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P R O C E E D I N G S

(11:18 a.m.)

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

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE PETITIONERS

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

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

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

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

And third, the court's approach ignores the 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 case 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, was that because that --

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 could 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 complying
9 with those requirements, and a challenge is brought,
10 saying something to the effect, well 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 functions.

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: Yet this 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 to 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 remains a 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 in your
7 theory.

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

9 JUSTICE SCALIA: Ok.

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

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

23 MR. FREDERICK: That's a different question,
24 Justice Scalia. The question of under "color of office"
25 as the statute defines it depends on the nature of the

1 acts and whether there is a causal relationship between
2 the acts that are charged by the State in the State case
3 and the actions of the people involved.

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

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

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

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

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, that doesn't
25 seem to be a distinction. The drug companies -- the

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

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

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

22 But the Government, of course, in a
23 multi-trillion-dollar budget purchases all sorts of
24 items all the time. Many of them are off the shelf.
25 And others are subject to very specific and detailed

1 specifications.

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

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

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

1 those Federal regulations, does not transform the person
2 into a person acting under a Federal officer.

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

7 MR. FREDERICK: It would depend on the nature
8 of the contract, Justice Scalia. The things that a
9 court would look at would depend --

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

12 MR. FREDERICK: What the Court --

13 JUSTICE SCALIA: -- or the Federal
14 Government.

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

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

24 One question that I think must have come up
25 in that context comes under the 1983 action in --

1 against a, a prison guard, a privately hired prison
2 guard.

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

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

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

17 JUSTICE SCALIA: But suppose it doesn't.

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

19 JUSTICE SCALIA: Should I conclude that it
20 therefore is not covered by --

21 MR. FREDERICK: No, I think that the proper
22 standard, Justice Scalia, as I've said, is whether there
23 is a ongoing supervisory relationship and the Government
24 has the power to alter the actor's conduct. If those
25 two conditions are met then a person can be said to be

1 acting under the Federal officer within the meaning of
2 this statute.

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

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

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

24 MR. FREDERICK: Justice Ginsburg, in our
25 cert papers -- and we didn't repeat them in our merits

1 papers -- we give examples where a window blinds
2 manufacturer, a medical device manufacturer, a whole
3 series of others, a bank, a credit union, have attempted
4 -- after the Eighth Circuit's decision in this case have
5 removed cases to Federal court on the grounds that they
6 are Federal officers because they are subject to far
7 more extensive regulations than Philip Morris.

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

20 If I could reserve the balance of my time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Frederick.

23 Mr. Gornstein.

24 ORAL ARGUMENT OF IRVING L. GORNSTEIN,
25 ON BEHALF OF UNITED STATES AS AMICUS CURIAE,

1 SUPPORTING PETITIONERS

2 MR. GORNSTEIN: Mr. Chief Justice, and may
3 it please the Court:

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

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

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

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

22 JUSTICE SCALIA: Is the Government
23 supervising those?

24 MR. GORNSTEIN: In some -- the Government
25 often says exactly what the test has to be.

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

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

7 JUSTICE SCALIA: They don't have to be there
8 every day.

9 MR. GORNSTEIN: But -- the Government is
10 capable of --

11 JUSTICE SCALIA: Policing --

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

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: You, you --

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 then the Agency certifies through regulation that
20 this person is inspecting as a representative of the
21 FAA. Now that's a varied situation. In that kind of
22 situation the person would be 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, then you are. Then acting
4 -- and subject to the supervision and guidance of the FAA.

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

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

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

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

25 JUSTICE SCALIA: I have a contract to

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

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

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

25 Now, this case is very far from the

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

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

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

1 --

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

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

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

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

1 Now, the final point to be made is, even if
2 there was a delegation of authority here, it would not
3 affect the disposition of this case because this
4 complaint does not challenge the testing itself.

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

10 If the Court has no further questions --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Gornstein.

13 Mr. Olson.

14 ORAL ARGUMENT OF THEODORE B. OLSON

15 ON BEHALF OF THE RESPONDENTS

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

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

1 its official responsibilities.

2 JUSTICE SOUTER: Did the FTC ever adopt a
3 regulation saying you've got to publish these measurements?

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

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

22 MR. OLSON: Yes, it would. In a 1978
23 advisory opinion, which is found on pages 202 of the
24 joint appendix, the FTC stated categorically -- and the
25 joint appendix, by the way, Justice Souter, is full of

1 exactly what I'm talking about. The FTC said tar values
2 in cigarette advertising must be consistent with the
3 latest FTC number and stated that it would be deceptive
4 to advertise higher numbers or lower numbers or
5 different numbers. In other words, the enforcement
6 wouldn't be through the enactment of a regulation. The
7 FTC -- again, I refer to the testimony of the Chairman
8 of the FTC: The FTC does things this way because --

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

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

15 JUSTICE SOUTER: The Cambridge test, yes.

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

1 JUSTICE SOUTER: I understand that. But if
2 the -- if a given cigarette manufacturer simply said,
3 we're not going to give any numbers, we're simply going
4 to say "Smoke Marlboros," and the FTC wanted numbers and
5 they wanted the numbers in accordance with the Cambridge
6 testing method, they would then have had to regulate,
7 adopt a regulation, or get Congress to pass a statute.

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

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

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

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

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

1 JUSTICE SOUTER: Right.

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

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

17 JUSTICE SOUTER: Exactly --

18 JUSTICE GINSBURG: It -- against, I mean
19 you're talking about an agency that has set certain
20 standards that the entity it's regulating must meet.
21 They must meet all kinds of requirements for certain
22 kinds of tests by OSHA, say, for example. Think of
23 pesticides, think of hazardous substances -- quite
24 precise tests that the Government says you must make
25 this test before you market that dangerous product.

1 I don't see how cigarettes is any different
2 from hazardous wastes, pesticides, just the vast number
3 of potentially dangerous-to-health products that are
4 marketed and the Government says: We're not going to
5 let you put those things out on the market unless you go
6 through a certain testing regimen. That doesn't make
7 the party an agent of the Government for the testing
8 purposes.

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

20 JUSTICE SCALIA: They are called "FTC
21 ratings"?

22 MR. OLSON: Yes.

23 JUSTICE SCALIA: And they are called -- and
24 in the regulations it's called the FTC test, even after
25 it has been done by the companies?

1 MR. OLSON: Yes, yes, Justice Scalia. And
2 in a case that you assisted --

3 JUSTICE SCALIA: That's very careless, isn't
4 it?

5 MR. OLSON: It's not careless. They are
6 pronouncing the facts.

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

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

22 MR. OLSON: Let me try again,
23 Justice Ginsburg. If the FTC had said to four local
24 hospitals, please perform this test according to this
25 specification for us, the FTC, and then give us these

1 results, which we will then publish as the FTC official
2 ratings of cigarettes, and then if those hospitals were
3 sued because the testing and the results were alleged to
4 be misleading, I think even the Government would admit
5 that that case could be removed under the Federal
6 officer removal statute. There is nothing --

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

13 MR. OLSON: No. It would be a vastly
14 different situation.

15 JUSTICE SOUTER: Why isn't that the
16 situation that we've got here?

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

1 JUSTICE GINSBURG: I thought that,
2 Mr. Olson, that the cigarette companies wanted to make a
3 light brand so that they could keep customers who might
4 be tempted to quit if there was only the heavy kind.
5 But to say that, the light cigarettes were forced on the
6 cigarette companies by the FTC is certainly --

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

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

24 The removal area has been really closely
25 guarded by Congress. You know it's not easy to get a

1 case out of State court and move it to the Federal
2 court. In fact, Congress has said if the Federal court
3 shifts it back, no matter how wrong that decision was,
4 it stays in the State court.

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

10 When Congress has been so careful to let
11 the State courts do State tort litigation, whatever, then
12 we are supposed to read into a Federal officer removal
13 statute, that kind of -- removal of a State tort case
14 from State court to Federal court? Because that's quite
15 astonishing.

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

25 JUSTICE BREYER: Is this right? If I have

1 it -- I'm using a sort-of-silly example to explain it
2 to myself. But I'm thinking the FDA -- or no, the
3 Agriculture Department decides they're really interested
4 in red apples not being red. So they say we hire
5 thousands of apple lookers, and the apple lookers look
6 at all the apples and they devise a redness test which
7 is really fabulous, you know, very precise.

8 MR. OLSON: The apple lookers' devise?

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

17 (Laughter.)

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

1 have red apples, they've said, you do it yourself.

2 MR. OLSON: Ah, but Justice Breyer, what
3 happens here is they say you do it yourself, and the
4 Chairman of the -- Chairman of the FTC said why. Here's
5 why; he said it's better undertaken by private
6 researchers. It's a mechanism that we can rely on to
7 ensure accurate reporting.

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

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

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

23 MR. OLSON: But we're -- we're not. We're
24 suggesting -- you're -- what you're doing in your
25 question and your statement is to disaggregate the

1 pieces of the process here. Here it is the FTC's goal,
2 it's FTC's method; it's the FTC's test which is
3 supervised but done by the companies. And then it
4 becomes the FTC official ratings which they then must
5 transmit to the company in their advertising. And now
6 they're sued because those ratings that they've done
7 according, for the FTC, according to the FTC standards,
8 are alleged to be misleading.

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

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

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

1 JUSTICE BREYER: Is that -- have I got that
2 right?

3 MR. OLSON: I think so. Let me restate it,
4 because I think I understand what you've said.

5 And I think what I was trying to say with
6 respect to Justice Ginsburg's question, if the -- all
7 those private hospitals did it, I think the Government
8 would admit, the Federal -- and then is there an
9 exception in the statute? If the regulated entity, in
10 this case the tobacco company, does it rather than the
11 hospital? And there's nothing in the statute that says
12 that. The Government doesn't say that --

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

22 MR. OLSON: The Agency decided they --

23 JUSTICE BREYER: Is there any -- I, I see
24 the argument now.

25 MR. OLSON: Yes.

1 JUSTICE BREYER: Then is there any, any
2 authority ever, that you found for that?

3 (Laughter.)

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

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

20 A little different from a commercial
21 company going out to sell market goods to the public at
22 large?

23 MR. OLSON: Justice, I understand there's a
24 distinction. Because the Government is the actual
25 consumer of that product. But here the Government

1 announced that its goals were to accomplish a market in
2 lower tar cigarettes. And it said with respect to the
3 testing, it's better undertaken by private researchers.
4 So it was fulfilling the Government's desire to have
5 something they could save the money, if they close down
6 the laboratory, they said in this testimony, we'll use
7 the money for enforcement purposes against the cigarette
8 company. We can regulate and determine, fulfill the
9 official functions of the Government more effectively,
10 more efficiently if we do it this way.

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

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

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

25 JUSTICE SCALIA: Your case would be stronger

1 if they weren't doing it just for themselves. But if in
2 fact they were doing it for the FTC who imposed it
3 even on somebody else.

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

6 JUSTICE SCALIA: Yes.

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

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

15 And you say okay. We'll test them pursuant
16 to the system you've established and -- and everybody
17 goes happily away.

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

1 to bring a lawsuit?

2 CHIEF JUSTICE ROBERTS: Mr. Olson, you've
3 been talking a lot about testing. But when you go and
4 look at the complaint in this case, testing is a small
5 part of it. They're complaining about the modification
6 of the tobacco blend, the weight, the rod length and
7 circumference, the use of reconstituted tobacco sheets.
8 In other words there's a lot going on in the complaint
9 here besides the testing. And if the Government is in
10 no way specifying the tobacco blend, the weight, the rod
11 length, all these other things that are allegedly part
12 of the manipulation to affect the figures.

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

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

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

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

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

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

1 Justice Ginsburg.

2 I don't think there's an exception. And the
3 Government hasn't suggested there's an exception in the
4 Federal officer removal statute because someone happens
5 to be in the industry which is asked to help the
6 Government perform a particular function. There is no
7 logic to that, and it certainly would be not a liberal
8 interpretation of the Federal officer removal statute.

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

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

20 JUSTICE SCALIA: Well that's a good, that's
21 a good preemption argument.

22 MR. OLSON: It's a --

23 JUSTICE SCALIA: I'm not sure it has much
24 bearing upon whether --

25 MR. OLSON: Well, it is a good preemption

1 argument, Justice Scalia. That will be played out
2 either in the State court, depending upon how you rule,
3 or the Federal court. But it's -- that's the nexus and
4 the color of Federal authority that you talked about in
5 your dissenting opinion in that Acker case.

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

16 JUSTICE KENNEDY: I know all that's involved
17 here is the forum and removal; but if we were to rule
18 for you that there is Federal officer status here,
19 would that affect any of the substantive determinations
20 on the preemption question, et cetera?

21 MR. OLSON: No, I don't think so. I think
22 --

23 JUSTICE KENNEDY: It's just a forum
24 question?

25 MR. OLSON: Yes, it is. And this is an

1 appropriate case for evaluation of the conduct of the
2 person acting --

3 JUSTICE BREYER: I have a quick question.
4 Is there anything in the complaint that alleges you
5 didn't perform the tests properly?

6 MR. OLSON: Yes.

7 JUSTICE BREYER: Yes

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

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

24 MR. OLSON: Well, it may perhaps be. But
25 what, it's an interpretation of the statute. And yes --

1 and I don't think there's any doubt about that anyway,
2 Chief Justice Roberts, because it's clear that what was
3 being done here is something that the FTC wanted done in
4 the way the FTC wanted it done. I don't know how the -- I
5 believe that the preemption argument is very, very
6 strong, because the lawsuit, the substance, the guts,
7 the core, the heart of the lawsuit, as the district
8 court said and the Eighth Circuit said is, you're doing
9 what the FTC required you to do, and the plaintiffs say
10 that it's deceptive.

11 And by the way, it's very clear from the
12 record in the joint appendix and in the district court
13 decision and in the remand in the motion -- the motion
14 to -- the petition to remove, that the FTC knew exactly
15 the deficiencies that are alleged in the complaint.

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

1 apple to an apple. Now there are other things that will
2 happen --

3 JUSTICE SCALIA: It all comes back to me
4 now, that case you mentioned. Lip drape, that was the
5 lip drape case, wasn't it, where people smoke
6 differently because some of them cover up the little holes
7 in the filter with their lips -- the wicked lip drape.

8 MR. OLSON: That is the case. I don't know
9 if you've characterized it the same way I did, but the
10 --

11 (Laughter.)

12 MR. OLSON: -- apples-to-apples thing that
13 ties in with your hypothetical, Justice Breyer, about
14 the apple inspectors.

15 JUSTICE BREYER: Is it the -- who's doing
16 the testing?

17 MR. OLSON: It's the Tobacco Institute
18 testing facility --

19 JUSTICE BREYER: Well, if it's the apple
20 institute. The other -- I mean, but that seemed to me to
21 be the case where it was the apple institute or whatever
22 it was that was the delegates, and then they applied the
23 test, and the people they were applying the test to
24 weren't.

25 MR. OLSON: It's a facility of the tobacco

1 industry. The FTC perceives it as -- these industries
2 -- and these companies, and as I said, even the
3 Petitioners in their remand petition are challenging the
4 low tar and nicotine rate measured by the company's
5 testing procedures. So yes, I'd like to have it be
6 something different but it isn't something different.
7 It is what the companies have done, and through this
8 mechanism.

9 This case comes down to the fact that the
10 FTC wanted certain things done. It decided how certain
11 things would be done. It calls the results of those the
12 official FTC ratings. It wants those ratings delivered
13 to the people. And the tobacco companies have done that
14 and they're being sued because they say -- because that
15 information which they're delivering, that they're
16 creating and delivering at the request of the
17 Government, is alleged to be deceptive. This is a
18 perfect case for a removal under the Federal officer
19 removal statute.

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

21 Mr. Frederick, two minutes remaining.

22 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

23 ON BEHALF OF THE PETITIONERS

24 MR. FREDERICK: If this is a perfect case
25 for Federal officer removal, there are easily 40,000

1 others in the State courts waiting to be removed, because
2 --

3 JUSTICE SCALIA: Well, how many others
4 involve the Agency calling the result of the private
5 action the FTC figures and the FTC test?

6 MR. FREDERICK: I don't know the answer to
7 that, but I can tell you that in lots and lots of areas,
8 the Federal Government wants safer, cleaner cars, safer
9 refrigerators --

10 JUSTICE SCALIA: But they don't -- they
11 don't put it out to the public as the Federal
12 Government's figures.

13 MR. FREDERICK: They do --

14 JUSTICE SCALIA: That makes a big
15 difference.

16 MR. FREDERICK: It does not make a
17 difference. And the reason it doesn't make a difference
18 is if you look on your refrigerator, if you look on your
19 lawnmower, if you look on your automobile, there are
20 Government standard tests that have to be complied with
21 for an industry to be able to sell its products. And if
22 Philip Morris is correct here, you are going to be
23 announcing a dramatic transformation of the role of
24 Federal and State courts, because every time there is
25 even a colorable argument for preemption, the industry

1 will take the case to Federal court saying we're acting
2 under the Federal officer, and therefore, don't --

3 JUSTICE SCALIA: Just don't call it the
4 Government's test. Don't call it the Government's
5 figures. Call it the industry's figures.

6 MR. FREDERICK: The description shouldn't
7 make a difference, particularly where it is in a
8 voluntary agreement that was not put out for notice-and-
9 comment rulemaking, and it was done for precisely this
10 reason, Justice Scalia. For decades, the cigarette
11 companies were rightly perceived as deceiving the public
12 about the health content of their products.

13 CHIEF JUSTICE ROBERTS: No, the FTC told us
14 why they did it. They did it because they could save
15 the money by having the industry do it rather than them
16 doing it.

17 MR. FREDERICK: They also said, Mr. Chief
18 Justice, that they expected the companies to police each
19 other, which is exactly what happened when the Barclay
20 cigarette came up. Philip Morris was the one that
21 complained and said that cigarette doesn't comply, it's
22 been manipulating the FTC Cambridge filter method. So
23 the FTC found a cheaper way to do regulation.
24 Compliance with rules does not transform an entity into
25 a Federal officer. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 The case is submitted.

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

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