 8:14 15:2 16:9,11 claims 22:22 cleaner 50:24 clear 6:3 13:8 17:16 29:7,23	47:21 48:5 clearly 39:13 close 8:19 41:2 closely 23:2 34:21 closest 40:2 Code 13:8 18:11 coincidence 42:16 color 10:22,25 11:6,10,14,14 46:1 colorable 19:10 51:16 combination 45:8,10 come 16:1 30:4 comes 16:2 48:22 50:1 comment 51:25 Commerce 7:25 commercial 40:17 commission 3:13 4:20 6:17 9:1 24:21 25:5 28:20 Commission's 3:22 committing 27:19 companies 1:6 3:5 12:12 13:1 13:5 15:7 25:14,16,21 27:9,12 30:2 30:10,13 31:22 33:24 34:3 36:16 37:25 44:9 49:19,24 50:5 52:2,9 company 9:19 10:18 14:14,16 27:18 36:12 38:2 39:7,12 39:13 40:18 41:5,15 44:17
---	--	--	---	--

company's 4:8 44:2 49:21	29:5 31:14 34:22,24 35:7	22:13,16 23:22	created 13:17 31:9,9	defended 16:8
compare 48:18 48:19	conjunction 34:8	controls 40:15	creating 50:8	defense 14:21 19:10 35:3,3
complain 43:19	conscripted 41:10	core 48:1	creation 26:21	deficiencies 48:9
complained 43:25 52:12	conscripting 33:22	corporal 24:5	credit 18:5	defines 11:1
complaining 43:2	consistent 27:25	correct 6:2 44:22 51:13	criteria 31:11	delegate 21:18 24:15 38:19 49:15
complaint 4:7 25:17,21 26:2 26:3 43:1,5,11 43:16,16,18,25 44:4 46:8,10 46:12 47:1,4,9 48:9	consists 11:24	Counsel 52:17	critical 8:13	delegated 4:6 21:9
compliance 7:14 7:22 9:9 12:14 13:6 14:3 17:11,18 21:3 31:8 52:15	constitute 9:9 13:7	counted 32:7	Cross 12:11,19	delegating 13:5 38:17
complied 51:11	constitutes 5:3	counterclaim 35:4,6	Cross-Blue 11:20 13:20	delegation 4:23 5:4 13:7 24:13 24:14,14 25:25
comply 13:11 32:13 52:12	construction 35:20	counting 32:8	curiae 1:20 2:8 19:2	delivered 50:4
complying 7:8 8:9 14:8,25 21:23 32:17	construed 35:19	County 46:4	customers 33:25	delivering 50:7 50:8
concerning 18:16,18	consumer 19:8 27:6 40:22	couple 9:14 43:13	customs 24:1	delivery 23:19 23:23
conclude 16:21	consumers 33:18 38:10 48:17	course 8:25 13:23 16:5 29:17 34:18	cuts 36:11,18 44:9	deny 44:20
concludes 44:8	contain 43:19	court 1:1,13 3:10,14,15,18 3:21 4:2,3 6:20 10:3 14:23,23 14:23 15:10,14 15:17 16:5,18 17:13,16,25,25 18:7 19:5,13 22:19,22 26:8 26:15 27:3 34:23,24,24 35:1,11,11,18 43:13,24 44:4 44:5,6,7,8,15 45:6,24,25 46:3,9,12 47:5 47:5 48:2,6 51:17	D D 3:1	Department 1:19 7:24,24 35:25
conclusion 20:17 33:9	contains 44:14	courts 14:25 35:8 50:18 51:15	data 26:22	depend 15:11
condition 25:7,9	contemporane... 34:9,10	court's 3:24 4:13 8:4,7 17:13	DAVID 1:16 2:3 2:13 3:7 50:14	depending 22:12 45:24
conditions 17:2	content 52:3	cover 23:14 48:25	day 20:10 36:11	depends 11:1 15:9
conduct 4:7 9:7 12:1,7 15:20 17:1,6 40:8 46:23	context 11:19 13:16 16:2,6	covered 16:14 16:22	days 30:4	described 10:22 34:7
conducted 4:20 7:7	contexts 8:13	create 19:11	death 11:7	description 51:22
conform 28:9	contextually 9:3		decades 52:1	design 48:11
conformity 22:19	continued 24:22		deceiving 52:2	designing 26:5
confronted 13:14	contract 9:1,4,4 9:10,24 11:21 15:10,25 22:24 24:3 40:4		deception 6:15 6:24	desire 41:1
Congress 5:8	contracted 13:20		deceptive 6:1,20 18:12 26:4 28:1 29:8 38:13 45:9,11 45:15 48:4 50:9	detailed 3:12 9:8 11:21 14:1,4 15:1 18:20 19:9 20:25 22:20 31:11

6:22 determining 3:19 4:12 6:24 development 34:7 deviated 30:13 device 18:4 36:5 devices 19:7 devise 36:3 devised 28:15 33:20 48:19 difference 14:7 33:14,14 36:17 47:8 51:6,8,8 51:23 different 6:14 10:24 12:19 13:15,21 21:14 28:3 30:23 33:11 34:20 36:10 40:10,17 49:23,23 differently 48:11,14,25 direct 17:13 direction 12:23 47:14 directly 43:14 Director 10:18 disaggregate 37:22 38:6 discharge 4:17 7:16 disclose 33:6 discussed 25:11 disposition 26:1 dispute 7:3 dissenting 46:2 distillery 24:4 distinct 8:24 11:10 distinction 13:1 40:21 distinguish 12:11 district 44:4,6,7 46:12 47:5	48:1,6 document 5:1 doing 4:21 6:16 10:20 12:12 24:23 27:13 28:18 33:21 37:18,21 40:10 40:14 41:23,24 42:6 44:17 48:2 49:9 52:7 doubt 47:20 dramatic 51:14 drape 48:23,24 49:1,2 drive 12:5 drug 12:12 13:1 14:13,15,16 drugs 13:2 14:14 19:6 duties 24:11 duty 23:11 D.C 1:9,16,19 1:22 5:21 6:4 6:20 25:19 32:5 <hr/> E E 2:1 3:1,1 earlier 34:9 early 33:17 easier 28:21 30:2,3 easily 50:17 easy 34:22 Edwards 6:5 effect 4:23 7:10 46:16 effective 13:3 27:9 28:21 effectively 41:6 efficiency 19:20 19:23 efficient 27:8 efficiently 41:7 eight 43:18 Eighth 3:11 4:4 4:11 18:6 40:1	48:2 either 10:4 15:12 45:24 eliminated 24:19 elucidates 4:14 employee 10:17 23:18 employees 15:6 23:12 employment 12:2 24:3 enactment 28:4 encourage 34:7 34:19 energy 19:23 enforce 30:12 enforcement 23:15 24:1 28:3 41:4 enforcing 11:18 20:13,24 engage 11:22 engaged 26:4 44:21 ensure 37:4 enter 30:3 entities 18:15 entitled 3:13 entity 8:3,10 14:5 30:17 39:6 52:15 entrepreneur 15:25 entwinement 16:18 erroneous 3:16 especially 46:6 ESQ 1:16,18,22 2:3,6,10,13 essentially 26:5 established 42:11,13 ET 1:3,7 etcetera 46:17 evaluation 46:23	event 4:8 events 4:22 everybody 17:20 42:13 exactly 20:2 27:24 48:8 52:10 example 8:22 9:18 12:2,11 30:19 35:23 39:11 42:2 examples 18:3 23:25 24:7 exception 39:6 42:19 44:24,25 executing 9:13 execution 17:18 Executive 23:1 expanded 23:8 23:13 expected 52:9 experts 36:12 explain 35:23 explaining 44:5 extensive 18:9 Exxon 43:12 <hr/> F FAA 21:17,17 21:20 22:5 fabulous 36:4 face 27:16 facility 49:11,17 fact 11:17 13:8 14:9,25 16:7 17:10 18:10 25:23 26:7 34:24 41:24 48:10 50:1 facts 11:9 32:3 33:6,7 factual 46:7 fairly 29:6,7 falsely 25:21 far 5:12 18:8,20 23:24 fashion 35:12	fast 27:8 FDA 12:13 35:24 36:6,6 36:11 federal 3:13,15 3:15,19,21,25 4:1,12,16,19 5:22 6:17,17 7:25 8:3,6,9,15 8:19 9:1,5,6 10:13 13:9,14 14:6,22,23 15:1,3,4,13,15 15:19,22 16:17 17:3,21,25 18:7,8,11,16 18:19 19:9,13 19:15,16,23 20:18 21:1,3,4 21:5,23 22:13 22:15,17,20 23:9,9,10,11 23:12,14,16,17 23:18,20 24:2 24:5,10 25:4 25:10 31:14 33:2 34:5,23 34:24 35:3,9 35:11,15 39:5 42:19 45:1,5 45:25 46:1,15 47:14 50:10,17 50:24 51:2,15 51:17,18 52:16 federally 22:3 figures 5:14 43:9 50:21 51:3,21,21 filter 5:19 6:11 28:11 49:1 52:13 final 25:24 firm 37:13,17 first 3:18 4:10 30:9 36:19 43:10 flexibility 30:6
---	--	--	---	---

<p>follow 17:5 33:9 following 28:8 food 21:8 22:25 23:3,18,19,23 footnotes 17:15 force 27:9 forced 34:2 forming 11:22 forth 29:22 34:5 47:7 forum 46:14,20 47:17 found 27:7,21 39:24 43:17 52:14 four 11:7 32:20 Frederick 1:16 2:3,13 3:6,7,9 5:2,5,16 6:2,9 7:13,21 8:23 9:14,25 10:3,8 10:11,24 11:19 12:14,22 13:6 14:20 15:9,14 15:17 16:5,15 16:20,23 17:8 18:1,24 50:13 50:14,16,22 51:4,7,22 52:8 frustrated 35:20 FTC 4:6 5:8,14 5:18 6:16,23 7:1 26:17,23 26:25 27:2,5,6 27:16,22,24 28:1,5,6,9,10 28:11,14,14,15 28:16,18 29:2 29:7,14,19,25 30:6,8,11 31:9 31:12,13,13,15 31:15,17,21 32:8,9,9,10,14 32:16,20,22,23 33:15,16,19,20 33:21 34:3,5,6 37:1,5 38:1,4,4</p>	<p>38:9,17 41:14 41:19,24 42:8 44:13,15,22 45:10,12 47:22 47:23 48:3,8 48:10,13,15,16 49:18 50:2,4 50:21,21 52:4 52:13,14 FTC's 26:18,20 37:23,24,24 44:8,13,14 fuel 19:20 fulfill 13:13 41:5 fulfilling 13:12 41:1 full 13:9 27:23 33:16 48:13,16 function 7:16 9:22,22 12:1 12:23 23:4,6 23:14 35:16 36:20 38:16,17 45:3 functions 4:17 9:21 10:15 11:23 13:19 23:15,17 41:6 funds 28:22 further 21:25 26:8 Furthermore 44:3</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 gained 47:10 gates 37:19 General 1:19 34:10 generated 26:17 getting 27:14 29:18 47:17 Ginsburg 8:17 15:23 17:5,22 18:1 25:12 30:15 31:7</p>	<p>32:11,20 33:23 34:14 40:9 44:17,23 Ginsburg's 39:3 give 7:11 9:6 18:3 29:1 32:22 36:10 39:16 40:12 given 28:25 38:10 go 12:6 31:2 goal 33:16,19 34:7,12 37:23 goals 34:5 40:23 goes 37:6 42:14 47:10 going 8:19 27:14 27:17 29:1,1 29:12,13 31:1 33:7,19 37:16 40:13,15,18 43:5 51:13 good 7:11 19:8 45:17,18,22 47:11 goods 40:18 Gornstein 1:18 2:6 18:25 19:1 19:4,18 20:1,7 20:11,13,19,23 21:11,14 22:4 22:10 23:7 25:4,12,15 26:10 gotten 6:7 governing 18:19 government 4:1 7:4,15,18,24 8:20,23 9:3,13 9:17,18,20,20 9:21,22 10:4,5 10:15 11:17,21 11:23,24 12:2 12:21,24,24 13:2,12,18,23 14:10,12,17,18 15:13,16 16:25</p>	<p>17:6,11 19:9 19:17,24 20:1 20:4,11 21:1,9 21:11,13 22:15 23:4,17 24:15 24:18 25:13,15 30:21 31:1,4 33:1,5 34:11 34:15,15,18 35:13,15,16,17 39:4,14,15,17 40:3,5,7,10,11 40:14,21,22 41:6 42:16,21 42:21,22 43:6 44:19,25 45:3 50:9,24 51:11 governmental 23:4,6 36:20 39:15 Government's 5:13 12:1,23 20:23 40:7 41:1,8,9 51:3 51:20,20 Greenwood 4:14 17:14 ground 4:5 24:12 grounds 18:7 growers 39:17 grudging 35:21 guard 16:3,4 guarded 34:22 guess 27:17 guidance 22:13 23:22 guts 47:25</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>happen 36:10 happened 29:6 52:10 happening 4:18 4:19,24 happens 7:23 11:20 15:6</p>	<p>36:25 42:15,16 45:1 happily 42:14 hazardous 30:20 30:24 34:8 head 27:5 heading 18:12 health 13:18 18:13 30:25 52:3 hear 3:3 heard 40:5 heart 26:16 44:10,11 48:1 heavily 39:15 heavy 34:1 held 3:11 6:10 6:21 8:7 16:6 help 8:18 42:20 42:21 45:2 helping 42:22 higher 28:2 38:12 highly 8:5 47:15 hire 9:18 36:1 36:20 hired 10:18 11:20 12:3 16:3 23:17 hires 36:11 hiring 9:20 historical 23:25 24:7 history 3:25 29:22 holding 3:16 holes 48:25 home 19:7,22 hospital 33:6 39:8 42:1 hospitals 32:21 32:24 39:4 Human 13:18 hypo 29:11 33:4 33:8 hypothetical 7:22 49:6</p>
---	---	---	---	---

<p>I</p> <p>ignores 3:24 17:15</p> <p>implementing 12:1</p> <p>imposed 41:13 41:14,24</p> <p>imposing 9:12</p> <p>incarcerated 9:23,23</p> <p>individual 35:14</p> <p>industries 49:18</p> <p>industry 8:1 12:16 13:10 17:20 19:20 24:17,22,24 28:19,23 31:12 38:8 41:10 42:17 43:22 44:21,22 45:2 49:18 51:12,16 52:6</p> <p>industry's 51:21</p> <p>information 8:2 27:11 50:7</p> <p>inquiry 11:10</p> <p>insistence 26:20</p> <p>inspecting 21:18 21:20</p> <p>inspection 21:8</p> <p>inspector 22:3</p> <p>inspectors 49:7</p> <p>instance 10:17 11:24 12:11</p> <p>instances 12:8 12:15 37:12</p> <p>institute 49:8,10 49:12,14</p> <p>instructions 13:10 14:4</p> <p>instructive 8:5</p> <p>insufficient 17:18</p> <p>intentionally 18:14</p> <p>interest 36:22</p> <p>interested 35:25</p>	<p>interference 4:2</p> <p>intermediary 11:22 12:20</p> <p>interpretation 35:21 45:5 47:19</p> <p>interpreted 44:4 44:16</p> <p>investigations 10:20</p> <p>involve 9:12,24 50:20</p> <p>involved 11:4 24:5 29:9 39:15 46:13</p> <p>involves 29:17</p> <p>IRVING 1:18 2:6 19:1</p> <p>issue 13:3 14:24</p> <p>issues 8:24</p> <p>items 13:25</p> <p>J</p> <p>January 34:6</p> <p>Jefferson 46:3</p> <p>jet 34:16</p> <p>joint 27:4,22,23 34:11 48:6</p> <p>Judges 6:4</p> <p>Justice 1:19 3:3 3:10 4:25 5:3,6 5:10,16,23 6:6 6:10 7:2,17 8:17 9:11,15 10:2,6,9,21,25 11:13 12:10,16 12:19,25 13:7 14:7 15:5,10 15:12,15,23 16:12,19,21,24 17:5,22 18:1 18:23 19:4,14 19:24 20:3,9 20:12,16,21 21:7,12 22:2,6 22:24 25:1,6 25:12 26:9,14</p>	<p>26:25 27:12,23 28:7,13,24 29:11,18,24 30:15 31:7,17 31:20,23,25 32:6,11,20 33:4,12,23 34:14 35:22 36:6,15,24 37:9 38:15,23 39:3,10,21,23 40:9,20 41:13 41:22 42:3,6 42:24 44:17,23 45:17,20,23 46:9,13,20,25 47:12,13,20 48:22 49:6,8 49:12 50:12,19 51:1,5,19 52:1 52:4,9,17</p> <p>K</p> <p>keep 33:25</p> <p>keeping 9:22</p> <p>Kennedy 12:10 12:16,19 46:13 46:20 47:13</p> <p>kind 13:21 17:17 21:21 25:2 34:1 35:10 37:17 47:17</p> <p>kinds 30:18,18 37:14</p> <p>knew 48:8</p> <p>know 7:5,18 14:15 27:15 34:22 36:4,13 40:11 41:17,21 42:4 46:13 47:23 49:3,13 50:22</p> <p>knowing 48:13</p> <p>L</p> <p>L 1:18 2:6 19:1</p> <p>lab 41:16</p>	<p>Labor 7:24</p> <p>laboratories 37:6</p> <p>laboratory 41:3</p> <p>large 40:19</p> <p>largely 4:4</p> <p>latest 28:1</p> <p>Laughter 6:8 36:14 39:25</p> <p>law 3:14 7:23 8:10 9:12,13 10:22 11:18 13:14 17:11 19:13 20:24 21:3 23:11 32:17 42:23</p> <p>lawn 51:10</p> <p>laws 17:18 24:2</p> <p>lawsuit 26:16 44:10,11 45:16 47:25 48:1</p> <p>lead 22:21</p> <p>leaving 6:25</p> <p>left 18:14</p> <p>legal 13:12</p> <p>length 43:3,8</p> <p>lest 25:22</p> <p>letter 30:1</p> <p>level 5:20</p> <p>levels 4:21 29:10</p> <p>liability 17:24</p> <p>liberal 45:4</p> <p>liberally 35:19</p> <p>light 3:23 4:9 18:17 26:7 33:25 34:2</p> <p>limited 35:19</p> <p>lip 48:23,24 49:1 49:2</p> <p>lips 49:1</p> <p>lipstick 36:11 39:11,13</p> <p>LISA 1:3</p> <p>litigated 22:22</p> <p>litigation 14:13 19:13 25:13,16 25:19 35:8</p>	<p>little 40:17</p> <p>local 32:20</p> <p>logic 45:4</p> <p>long 3:25</p> <p>look 9:3 15:11 15:17 27:3 29:12 36:2,12 42:25 51:9,9 51:10</p> <p>lookers 36:2,2,5 36:7</p> <p>looking 9:2 36:7 36:17</p> <p>lot 21:8 37:12 42:25 43:5</p> <p>lots 50:23,23</p> <p>low 29:13 34:13 42:7,7,8 44:1 49:21</p> <p>lower 5:12 28:2 33:18 38:12 40:24</p> <p>M</p> <p>machine 43:17</p> <p>mail 22:7,8</p> <p>major 19:12 41:20</p> <p>makers 6:19</p> <p>making 24:6</p> <p>manipulated 47:9</p> <p>manipulating 52:13</p> <p>manipulation 43:9</p> <p>manufacturer 7:8 18:4,4 28:25</p> <p>Manufacturers 19:6</p> <p>manufacturing 32:17 40:16</p> <p>market 12:18 19:8 30:22 31:2 37:13 40:18,23 44:18</p>
--	--	---	--	--

marketed 19:15 25:22 31:1 34:17	47:15,17 met 15:21 17:2 method 5:11,13 5:19,20,24 6:11,11,19,21 25:2,5 29:4 37:24 43:18 52:13	new 5:11 10:6 nexus 45:25 nicotine 4:21 5:12,14,21 26:17 29:10,13 33:18 34:13 43:20 44:1 48:15 49:21	23:9,10,14,16 24:1,4,6,10 officer's 4:16 10:14 official 4:17 10:15 11:16 14:19 20:4 26:16,24 31:15 32:9,23 33:20 33:21 35:16 38:1,9,10 41:6 41:11,14,14 45:13 50:4	14:21 oral 1:12 2:2,5,9 3:7 19:1 26:12 Orange 8:21 40:11 order 5:7 21:25 33:5 40:12 45:11 OSHA 30:19 ought 9:16 outcome 48:12 oversight 23:23
marketplace 41:20	methodology 32:9	notice 51:24 noting 45:7	32:9,23 33:20 33:21 35:16 38:1,9,10 41:6 41:11,14,14 45:13 50:4	
market/not 37:13	military 24:5	number 28:1,9 28:10,17 30:24	officials 21:10	P
Marlboros 29:2 29:13	minds 22:12	numbers 5:12 27:14 28:2,2,3 29:1,2,3,20,21 38:9,10,13 44:14,14	Oh 10:9	P 3:1
Maryland 10:16 10:18	minutes 50:13	numerous 19:7 19:19	okay 22:25 27:16 29:11 42:12	page 2:2 44:7 45:7
matter 1:12 23:1 34:25 52:20	misleading 26:20,21 33:1 38:5 44:1		Olson 1:22 2:10 26:11,12,14 27:2,20 28:10 28:14 29:6,16 29:22,25 31:6 31:19,23 32:2 32:19 33:10,14 33:24 34:4,20 35:13 36:5,24 37:20 38:22,25 39:19,22 40:1 40:20 41:17 42:1,4,15,24 43:10 44:20 45:19,22 46:18 46:22 47:3,18 49:3,10,17 50:12	pages 27:4,21 34:11
mean 9:16 17:23 34:16 39:11 42:19 47:4	mistake 10:3	O		panel 6:4
meaning 17:3,12 21:5,6 23:21 37:13	misunderstood 3:21	O 2:1 3:1		papers 18:2,3
means 7:6 11:14 35:18	modification 43:2	objective 41:8		paradigmatic 11:23
measure 7:11	money 41:2,4 52:6	obligation 13:13		part 8:1 11:12 18:11 27:6 37:18,18 43:1 43:8 47:4
measured 43:22 44:1 49:21	months 7:19	obtain 41:9		participant 41:15
measurements 27:1	Morris 1:6 3:4 3:11 4:4,7,22 4:24 8:15 9:2 16:8 18:9 51:13 52:11	occasioned 42:22		participants 24:24
mechanism 6:13 31:10 37:3 49:25	motion 43:24 44:3 48:7,7	offense 27:19		participated 32:4
Medicaid 13:16	move 34:23	offers 4:5		participation 41:21
medical 18:4 19:6	moved 27:16	office 10:25 11:6 11:10,14,14		particular 4:25 5:19 14:12 16:7 25:5 45:3
Medicare 11:19	mower 51:10	officer 3:15,20 3:25 4:13,16 7:15 8:3,6,9,11 8:15,18 9:5,6 10:13 14:6,22 15:4,19,22 16:17 17:3,21 18:19 23:19,20 25:10 33:3 35:9 42:19 45:1,5 46:15 47:14 50:10,17 51:18 52:16		particularly 51:23
meet 30:17,17 32:15	multi-trillion-... 13:24	officers 18:8 20:18 21:4 22:14,17 23:9		parties 21:18 party 9:7 31:4 32:13,15 38:18 38:19
meets 16:17	municipality 15:24			pass 29:5 36:8,9
mentioned 32:6 48:23	N			payments 11:22
mere 9:8 14:25	N 2:1,1 3:1			Peacock 4:14
merely 7:13 8:9 31:7,8	naked 49:1			
merits 18:2	narrow 35:19,20			
	nature 9:4 11:1 11:8 15:9			
	nearly 34:9			
	needing 8:18			

<p>pending 25:19 people 11:4 20:17,19,24 24:8 34:17 36:21 48:11,13 48:24 49:15 50:5 people's 17:6 perceived 52:2 perceives 49:18 perfect 50:10,16 perfectly 5:10 perform 9:20 13:18 23:14 32:21 36:13,20 39:18 45:3 47:2 performance 10:14 23:5 37:6 performed 13:19 26:18,23 28:16 31:10,11 performing 12:22 22:14 23:11,16 26:23 35:15 performs 37:14 period 27:18 person 3:19 4:12 4:15 8:7,8,14 10:12 11:11 14:5 15:3,4,22 16:16 17:2 21:20,22,23 22:8 23:20,22 42:20 46:24 persons 23:15 pertinent 47:15 pesticides 19:7 30:19,24 petition 44:7 45:8 46:5,5,11 48:8 49:20 petitioners 1:4 1:17,21 2:4,8 2:14 3:8 19:3</p>	<p>43:23 44:3 45:14,15 49:20 50:15 petitions 10:22 Philip 1:6 3:4,11 4:3,7,22,24 8:15 9:1 16:8 18:9 51:13 52:11 phrase 17:16 pieces 37:23 place 43:10 plaintiff 35:5 45:9 plaintiffs 45:13 48:3 plaintiff's 44:10 44:11 played 45:23 players 41:20 please 3:10 19:5 26:15 32:21 point 4:10 24:8 25:24 29:14 33:8 police 52:9 policing 20:12 20:13,21,23 policy 5:7 position 24:9 possibility 6:25 36:15 possible 38:6 potential 19:12 potentially 30:25 power 9:6 15:19 17:1 40:7 practices 6:1 precise 7:6 21:15 30:20 36:4 40:13 precisely 14:10 27:10 44:4 45:14 51:25 preempted 15:2 preemption</p>	<p>14:21,24 19:10 35:3 45:18,22 46:17 47:16,17 47:24 51:16 preferred 5:20 5:24 preparation 23:2 prescribes 32:12 present 8:24,25 presumably 5:24 27:15 principle 24:8 prison 15:12,23 15:25 16:3,3 prisons 9:19 15:7 private 9:19 15:6,25 21:24 22:6,7 35:14 37:2 39:4 40:25 42:1 50:20 privately 16:3 probably 37:12 problem 5:15 11:5 23:7 37:10 procedures 44:2 49:22 proceedings 4:2 process 30:14 33:17 37:23 procurement 12:8 produce 48:15 produced 30:5 producers 21:9 product 12:17 17:24 25:8,9 30:22 32:18 34:14,19 40:22 44:18 products 7:5 14:8 18:18 19:8,14 20:25 21:2 22:1</p>	<p>25:22,23 30:25 31:9 34:17 51:12 52:3 program 24:19 24:19 Prohibition 8:20 10:19 promote 34:16 promotion 34:12 promulgate 7:1 pronouncing 32:3 proper 4:13 9:2 9:16 16:23 properly 47:2 proposed 6:23 30:1 protect 4:1 protection 27:6 provide 9:5 23:12 provides 22:25 providing 14:8 provision 4:1 7:12 15:8 22:9 public 26:19 40:18 51:2 52:2 publish 5:13 27:1 29:20,20 32:23 publishes 31:14 pumps 41:4 purchase 33:18 purchases 13:24 purely 3:14 purposes 3:25 6:24 8:4 16:10 28:22 31:5 pursuant 11:21 42:10,12 put 31:2 40:15 45:10 51:2,24 puts 10:6 p.m 52:19</p>	<p>Q question 5:17 10:24,25 11:8 11:12 13:14 16:1 31:7 34:20 37:22 39:3 46:17,21 46:25 questions 26:8 quick 46:25 quickly 6:1 quit 34:1 quite 8:24 13:8 30:20 35:11</p> <p>R R 3:1 raid 24:4 random 7:20,20 rate 49:21 ratings 26:17 31:15,18 32:9 32:24 33:21 38:1,3 44:1 48:15 50:4,4 rationale 4:4 read 35:9 really 4:24 34:21 35:5,25 36:4 37:18 reason 5:17 13:8 51:8 52:1 reasons 3:17 25:10 REBUTTAL 2:12 50:14 recall 17:23 reconstituted 43:4 record 29:23 33:16 34:5 48:6 red 36:1,1,9,23 redness 36:3,7 36:12 refer 28:5 43:23 references 43:17</p>
---	---	---	--	--

referring 30:8	relevant 37:9	30:18	5:23 6:6 7:2,17	15:12,15 16:12
refrigerator	Reliable 10:17	requires 7:4	12:25 14:7	16:19,21,24
51:9	rely 37:3	11:16 31:16	18:23 20:16,21	19:14,24 20:3
refrigerators	remain 9:22	44:15 45:10	21:7,12 22:2,6	20:9,12 22:24
50:25	remaining 50:13	requiring 27:10	25:1 26:9	31:17,20,23,25
reg 27:17	remand 43:24	researchers	42:24 46:10	41:13,22 42:3
regard 8:5	44:3 48:7	37:3 40:25	47:12,21 50:12	42:6 45:17,20
regarding 16:9	49:20	reserve 7:25	52:4,17	45:23 48:22
regime 3:22	removal 3:15,25	18:22	rod 43:3	50:19 51:1,5
18:19	7:12 8:6 14:22	resolve 25:3	role 4:16 51:14	51:19 52:1
regimen 31:3	19:11 33:3	respect 3:22	routinely 8:1	seat 7:5
Register 31:14	34:21 35:9,10	4:10 6:15 30:7	rule 6:12,23	second 3:21
34:6	42:20 43:11	39:3 40:24	7:14 30:1 31:8	36:21 38:19
regular 43:20	45:1,5 46:5,11	41:20	45:24 46:14	secondly 43:14
regulate 29:4	46:14 50:10,11	Respondent	rulemaking	Secretary 13:17
41:5	50:17	26:4	6:12 30:14	section 6:16
regulated 8:3,10	remove 3:14	Respondents	51:25	16:11 35:17,18
17:20 32:12,14	17:20 22:8	1:23 2:11	rules 13:11	see 27:4 30:23
36:22 37:12	23:10 35:2,3,5	26:13,18,22,23	52:15	31:6 32:15
39:6 44:22	48:8	44:21	run 9:19 15:7,12	37:11,15 39:21
regulates 17:7	removed 15:7	Respondent's	15:25 33:5	seeking 41:9
regulating 20:24	17:24 18:7	26:19	running 23:9	sell 40:18 51:12
24:17 30:17	33:2 35:17	response 47:13		Senate 22:25
regulation 5:6	43:12 50:18	responsibilities	S	23:1
6:12 12:15	repeat 18:2	24:16 26:24	S 2:1 3:1	send 7:19
17:11 19:9	report 34:10	responsible	safe 13:2	sent 30:1
21:1,19 22:20	38:13	23:19 34:12	safer 34:16,19	separable 38:16
27:1,3,7 28:4	reported 31:13	restate 38:25	50:24,24	sequence 4:22
29:5 37:13	34:10	result 15:2	save 41:2 52:5	series 18:5
44:8 52:14	reporting 7:21	24:21,23 50:20	saw 47:5,5	serve 10:19
regulations 3:12	8:1,2 37:4 38:8	results 7:20,21	saying 5:13 7:10	23:18
13:3,9 15:1,3	reports 31:13	31:12,13 32:23	13:3 23:8 27:1	service 22:14
18:9,11,16,18	representations	32:25 37:8	27:6 30:2	23:2,12 44:19
19:16 31:21	43:19	41:9,12,15	34:13 38:16,22	Services 13:18
regulator 32:14	representative	43:21 44:13	39:12 43:15	set 8:24 28:15
regulatory 3:22	21:20 22:5	45:14 50:3	51:17	29:22 30:16
24:16 25:7,9	request 50:8	return 30:13	says 7:18 14:14	33:16 34:5
33:17	require 8:1 25:5	revenue 8:18	14:16 18:12,14	sets 32:14
rejected 4:6	29:20 40:4	24:2,3	20:2 21:17	setting 38:11
30:6,9	required 12:12	reversed 3:16	26:3 30:21	sheets 43:4
related 11:11	12:16 24:20	RICO 25:18	31:1 35:13,17	shelf 13:25
relationship	44:12 45:12	right 5:11 6:7,10	39:8 40:11	Shield 11:20
7:15 8:9,12	48:3	29:24 35:22	42:8	13:20
9:10 10:14	requirements	38:15,24	Scalia 4:25 5:3,6	shift 19:12
11:2,25 12:5	7:9 19:19,22	rightly 52:2	6:4 9:11,15	shifts 34:25
15:18 16:25	19:23 20:14	rigid 19:15	10:2,6,9,21,25	shut 33:7
17:10,17 32:13	21:23 28:16	Roberts 3:3 5:10	11:13 15:5,10	sick 27:13

side 17:14 silly 35:23 39:11 similar 16:9 17:25 25:17 simple 16:16 simply 9:9 13:12 17:11 21:23 22:19 24:21 25:7 28:25 29:1 situation 7:11 9:17 13:15,22 14:18 21:21,22 22:18 33:11,13 40:2 situations 21:15 21:16 ski 34:17 small 43:1 smoke 29:2,12 48:11,14,24 Solicitor 1:18 somebody 9:12 9:20 11:15,18 14:14 20:8 36:20 41:25 Soper 10:17 11:5 12:3 sort 35:23 sorts 12:15 13:9 13:24 sounds 20:22 source 28:8,10 Souter 26:25 27:12,23 28:7 28:13,24 29:11 29:18,24 33:4 33:12 so-called 3:23 4:9 28:8 special 13:16 specific 3:12 13:10 14:1,4 18:20 19:9,21 20:25 22:20 28:15 specifically	11:11 30:8 specification 32:22 specifications 9:8 14:2 40:13 specifies 14:10 specify 7:6 specifying 43:7 spectrum 38:7 stamp 21:13 standard 16:24 22:10 31:9 43:22 51:11 standards 30:16 32:14 38:4 start 37:16 State 3:14,14 4:2 11:3,3 14:22,24 15:13 15:24 16:6,10 16:13 17:25 19:13,13 22:22 34:23 35:1,8,8 35:10,11 43:24 45:24 50:18 51:15 stated 27:22 28:1 statement 5:1,7 5:8 6:23 37:22 States 1:1,13,20 2:7 19:2 status 46:15 statute 3:15 11:1 16:14 17:4,19 17:21 21:6,17 23:8,13,21 24:20 25:19 27:17 29:5 33:3 35:9 39:6 39:8 42:20 45:1,5 47:19 50:11 stay 44:18 stays 35:1 stopped 4:21 28:18 32:7	strength 7:5 strong 15:21 47:25 stronger 41:22 42:5 stuff 7:6 stumbled 11:8 subject 3:12 14:1 22:12,15 23:22 subjected 18:8 submitted 52:18 52:20 subordinate 4:16 7:15 8:8 8:11,12 9:10 10:13 17:9,17 24:9 substance 30:20 40:12 47:25 substantial 22:21 substantive 46:16 sued 26:22 32:25 38:3,13 42:21 50:6 sues 14:14 sufficient 19:11 suggested 44:25 suggesting 37:21 suit 42:23 supervise 37:5 supervised 19:16 37:25 40:6 supervises 23:2 34:15 supervising 19:25 supervision 9:5 22:13,16 26:18 40:5 supervisor 34:18 supervisory	11:25 12:5 15:18 16:25 supporting 1:21 2:8 19:3 suppose 16:19 supposed 14:11 20:5 35:9 Supreme 1:1,13 sure 13:2 20:4,8 21:15 37:7 45:20 Surgeon 34:10 system 42:11,13 <hr/> T <hr/> T 2:1,1 take 38:21 51:17 talk 19:18 talked 46:1 talking 21:16 24:8 27:24 30:15 42:2,25 tar 4:20 5:11,14 5:20 26:17 27:24 29:10 33:18 34:13 38:12,12 40:24 42:8 43:20 44:1 48:15 49:21 technical 39:14 tell 38:11 50:23 telling 12:5 tempted 34:1 terms 9:9 43:14 test 3:18 4:11,13 7:10,18,20 9:15,16 13:4 14:17 16:12,13 16:18 19:14,20 19:21 20:2 21:24 22:18 26:6 28:11,12 28:13,15,16,17 30:8,21 31:12 31:21 32:9,12 32:16,16,21	33:15,20,20 35:14 36:3,7,8 36:8,9,13 37:6 37:24 42:10,12 43:21 45:13,14 47:9,11 48:12 48:19 49:15,16 50:21 51:20 tested 14:15,16 19:22 testimony 27:5 27:15 28:5,20 41:3 testing 4:7,9,20 5:11 6:13 7:5 12:12 13:5 14:9,10,14 19:15,19,21 20:5,14,14 24:13,19,19,23 25:2,5 26:2,17 29:4 30:7 31:3 31:4,8,10 32:25 37:18 38:7,18,20,20 39:16 40:25 41:16 42:25 43:1,6,17,22 44:2,9,12,12 47:6 49:9,11 49:22 testings 44:13 tests 7:7 30:18 30:20 31:10,11 37:15 47:2 51:11 Thank 3:9 18:23 26:9,14 50:12 52:16,17 THEODORE 1:22 2:10 26:12 theory 10:7,11 they'd 30:13 thing 20:15 41:11 49:5 things 12:17
---	--	--	---	--

15:10 28:6 31:2 36:10 43:8 48:14,20 50:2,3 think 9:2,25 10:23 11:16,23 14:15 16:1,23 17:9 30:19,19 33:1 34:16,17 36:17,18 38:25 39:1,2,4 41:18 41:18 44:24 45:7 46:18,18 47:7,20 thinking 35:24 third 3:24 11:12 16:7 21:18 38:18 thought 33:23 thousands 36:2 three 3:17 7:19 tied 49:5 tight 40:15 time 4:20 5:18 6:22 7:23 13:25 18:22 24:18 27:18 41:19 51:15 times 14:23 32:8 32:12 43:18 tobacco 27:9 30:2,10,12 31:15 39:7 43:3,4,7 49:10 49:17 50:5 today 44:5 told 14:17 52:4 tort 35:8,10 trade 3:13,22 4:20 6:1,12,17 6:17 9:1 25:4 traditional 19:12 Transfer 10:18 transform 8:3 8:10 14:5 15:3 15:20 52:15	transformation 51:14 transforming 14:21 transmission 26:21 transmit 38:2 transmitted 26:19 28:18 transportation 22:7 trigger 19:11 true 12:9 46:9 try 32:19 trying 36:18 39:2 turn 18:10,11 two 17:2 36:10 50:13 <hr/> U <hr/> underneath 18:14 understand 7:2 17:9 28:24 39:1 40:20 47:12 48:16 understanding 8:13 undertaken 37:2 40:25 undertaking 6:15 Unfair 18:12 union 18:5 United 1:1,13,20 2:7 19:2 unusual 24:15 40:2 USDA 21:8 use 6:19 14:22 28:22 39:10 41:3 43:4 U.S 22:8 44:19 <hr/> V <hr/> v 1:5 value 27:16	values 27:24 varied 21:21 vast 30:24 vastly 33:10 versus 3:4 4:14 10:16 43:12 46:4 violation 29:15 volume 18:10 voluntarily 41:10 voluntary 27:10 29:19 30:3,5 30:12 51:24 vote 24:21 <hr/> W <hr/> waiting 50:18 want 34:16,18 34:19 40:11,14 42:7 48:17 wanted 29:2,3 33:17,24 47:22 47:23 50:2 wants 13:2 38:9 38:9 42:17,18 50:4,24 Washington 1:9 1:16,19,22 wasn't 11:5 48:24 wastes 30:24 Watson 1:3 3:4 way 9:2 12:7 14:16 16:16 20:5,5 25:3 27:23 28:6 33:22 37:7 40:4 41:7 42:8 42:9 43:7 44:5 47:22 48:5 49:4 52:14 weaker 42:5 Wednesday 1:10 weight 43:3,7 went 10:19	weren't 41:23 46:6 49:16 we'll 3:3 41:3 42:8,9,12 we're 27:13,14 27:14,17 29:1 29:1,12,13 31:1 33:7 37:20,20,20 40:13 51:17 we've 33:13 what-not 27:18 Williamson 6:3 32:6 willing 42:17 window 18:3 wonderful 35:2 words 14:9 28:3 32:8 43:5 44:6 work 12:4 worth 45:7 wouldn't 27:19 28:4 29:16 37:9 wrong 3:18 4:11 14:15 34:25 wrote 32:7 <hr/> X <hr/> x 1:2,8 <hr/> Y <hr/> Yeah 20:3 39:22 42:3 years 28:17 yes/no 37:13,14 yields 5:12 <hr/> 0 <hr/> 05-1284 1:5 3:4 <hr/> 1 <hr/> 10 32:8 11:18 1:14 3:2 110 27:4 12 32:8 12:17 52:19 1441(a)(1) 35:18	15a 45:7 16 18:10 17 17:15 1815 8:6 19 2:8 1948 23:8,13 1964 34:6 1978 27:20 1983 16:2,11 1987 28:17 <hr/> 2 <hr/> 20 17:15 2007 1:10 202 27:21 22 34:6 25 1:10 26 2:11 29 34:4,5 <hr/> 3 <hr/> 3 2:4 30 30:4 <hr/> 4 <hr/> 40,000 50:17 408 18:11 42a 44:7 <hr/> 5 <hr/> 5 6:16 50 2:14 530 34:6 57 34:11 <hr/> 6 <hr/> 60 34:11 <hr/> 9 <hr/> 93 27:4
--	--	--	---	--