1   IN THE SUPREME COURT OF THE UNITED STATES

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3 LISA WATSON, ET AL.,   :

4   Petitioners   :

5   v.   : No. 05-1284

6 PHILIP MORRIS COMPANIES, INC.,   :

7 ET AL.   :

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9   Washington, D.C.

10   Wednesday, April 25, 2007

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12   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:18 a.m.

15 APPEARANCES:

16 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of

17   the Petitioners.

18 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor

19   General, Department of Justice, Washington, D.C.; on

20   behalf of the United States, as amicus curiae,

21   supporting the Petitioners.

22 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of

23   the Respondents.

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1   C O N T E N T S

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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

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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

4

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

12

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.

13

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 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?

17

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

20

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

22

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 lest 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

27

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,

28

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   marked 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

35

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

43

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,

47

 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

48

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 charactered 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 he 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 --

50

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

51

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

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