

1           If we break for lunch after hearing some of the  
2 arguments, I want you to be very careful to keep an open mind  
3 until after lunch when you hear the rest of the arguments. All  
4 right?

5           Mr. Griffin, you may proceed, sir.

6           MR. GRIFFIN: Good morning, ladies and gentlemen.  
7 We've now been seven days, or six days since we started this  
8 trial, and you-all might remember what my first question I asked  
9 you-all: Have you-all ever heard it said, you can't have it  
10 both ways.

11           We're now at the end of this case. And you will hear,  
12 after I'm done, the FBI lawyers get up here and tell you that  
13 they can have it both ways. They will tell you that diabetes is  
14 not a disability for Jeff Kapche, despite what it does to his  
15 ability to eat and care for himself when compared to those who  
16 don't have diabetes, and then they will turn right around and  
17 say it's a necessity to ban every last person with his disease  
18 on his treatment because they're too disabled to work.

19           This evidence in this trial has shown you, they don't  
20 get to have it both ways. Because Jeff Kapche has limitations  
21 in the way he eats, and you heard from Dr. Gavin what they are;  
22 sometimes he can't eat, he has to watch what he eats, he has to  
23 limit what he eats. When his blood sugar is high, he has to not  
24 eat, unlike other people. And the way he cares for himself, the  
25 way he finger-sticks, the way he gives himself injections,

1 consider that to people who don't have diabetes.

2 But the FBI disables him from being a special agent  
3 because they claim he can't work. Yes, the evidence has shown  
4 here that he has disabilities in the way he eats and cares for  
5 himself, but you heard Dr. Gavin share with you that the limits  
6 he bears on his back every day with the way he monitors, the way  
7 he eats, the way he is 24/7 vigilant to pay attention to what's  
8 going on with him, has made him a better, more qualified law  
9 enforcement officer.

10 Now, we've talked a lot about essential functions in  
11 this case, and you've heard a lot of things about FBI agents  
12 going to Jordan and going to the Mideast and going to  
13 Afghanistan and going to all kind of places. But what you  
14 haven't seen a whole lot of are the actual, everyday duties of a  
15 special agent. You'll see on the left-hand side of the  
16 screen -- I hope you do. Are you-all able to see it okay?  
17 We're not? Okay. Well, thank you for telling me that. I  
18 appreciate that. Now it's up. Good.

19 On the left-hand are those everyday things that special  
20 agents do, from the evidence you've seen in this case. On the  
21 right are what Jeff Kapche has done and established over the  
22 past 15 years. It's not all about going to Afghanistan. It's  
23 about investigating crime, arresting people, apprehending  
24 subjects, interviewing people, working up a case to get a  
25 conviction. Yes, those are the essential functions of the job.

1           When we began, I thought I told you that we would be  
2           able to show that it's more likely than not that Jeff Kapche is  
3           a qualified individual with a disability. You now have heard  
4           from Jeff Kapche that he, for two and a half years, waited to  
5           hear from the FBI after he applied. He applied in  
6           February 2002; it took him two years and eight months to be able  
7           to wait for the FBI. Garin, we're finished with that slide, I  
8           think.

9           Two years and eight months later, and in that two years  
10          and eight months, what did he do? He took written exams, he  
11          took oral exams. When the FBI said, "We need people on  
12          computers to deal with hard drives, forensic work," he held his  
13          full-time job, he was a dad, he was a husband, he went to school  
14          full-time -- I mean, went to school to get computer skills, even  
15          as he worked a full-time job, because the FBI asked him to. He  
16          waited through a hiring freeze.

17          And so, two years and eight months after he applied,  
18          the letter came. You heard in this trial, that was one of the  
19          best days of this young man's life. Maybe second to his  
20          marriage too, but second to the burden of his kids. But you  
21          heard him tell what a great day that was, and what had to happen  
22          after that. It was subject to him passing his fitness exam and  
23          his background check. He passed both of them.

24          You heard the evidence. He passed his background  
25          examination, then he passed his fitness exam when Dr. Burpeau,

1 the FBI's highly paid, highly qualified doctor who conducted  
2 that examination, wrote it up on paper, declared Jeff Kapche fit  
3 for duty.

4 You also heard that he passed his physical endurance  
5 test, where he had to go out and run and get all the score and  
6 all the points, and able to show that he was physically fit  
7 enough to do the job.

8 Yet, you heard, and you saw the evidence that you would  
9 think, after he passed those two things that his letter said he  
10 had to pass, subject to those, he would be going into the FBI.  
11 But he was not. And you now have heard in this case why he  
12 wasn't let into the FBI: Because a person in Washington, D.C.  
13 would not allow him, a person who didn't know him, a person who  
14 you saw testify from the witness stand he didn't even know about  
15 Jeff's state-of-the-art 24/7 insulin that protects him 24 hours  
16 a day. No matter what, he's protected. He didn't know about  
17 that.

18 He had a fascination for insulin infusion pumps, and I  
19 don't deny that they're fascinating. They are fascinating.  
20 They've got all kind of parts, they've got needles, they've got  
21 electronics that goes into your tummy. It's a very advanced  
22 device. You also heard that 90 percent of us folks who have  
23 insulin-treated diabetes manage it with a pen or injections, not  
24 those expensive pumps.

25 You've seen the pumps. We didn't make Mr. Keith show

1 you the pump, but they go into your gut. He described it. You  
2 could see on your screen there, they insert it with a needle,  
3 leaves a little catheter inside your gut, goes through a tube,  
4 goes through an adapter, then it goes into a complicated  
5 electronic device with lots of moving parts. Is that not up,  
6 either? Not all these electronics work all the time.

7 Okay, great. Just so you can kind of see it there --  
8 thank you-all for letting me know when our electronic are not  
9 working the way it's supposed to.

10 But you can see, common sense tells you - and  
11 Judge Robertson told you a couple of days ago, you don't check  
12 your common sense at the door - this is a very complicated  
13 contraption with many moving parts, many places that can go  
14 wrong. And you heard that in the evidence.

15 But yet Dr. Yoder, because of his fascination for this,  
16 bans everybody who uses this (indicating). We'll talk about  
17 which is more reliable and which is more safe here in a little  
18 while.

19 But Dr. Yoder has made himself blind to the fact,  
20 excuse me for saying this, that there's more than one way to  
21 skin a cat in this world. People can make their diabetes  
22 controlled on injections, they can make their diabetes  
23 controlled on pens -- I mean, on pumps. Both people do it. You  
24 heard two of them in this courtroom, Mr. Kapche, Mr. Keith.  
25 They both get to the same result using different treatments

1 because all people are different.

2 But Dr. Yoder didn't consider any of that. He didn't  
3 know about Jeff's insulin, he had done no analysis. And I can't  
4 say -- I can say this is very important: He had not even  
5 gathered information from people like Mr. Barnes, and the other  
6 people they let work every day at the FBI, on the exact same  
7 therapy that Jeff has. He never asked anyone, "Tell me how it's  
8 going in the field with people using pumps. How many are using  
9 injections. How are they doing? Is it causing any problem?"  
10 No.

11 Well, we know that Mr. Keith has never been to the  
12 Mideast, he's never been to any of these places. So how can  
13 they have and argue to you that it's necessary to ban a therapy  
14 they don't know anything about?

15 So what they had to do was kind of a stealth plan.  
16 This is what Dr. Yoder did. He says, "I won't consider anybody  
17 unless they're on the kind of therapy that I'm fascinated with,  
18 the pump." So they reject everybody on the therapy he doesn't  
19 know anything about. Okay? That's what he does. That's  
20 precisely what he does.

21 Now, we expect the FBI lawyers to say, well, there's  
22 nothing -- you don't have to write your policies down. There's  
23 nothing unlawful about having unwritten policies. And that's  
24 right. But here the FBI has a written official policy. You see  
25 it before you. It's written in plain English: Everybody is

1 reviewed on a case-by-case basis, not lumped in with anybody  
2 else.

3 And then you see what we talk about safety: It is  
4 important that the best-qualified people, without regard to  
5 disability, are hired. Without regard to disability. Best  
6 qualified.

7 And I heard this, and you did too. I wrote it down  
8 when he said it. Dr. Yoder blurted out in the trial, "We deny  
9 people even though they're qualified." What kind of system is  
10 there in place where the decision maker says, "I deny people  
11 even though they're qualified"?

12 And I'm not saying people can't have unwritten  
13 policies. But when they have unwritten policies that conflict  
14 with the very policy that's the official written-down policy  
15 that you and I and everybody can see what the FBI says they're  
16 doing, and which they told Jeff Kapche they were doing when he  
17 was concerned when he applied: Is there something the FBI says  
18 might get in my way? Do you-all have some kind of policy about  
19 people with diabetes? They tell him, "No. You'll be judged on  
20 your qualifications, not your diabetes. You'll be case-by-case.  
21 That is official FBI policy."

22 How can an admitted blanket ban make any sense when the  
23 ban is created by someone who doesn't know anything about either  
24 one of these therapies? That's the truth. That's where we are.

25 He has lumped everyone together who uses Jeff's

1 therapy. And I'll tell you this: It is no different than  
2 taking a thousand of us and putting them in a group and giving  
3 them a, quote, "individualized assessment," and then grouping  
4 them together according to people who have diabetes on  
5 injections, people of color, women. We're going to group them  
6 all separately after determining what they are, putting them as  
7 a group and then saying, "This group can't get in, this group  
8 can't get in, or this group can't get in."

9 That's what the FBI has done for people who have  
10 diabetes like Jeff Kapche. Their individualized assessment on  
11 the record in this case is no more than setting up a manila  
12 folder for each person like Jeff Kapche, who is otherwise  
13 qualified, and rejecting them one manila folder at a time  
14 because of their common trait: That they have insulin-treated  
15 diabetes managed, like 90 percent of people who have it, on  
16 insulin injections and pumps. That's what this is about.  
17 That's why they have to prove that defense.

18 No matter what you hear this afternoon, or this  
19 morning, this afternoon from the FBI lawyers, discrimination in  
20 this country is unlawful because we're entitled to be judged on  
21 our own merits. In our country we've turned some corners  
22 recently. We're trying to do better. But the FBI is lagging  
23 behind.

24 And the judge has just read to you the burden of proof.  
25 You can see it. We have to prove that Jeff has a disability,

1 that he was qualified, and that they withdrew the job because of  
2 disability. The FBI has to prove that it was business necessity  
3 for the FBI to have this ban. I think the judge's instruction  
4 called it the insulin pump requirement. But we all know what  
5 that is.

6 But I will tell you this in the evidence: Did you ever  
7 hear anyone from the FBI who serves us look you in the eye and  
8 admit to you: We ban people like him, we ban every one of them.  
9 They acted like they were allergic to the word "ban." They want  
10 to call it a requirement, they want to call it a standard.

11 No matter what you call it, it is lumping everybody  
12 together just like him and saying, "No matter your  
13 qualifications, you are out." I never thought I would hear this  
14 from a witness. I asked him, "If this man were Superman, to be  
15 a special agent, you wouldn't have let him through." He said,  
16 "That's right." A doctor playing diabetes doctor with no  
17 expertise in diabetes.

18 The FBI has to prove to you not that they want the ban,  
19 not that they like the ban, not that the ban is easy to enforce  
20 and exclude a bunch of people. They have to prove to you under  
21 Judge Robertson's instructions that the ban promotes safety,  
22 promotes good performance, and that it's backed up by a credible  
23 scientific basis. They had no evidence of any of that, none of  
24 the elements of it. Everything you heard is, the pump, for the  
25 places they're worried about, is absolutely the worst kind of

1 therapy you can have if you're going across in terrible  
2 environments where it's hot, sweaty, fighting with people,  
3 grappling with people, the pump is the worst therapy. That's  
4 what you heard in the case. They have to prove they need it.

5           And ask yourself this: If it was really necessary to  
6 have this ban, wouldn't it be written down? Wouldn't they have  
7 corrected their case-by-case policy assessment? No. They've  
8 left their case-by-case out there, and had witnesses to look you  
9 in the eye and say, "Oh, we do case-by-case," although now you  
10 know what that means. Case-by-case means: Figure out what he  
11 is, put him in a group, and exclude the whole group. That's  
12 what we got.

13           And how can it be necessary if they don't tell their  
14 own doctors? You heard that the FBI on paper has a pretty good  
15 system; they have independent, expert, board-certified doctors  
16 around the country they pay this \$257,000 to, for one of them,  
17 to go through exhaustive tests, to go through every kind of test  
18 known to humankind. You've seen some of them. You've got them  
19 in evidence, and you can read these if you want to. But they  
20 have him do a lot of stuff to make sure that nothing in Jeff's  
21 background would interfere with his ability to do the job.

22           You can see him there: Restraining violent people, the  
23 fugitive crawl, live-or-die drills, weapons disarming, violently  
24 resisting people, arresting people who are resisting  
25 strenuously. He's got to jump from high obstacles, climb and

1 vault. Almost sounds a little bit like Superman jumping from  
2 high obstacles. Net rope climbing, seven miles, firearms from a  
3 laying-down position. All of this, the FBI's expert who  
4 examined Jeff declared him fit for duty.

5 You'll see he had to be able to do a bunch of exercises  
6 and be good to go: Pull-ups, push-ups, sit-ups. He has to run  
7 two miles in eight minutes and 15 seconds a mile; he's got to  
8 run 120 yards in 22 to 25 seconds; he's got to do 50 sit-ups,  
9 35 push-ups -- you get the drift.

10 At the end of this process, Dr. Burpeau, the FBI-paid  
11 doctor, who has been given all of the essential functions of the  
12 job. You heard Dr. Yoder. We give him all of them, and tell  
13 him to tell us, "Is this man qualified or not?"

14 And at the end of that form, you'll have it in  
15 evidence, there's a box for him to say, "Is there any defect  
16 whatsoever that could interfere with Mr. Kapche's ability to  
17 perform the job?" Dr. Burpeau said, "None. No defects that he  
18 has that would keep him from being a good special agent."

19 Now, what happened when Jeff was 36 in January of 2005?  
20 That's where we see the FBI writing one thing to themselves in  
21 their private memos and what they told Jeff. You've got it on  
22 your screen. The letter they wrote to Jeff, the one we'll talk  
23 about in a minute, says, "Your diabetes is not sufficiently  
24 controlled." On the right what they wrote to themselves was,  
25 "He's on the wrong therapy." They want a more dependable form

1 of treatment for diabetes. And they claim in their private  
2 writing that the pump is more dependable than the pen.

3 Well, we know from Dr. Crantz, that's not true. He  
4 begrudgingly finally had to admit: "Oh, yes, Mr. Griffin,  
5 that's right. A pen is more reliable. You just stick it and  
6 you're gone, you're good to go." He finally admitted that.

7 But going back to the screen that we just saw here,  
8 about what they wrote down, why did they tell you they're  
9 concerned? "To guard against subtle incapacitation," that's  
10 what they wrote there. That's what Dr. Yoder wrote down in his  
11 own memo.

12 But what did you hear in the evidence from the witness  
13 stand as to which of these therapies is going to be better able  
14 to keep people well controlled in tough environments? That was  
15 the pen.

16 Remember, we talked about it. You heard Dr. Crantz and  
17 Dr. Schatz talk about the only study that wasn't financed by  
18 drug companies and pump companies looked at this, and they found  
19 out that 12 people on the pump got DKA. That's bad. That's  
20 leading toward incapacitation if that happens. Never happened  
21 to Jeff, never happened to a single person on his therapy in  
22 that study. 12 to nothing; 12 DKA's in the pump group, none in  
23 the pen group. The nationals only got beat by two yesterday.  
24 The pump's got beat 12 to zero: 12 DKA's, zero on the pen.

25 So, since the FBI is trying to have it both ways, they

1 have to kind of ride on a seesaw. They've got to say, on the  
2 one hand, Jeff's diabetes is so unimportant and it's so trivial,  
3 he doesn't even have a disability, even though Dr. Gavin looked  
4 you in the eye and says, in terms of eating and caring for  
5 himself, he has an extreme disability. It is severe, it is  
6 substantial. There are times when he cannot eat at all when his  
7 blood sugar is high. Other times he has to calculate, do  
8 conversions, how much insulin, how much you're going to take,  
9 how many carbs, to carefully keep his A1c in order. The rest of  
10 you-all, if you want to, can eat a donut, whatever you want, any  
11 time you want it, and you never have to say, "I cannot have that  
12 because my blood sugar is too high."

13 Dr. Gavin told you exactly how limiting it is in those  
14 activities. But the discipline and the limits that he lives  
15 with every day are those allow him to be a very, very fine  
16 special agent -- I mean, a very fine special agent and law  
17 enforcement agent, which he's been doing for 15 years.  
18 15 years.

19 Then they've come around on the other side of the  
20 seesaw and say: His diabetes is trivial, but we're going to  
21 declare as disabled everybody on his therapy, because they can't  
22 be let on the job because they're so limited. That's what  
23 they're saying. But they don't understand. He's not disabled  
24 in working. He has a disability, he's got diabetes. Of course  
25 it's a limitation in eating and the way he cares for himself,

1 compared to people who don't have it, people who haven't walked  
2 through his shoes. But that doesn't make a person who can't  
3 work. In fact, it's made him a better worker. They've got that  
4 backwards.

5 Now, you'll see the pump there. Every witness on that  
6 stand who talked about this device said the disadvantage of this  
7 therapy is DKA. That's what Dr. Crantz said. He said it  
8 begrudgingly, but he finally admitted: That's a disadvantage of  
9 pump therapy, that it's prone to DKA. And on the board you saw  
10 Dr. Gavin explain, DKA is a bad, bad thing. Jeff has never had  
11 any of those things on that board. He never had any of those  
12 problems on his therapy. But this therapy is a disadvantage.

13 And Dr. Schatz explained it to you. It's because  
14 there's many things that can go wrong. It is many links in a  
15 chain. The many links in the chain have to work if you have a  
16 pump. Any one of the links of the chain break, you're without  
17 insulin. And without it, they're headed to DKA.

18 Contrast that, as Dr. Schatz told you, with Jeff's  
19 insulin, which is a state-of-the-art insurance policy. He takes  
20 his once a day shot before he goes to bed, he's covered whether  
21 he's at war, whether he's at peace, whether he's behind a desk,  
22 or even if he wants to go out and do some impromptu, just go out  
23 and exercise any time he wants to.

24 Dr. Crantz told you, well, with a pump you need to  
25 alter and fiddle around with it before you go play tennis. Then

1 he had to read the study on Jeff's therapy. He can go engage in  
2 exercise any time he wants to you changing his dose of insulin.  
3 So which is more flexible: The one that lets you do what you  
4 wan to when you want to, or the one you've go to fiddle with the  
5 pump and change it before you go play tennis?

6 Besides, ask yourselves this: What's more important,  
7 reliability in a time of stress that is going to work? I think  
8 so, especially when you're on a mission. They claim that people  
9 have to go abroad, and doing all kind of the things.

10 I won't belabor all the justifications or excuses that  
11 the FBI has in this case, but you've seen them all in this case.  
12 They're all in the documents. You read them: Diabetes  
13 incompatible with the job? Didn't work, because they had to  
14 admit they let people work with Jeff's therapy. So they had to  
15 change that one.

16 Not sufficiently controlled? Not true, so they had to  
17 change that one. Besides, you heard Dr. Yoder. Did you hear me  
18 ask him, "Is Mr. Kapche a role model?"

19 "Yeah, I guess so."

20 And then I asked him, "Out of all the people whose  
21 charts you've ever seen in your whole career, has anybody been  
22 better than this man?"

23 "Can't think of a single one. Nope, he's the best."  
24 Got rejected anyway.

25 As you look down, you've heard some of this during the

1 trial: He was too old, and it's not flexible. We've talked a  
2 little bit about that. Which treatment allows you to do what  
3 you want when you want to, without worrying about going DKA?  
4 That's the most flexible, that's the most reliable.

5 But this is not debate. Okay? As the judge instructs  
6 you, this isn't a debate about two different kind of therapies.  
7 They've got to prove it's necessary to ban everybody on his.  
8 They've got to show that the ban is necessary. It's not enough  
9 for them to show pumps are good, pens are good, they're both  
10 good. They've got to have a scientific basis and a good reason  
11 for the ban, not for the pump.

12 You've heard in this case that people can do pretty  
13 good on pumps and pens. You heard Dr. Crantz admit, neither  
14 therapy overall is any more superior to the other, although he  
15 did say the disadvantage of the pump was DKA.

16 Dr. Schatz told you, both of these are state-of-the-art  
17 therapies; 90 percent use the pens and injections, 10 percent  
18 use pumps.

19 At the end of the case, you'll decide who has proved  
20 what they said they would prove, and which party has not. And  
21 you probably will have a question at the end that asks you, "We  
22 find for the plaintiff" or "We find for the defendant."

23 But these are the kinds -- this is what you would have  
24 to be able to kind of keep your head as you're doing that: Have  
25 we shown that Jeff Kapche is a qualified person with a

1 disability, and that they revoked his offer because of that  
2 disability? And did the FBI prove that it was a necessity to  
3 ban everybody of his type? Those are the questions.

4 Now, I want to talk about our burdens just for a  
5 moment, and the restrictions that a person like Jeff has.  
6 Dr. Gavin walked you through this, Jeff told you about these  
7 things, and I'm not going to read them. But in every one of  
8 these areas, Dr. Gavin told you that he has a disability, he has  
9 substantial -- he's substantially limited in the manner in which  
10 he eats and the manner in which he takes care of himself, as  
11 compared to people who don't have diabetes. Constant blood  
12 sugar vigilance. That means he's got to be aware at all times  
13 of his blood sugar. He's got to make sure he doesn't over-  
14 inject insulin. Because you heard from these doctors, if people  
15 do that, they can get low, and they don't want to get low. He  
16 never gets low.

17 Multiple blood finger-stick checks every day. FBI  
18 might say no big deal, just takes a minute or two, you can give  
19 yourself a shot in a hurry. But you heard Mr. Keith. He didn't  
20 like shots. Most of us don't like shots. Most of us don't like  
21 pricking our fingers every few hours. That's a limitation he  
22 lives with in caring for himself that people without diabetes do  
23 not have.

24 And these constant mental calculations: What he eats,  
25 how many grams, is he sick? Because if he's sick, he's got to

1 take more medicine. Different mathematical conversions, all of  
2 these things. Quarterly doctor visits that other people don't  
3 have to take. And I'm not saying some of us don't have to go  
4 for other stuff. But diabetes, you have a life history where  
5 you're going to be going to the doctor more often than other  
6 people.

7 Yes, you can see from that chart, there is no doubt  
8 that diabetes for this man, he does have a disability, at least  
9 the way he cares for himself and the way that he eats, when  
10 compared to people who don't have diabetes. And anybody who  
11 says it's trivial, anybody who says it's no big deal, you ask  
12 them: Is there any evidence this man can eat at all when he has  
13 got a high blood sugar? Is there any evidence at all that he  
14 can go days without giving a shot? Is there any evidence at all  
15 that he can go days without checking his blood sugar and doing  
16 those things he has to do?

17 If safety is the main reason for this ban, then why do  
18 they reject people on a therapy that's safer and more reliable,  
19 and let only the people using the therapy that's most  
20 contraindicated in the environments that the FBI is afraid of?  
21 They say he might have to go to Iraq and Afghanistan and be  
22 grappling with terrorists. You heard from every witness, in  
23 that situation he's better protected than the fellow who's got a  
24 pump.

25 I'm not knocking pumps. Pumps are fine. The question

1 here is, do you need to ban people from either therapy, in this  
2 case on the more reliable therapy, and can that ever be  
3 necessary? And we think the answer to that is no.

4 It is not necessary to lump people together as if their  
5 merits were all the same. And we know that people with  
6 diabetes' merits are not all the same. Do we need the  
7 government to play diabetes doctor and make medical decisions  
8 for us and say, "We want you to change your therapy, even though  
9 you're doing exactly what you need to be doing?" That's not the  
10 government's business, and it's not necessary.

11 It is never necessary to pass bans without a basis for  
12 it. That's what Dr. Yoder did. And every attempt that you're  
13 going to make in this case, or by the defense, they're going to  
14 get up and say, "Pumps work fine." You know, that's what  
15 they're going to say.

16 And we're going to say, "Of course they work fine, when  
17 they work." But at the end of the day, they've got to show you  
18 this ban has a scientific basis, and Dr. Yoder had no basis  
19 whatsoever. Everything they are going to try to tell you in  
20 their argument is made up after the fact. Because what they  
21 said then, all three things they said then were not true:  
22 Jeff Kapche is insufficiently controlled, not true; pump therapy  
23 is more dependable, not true; pump therapy is better to avoid  
24 sudden incapacitation; not true. So they will have different  
25 explanations for you this afternoon for this ban, but they will

1 have to show that it's necessary.

2 When I was at the hotel gift shop yesterday, I saw all  
3 these pictures of horses. You-all might have seen some of these  
4 pictures of horses. Picture of a horse on all the papers, big  
5 headlines: "Ladies First," "She's the One." I'm from Texas,  
6 and we don't have much horse racing, so I'm not a horse racing  
7 fan. I learned that a filly is a lady horse.

8 The lady horse won the race, and I learned that that  
9 doesn't happen very often, that a lady horse wins. Usually, the  
10 men horses win. But over in horse racing, they don't have a  
11 blanket ban on the lady horses. They let them be judged by how  
12 fast they run. The lady horse ran.

13 Dr. Yoder admitted from this witness stand, from right  
14 over there: Who's the number one person, the best in terms of  
15 managing diabetes, of all the people you looked at, including  
16 the people who work for the FBI today and who are allowed to use  
17 injection therapy? No one could come to mind any better than  
18 Jeff Kapche. But unlike that lady horse over in Maryland, he  
19 did not get to run.

20 So let's talk about the witnesses before I wrap up  
21 here. You heard Dr. Yoder. He has no expertise in diabetes, he  
22 has no basis for his ban, he has no studies, he didn't even  
23 check out how people are doing in the field with diabetes. He  
24 knows nothing about Jeff's 24/7 reliable insulin. He has no  
25 evidence.

1           And then he answered this question: I said, "Over at  
2 the FBI, do the non-experts overrule all the experts?"

3           "Yes."

4           And we talked about this a minute ago. He's given  
5 multiple different explanations for why he did what he did.  
6 That's a fact. He has done that.

7           The next witness you heard was Mr. Raucci, the head of  
8 HR at the FBI. He wasn't up there very long, but what shocked  
9 me, he's head of HR and he didn't even know they had this ban.  
10 He thought it was still case by case. He didn't know anything  
11 about Jeff Kapche, and didn't know anything about the necessity  
12 of banning people on Jeff's therapy.

13           You didn't get to see Ms. Summerfield, but you did see  
14 Katie Hathaway read her testimony under oath. She's the lady  
15 who signed the letter to Jeff that we looked at earlier. I  
16 asked her, "At the FBI, is there any checks and balances to make  
17 sure Dr. Yoder is not making mistakes?"

18           "Nope."

19           We asked her, "Why was he rejected?"

20           "Because Dr. Yoder said he had diabetes. Diabetes was  
21 the reason he was rejected." That means there's a yes answer to  
22 the question of whether they revoked the offer because of his  
23 diabetes, his disability. The answer to that is yes.

24           Dr. Schatz testified. And the judge is going to give  
25 you an instruction that he's not read to you yet, but he will,

1 that will say something to the effect that maybe the experts  
2 don't agree on everything, and that you get to decide who's more  
3 believable and who you're going to believe and who you're not:  
4 Dr. Schatz and Dr. Gavin on our side, or Dr. Crantz on their  
5 side.

6           You saw Dr. Schatz tell you forcefully, straight,  
7 without any evasiveness whatsoever, that the ban is not a  
8 business necessity, it doesn't promote safety, it makes no sense  
9 at all. And if there was any therapy that was better in those  
10 kinds of conditions that they're worried about, they really  
11 ought to be on the pen. In an air-conditioned office, maybe  
12 they're equal, but not in the topsy-turvy world of arresting  
13 people and things like that.

14           And did anyone in this trial from the FBI's side ever  
15 take that stand and take an oath and say, "I disagree with  
16 Dr. Schatz?" Nobody. Even Dr. Crantz, the FBI never asked him,  
17 "Well, do you agree with Dr. Schatz's conclusion?" No, he  
18 didn't ask that question. Did they agree with Dr. Gavin?  
19 Didn't ask him that question either.

20           Now, we move on, then. Because of Dr. Schatz, what he  
21 has told you, though, he's made it pretty plain, you-all might  
22 remember this, that the pen meets or beats the pump in every  
23 category: Meals, DKA, quality of insulin, ease of use, cost,  
24 access. Every single criteria, the pen meets or beats.

25           But the one that's most important from what you heard

1 in the scientific study was that the pen has less risk for the  
2 terrible condition of DKA than the pump, which interrupts the  
3 flow of insulin and compromises a person very quickly.

4 You heard Dr. Tulloch. At least you heard his words,  
5 because he was in Houston. He's obviously proud of Jeff, of  
6 what he's accomplished. He said he's a role model. He also  
7 told you, though, as Jeff's treating physician, that pumps are  
8 hardware that can go wrong, get wet, and get blocked, and that  
9 the FBI refused to talk with him about Jeff as an individual.

10 Now, the FBI may say, "Well, Dr. Tulloch says he can  
11 live a normal life, despite him having diabetes, that he can  
12 take care of himself without somebody having a full-time nurse."  
13 But remember what Dr. Tulloch said: The manner in which he does  
14 that is by the limits he places on himself in terms of the way  
15 he eats and the way he cares for himself.

16 Next you heard from Jeff. And you heard him tell you,  
17 share with you from start to finish what happened: That he had  
18 15 years, that he gave everything the FBI asked, that he passed  
19 every test; he did everything that was asked, was declared fit  
20 for duty, passed his background check. Diabetes has never  
21 interfered with his work at all. He was dreaming the dream,  
22 climbing the hills step by step, test by test. Every single  
23 step, he passed.

24 He got the call from Dr. Burpeau, the FBI's examining  
25 doctor, who said, "Congratulations, Jeff, you passed your

1 fitness exam." He told his bosses, "I'm going to the FBI."  
2 Then the letter, "You are rejected," at the last minute. And  
3 what did that letter say? It was the coldest of cuts because it  
4 said, "Your diabetes is insufficiently controlled."

5 Jeff has had diabetes since he's 16. What they said  
6 was dishonest because it wasn't true. But it was cruel because  
7 he, since he's been 16 years of old -- of age, he wanted no one  
8 ever to be able to say: Your diabetes isn't sufficiently  
9 controlled. He has fought his whole life to keep someone from  
10 saying that because of the limits he's put on his back in the  
11 way he eats and cares for himself.

12 It was the coldest and meanest of cuts, because it hit  
13 him to his core. It pulled a rug out from under him and his  
14 family. He was working to be judged on his merits.

15 Can you imagine the blood rushing from his face after  
16 he has passed every test, and at the last minute they write him  
17 and say, you are rejected, where he has to figure out how to get  
18 through sleepless nights and headaches and the nausea that he  
19 suffered, to go in and then tell his bosses, with his tail  
20 between his legs, "I'm not going to the FBI after all. I have  
21 been rejected at the last minute"?

22 The professional humiliation, the tearing up of his  
23 family. These are the things that was caused by one man with  
24 one unwritten rule that violates FBI policy.

25 Nora Kapche shared with you how this affected Jeff. As

1 I told you at the beginning, he is not a person to go out  
2 moaning, groaning, and complaining. But she said he was  
3 depressed, he wasn't as good at his work, he had headaches,  
4 nausea, sleeplessness, depression.

5 He still tried to go to work, but that it was tearing  
6 the family apart, and the family had to make a decision: We've  
7 got to get past this somehow. So they decided: We are going to  
8 take this head-on, and we are going to let 12 good men and women  
9 decide whether people should be evaluated individually, or  
10 whether people should be set off in groups and not be given the  
11 chance to succeed.

12 Last of all, you heard in this case from a man that  
13 only the Lord can make, James Gavin. Dr. Gavin's resumé, you  
14 saw it. He has spent his entire life trying to find a cure for  
15 diabetes, caring for those of us who have diabetes on a daily  
16 basis, and training young doctors to help people with diabetes.  
17 He took an oath, looked you in the eye, and told you,  
18 "Jeff Kapche is a qualified person with a disability." He said  
19 the truth: There is no vacation from it. 24/7, you undergo  
20 those limits every day.

21 Jeff Kapche takes those limitations, and the way he  
22 eats and cares for himself, and turns it into a positive.  
23 That's what Dr. James Gavin told you.

24 You may see the chart here of all the ways Dr. Gavin --  
25 we talked about that earlier. All of those things are

1 substantial and severe limitations compared to people who don't  
2 have diabetes.

3 And then Dr. Gavin was asked, unlike Dr. Crantz -- and  
4 the judge tells you, you assess the credibility of the experts.  
5 And one of the things you can assess in their credibility is  
6 whether they're getting paid or not. Okay? Dr. Gavin was asked  
7 the question, "Are you getting paid?"

8 And what he said was, "I know. I know what it's like  
9 to be twice as good, to be given a chance. And that's why I've  
10 come here to talk about Jeff Kapche." That is what he said.  
11 And not a single FBI witness took a stand and swore an oath and  
12 said that he was not right, that Jeff Kapche is a qualified  
13 person with a disability.

14 With every one of our witnesses, none of them were ever  
15 had any FBI to say they are wrong. They had no one to contest  
16 Dr. Schatz, no one to contest Dr. Tulloch. And remember how  
17 they tried to pick on Dr. Schatz one time about those studies?  
18 They kept knocking that board -- my colleague over here had this  
19 board of all these studies listed. And after Dr. Schatz said,  
20 "I only gave you those studies about these therapies because  
21 you-all said you didn't know about any of them," then my  
22 colleague over here starts X-ing them out: This one is kids,  
23 this one is that, whack. Puts a pen through every last one of  
24 them except one.

25 That's the one that was not paid for by the drug

1 companies or the pump companies. That's the one that said pens  
2 are preferable to pump therapy because of the risk of DKA, where  
3 they had the 12 people in a controlled study having problems  
4 with that pump. And that's not people out in the field  
5 grappling with people. So that's what you heard.

6 Yes, at the end of the day, Judge Robertson's  
7 instructions are pretty clear: A ban is only justified if it's  
8 a necessity, not that it's an option or might be a good idea.  
9 The FBI has to lose this argument because there was never a  
10 basis for it, even though there's been an attempt made to patch  
11 it up.

12 Because Dr. Crantz, you heard him, he was up on that  
13 witness stand, I couldn't believe it when he said it. But he  
14 said, "I believe in case-by-case assessment." Remember that? I  
15 asked him that. He said, and I'm quoting him, "I believe in  
16 opening the doors for people with diabetes, not closing them."

17 Then I asked him this: "Won't it be more reasonable to  
18 consider people on their own, regardless of their therapy?" You  
19 know what he said? "The FBI never asked me to do that. They  
20 only asked me to come in here and say pumps are preferable to  
21 some people." And maybe for his patients in suburban Virginia,  
22 they are.

23 You remember what he said: Neither therapy is better  
24 than the other. He doesn't take a position on the ban. He  
25 believes in case-by-case. But he also admitted, and he said it

1 from the stand, there are no scientific studies that are a basis  
2 for that ban, except for the one that shows that the ban is not  
3 necessary. In fact, the ban is probably the opposite of what  
4 they need to have safe performance for their special agents.

5 So at the end you will get to decide whether this ban  
6 is supported by the necessity; not an option, not a rational  
7 basis, not convenient, not hiring somebody to come in and say  
8 they like pumps. Is it necessary?

9 Before the having-it-both-ways argument can work, the  
10 FBI has to go through you. You have to say it's a necessity.  
11 They should have said a long time ago that it's not because it's  
12 not, and you've heard all the reasons why it's not.

13 And I'm now going to sit down, and hopefully we're all  
14 going to have a little bit of lunch here for a little while, as  
15 long as Judge Robertson allows us, and the FBI is going to have  
16 over the lunch hour to figure out what they're going to say in  
17 response to what I have just told you.

18 So I don't mind laying this question out for them and  
19 giving them an hour to think about, is: Why do they have a  
20 written policy, official policy that says one thing, and they do  
21 something completely different? If they really needed to ban  
22 anybody, why wouldn't they change their policy and say, "We give  
23 everybody a case-by-case assessment, except for certain folks  
24 that we group together"?

25 Maybe they'll tell you how it can ever be necessary to

1 require somebody to use an insulin pump in austere medical  
2 locations, where all kind of bad things can happen to the pump,  
3 as opposed to someone who is insured 24 hours a day, seven days  
4 a week. These issues that you have heard are important ones.  
5 These questions that I have raised are ones that I hope that  
6 they will answer for you when they get to talk to you.

7 I want to thank each and every one of you for giving a  
8 week out of your life to how to make us all better here. And  
9 I'm not just talking about Jeff. Although it's important when  
10 you measure what the FBI ought to compensate him for to make him  
11 whole, you can make us all better. The FBI will be better when  
12 they get better agents. Dr. Yoder has said this man is at the  
13 top of the hill, but he couldn't get in because he didn't have  
14 the right therapy. But yet you heard everybody say: Whatever  
15 you do, whatever you do, if it ain't broke, don't fix it, and do  
16 no harm.

17 And the last person I want to comment on before I sit  
18 down is David Keith. He was rejected just like Jeff at first,  
19 but he allowed them to tell him to change, and he did change.  
20 But he told you that the pump is a personal preference, not a  
21 business necessity. I said he didn't like shots. He did well  
22 on both these therapies, although he wasn't on pen very long or  
23 on the injection very long. But then he told you he had  
24 multiple issues with the pump.

25 Now, why do I talk about David Keith? I liked him. He

1 reminded me of Jeff Kapche. Think about it. He's a young man,  
2 got insulin-treated diabetes, he's managed to control it by the  
3 way he eats and cares for himself. He's a good agent. He did  
4 not have law enforcement experience like Jeff did, but he had  
5 some military experience.

6 They both were afflicted with the same disease that  
7 neither one of them asked for or deserved. The difference is,  
8 one of them got an individualized assessment so that he could  
9 help his country. The FBI refused to do that.

10 And I'm going to steal an analogy from Dr. Schatz.  
11 Excuse me for doing this. But he talked about the pitchers in  
12 the baseball, the 20-game winners. You've got your fastball,  
13 Nolan Ryan, and you've got your finesse pitcher, the  
14 Greg Maddux. No question but that Jeff Kapche is the fastball:  
15 Twist and shoot, he's good for 24 hours a day, no matter what.  
16 Mr. Keith is a finesse pitcher: He pushes all the buttons on  
17 the pump, the insulin goes through the tubing, into his gut, and  
18 he gets his insulin that way.

19 They both are good people. They both have gifts to  
20 protect our country. One got an individualized assessment, and  
21 one did not. At the end of the case, you will decide whether  
22 that will stand or not.

23 So I thank you. I always make sure I thank the  
24 important people: Becky Stonestreet, their court reporter who  
25 has put up with us talking too fast sometimes. And I also want

1 to thank Catina Porter, the courtroom deputy, who has been nice  
2 not just to me but to the FBI lawyers as well.

3 It has been my privilege to present this important  
4 civil rights case to you. And Kathy Butler, my colleague, will  
5 look forward to having the final opportunity to sum up after the  
6 government does their argument. Thank you again for your  
7 attention.

8 Thank you, Judge Robertson.

9 THE COURT: Thank you, Mr. Griffin. All right, ladies  
10 and gentlemen. Let's be in recess for one hour. Light lunch,  
11 keep an open mind. We'll see you at 1:43.

12 (Jury out at 12:46 p.m.)

13 THE COURT: We'll be in recess until then.

14 (Recess taken at 12:46 p.m.)

15 (Jury in at 1:50 p.m.)

16 THE COURT: All right. Welcome back.

17 Mr. Gardner for the FBI.

18 MR. GARDNER: Thank you, Your Honor.

19 Ladies and gentlemen, on behalf of the United States, I  
20 want to personally thank you, and on behalf of my colleagues,  
21 for your time and attention this week. I have the dubious  
22 distinction of talking to you right after lunch, so hopefully I  
23 can keep your attention, and I promise you I'll make this as  
24 quick as possible and cover as much stuff as I can as  
25 expeditiously as I can.

1           As you heard my colleague Ms. Kelleher say from day  
2 one, this is a case about public safety. It is about ensuring  
3 that the men and women who perform as FBI agents, one of the  
4 most dangerous law enforcement positions, can do so safely and  
5 effectively.

6           You've heard the testimony in this case that FBI agents  
7 perform a number of different functions, and those functions may  
8 change on a second-to-second and minute-to-minute basis. You  
9 also heard that the FBI's mission takes them across the  
10 United States and around the world.

11           You also heard how the difference between mission  
12 success and mission failure can be a matter of a delay of  
13 seconds, and delays and hesitation at the FBI doesn't mean that  
14 paperwork is getting put off for another day; rather, it means  
15 that lives can be placed in danger. And not just the lives of  
16 the FBI special agent, but that agent's colleagues and the  
17 general public that the FBI is entrusted to serve.

18           And it's in this context, ladies and gentlemen, that  
19 the FBI must consider the hiring of individuals with Type I  
20 diabetes. As you've heard in this case, and it's undisputed,  
21 Type I diabetics pose certain challenges, and those challenges,  
22 as you heard, are high blood sugar and low blood sugar, and the  
23 consequences attendant to both of those. High blood sugar being  
24 hyperglycemia; low blood sugar, hypoglycemia.

25           You heard that with both hyper and hypoglycemia, some

1 of these symptoms are dizziness, loss of concentration, the  
2 inability to think straight, and in certain circumstances even  
3 feeling drunk. And in very severe situations, the consequences  
4 can be much, much more serious.

5 And it's with this safety-first attitude, ladies and  
6 gentlemen, that before 2001 the FBI did not hire Type I  
7 diabetics, because it determined that the risks associated with  
8 this high and low blood sugar were simply too great to allow a  
9 Type I diabetic to perform the essential functions of the job.

10 But you also heard in 2001 that Dr. Yoder received an  
11 application, an application from someone who wanted to be an FBI  
12 special agent, and this applicant was using a relatively new  
13 form of technology. Dr. Yoder wasn't particularly familiar with  
14 that technology at the time. Dr. Yoder consulted with an expert  
15 in endocrinology, Dr. Frank Crantz. You heard from the trial,  
16 Dr. Yoder asked Dr. Crantz, "Would this new innovation allow the  
17 FBI to open doors and allow those with Type I diabetes to serve  
18 as FBI special agents? Dr. Crantz said yes, this would provide  
19 the flexibility necessary to allow those that are FBI special  
20 agents to perform the essential functions of the job. And as a  
21 consequence, the FBI ended up hiring its first Type I diabetic  
22 in 2001.

23 And what was that new technological advancement? We've  
24 heard quite a bit and -- you've heard quite a bit about this.  
25 It's the insulin pump. You heard the testimony in this case

1 that the insulin pump provides the user with certain  
2 flexibility, flexibility that mirrors in many respects the  
3 flexibility necessary for an FBI special agent. And it's with  
4 this insulin pump and that flexibility that the FBI was able to  
5 ensure that it could open doors, not create bans, open doors  
6 while at the same time keep safety first.

7 Ladies and gentlemen, I urge you to reject Mr. Kapche's  
8 attempt to second-guess that medical judgment.

9 Now, Mr. Griffin explained to you his theory of the  
10 case, and various issues in this case. I want to focus your  
11 attention on two separate issues: First, whether Mr. Kapche is  
12 an individual with a disability; and second, whether the insulin  
13 pump requirement is job related and consistent with business  
14 necessity.

15 And let's take that first issue, about whether  
16 Mr. Kapche is an individual with a disability. As the Court  
17 explained to you, in order to determine whether Mr. Kapche has a  
18 disability, you must determine whether or not Mr. Kapche is  
19 substantially limited in the major life activities of eating and  
20 caring for himself. Now, you may be saying to yourself: Well,  
21 of course Mr. Kapche has a disability. He's got diabetes;  
22 diabetes is a serious disease.

23 But as the Court informed you, in order to determine  
24 whether Mr. Kapche has a disability, you must determine whether  
25 Mr. Kapche's diabetes individually substantially limits him in a

1 major life activity.

2           The other point that the Court explained is that when  
3 you are considering whether Mr. Kapche is disabled, you need to  
4 consider him in his corrected state. What do I mean by  
5 corrected state? When Mr. Kapche takes his insulin. In other  
6 words, the question for you to resolve is, is Mr. Kapche, when  
7 he takes his insulin, substantially limited in his ability to  
8 eat and to care for himself? Mr. Kapche has the burden of proof  
9 on this issue, and we submit, ladies and gentlemen, that he has  
10 not met that burden.

11           Now, what did the evidence show in this case? And  
12 hopefully, is it coming up on your screen? Perfect. What the  
13 evidence shows is that Mr. Kapche was never restricted as to  
14 what he could eat. You heard him say that he could eat what he  
15 wants when he's taking his insulin. You heard his treating  
16 doctor, Dr. Tulloch, say the exact same thing.

17           You also heard that all, all of the experts agree on  
18 this point. There are many disagreements in this case, ladies  
19 and gentlemen. I'll highlight some of them for you, but this is  
20 one point that everyone agrees with. Dr. Gavin, Dr. Crantz, and  
21 even his treating doctor, Dr. Tulloch, all of them agreed that  
22 when a diabetic, Mr. Kapche, takes his insulin, he can eat like  
23 a nondiabetic.

24           Accordingly, ladies and gentlemen, there is simply no  
25 evidence in this case that Mr. Kapche is substantially limited

1 in his ability to eat when he's taking his insulin.

2 Let's talk now about his ability to care for himself.  
3 What did the evidence show on this score? Well, we heard from  
4 Mr. Kapche that he's never been restricted from working because  
5 of his diabetes. We heard from Mr. Kapche that he's never  
6 declined to participate in any activities because of his  
7 diabetes. We heard that Mr. Kapche has the ability to care for  
8 himself. He doesn't need to hire others. And perhaps most  
9 fundamentally, Mr. Kapche testified that when he takes his  
10 insulin, he can do anything. Remember, his wife Nora said the  
11 exact same thing: When he puts his mind to it and he's taking  
12 his insulin, he can do anything.

13 And perhaps the most important testimony at this point  
14 comes from his doctor, Dr. Tulloch. Now I recognize, ladies and  
15 gentlemen, that listening to deposition designations is not the  
16 most interesting thing. But Dr. Tulloch said something on the  
17 stand that was notable, and I want to actually highlight it.

18 Dr. Tulloch was asked, "If Mr. Kapche or any other  
19 diabetic performs the diabetes management regime, is Mr. Kapche  
20 able to care for himself as any normal nondiabetic adult is?"  
21 What did he say? "Yes, within the limits of good luck and good  
22 circumstance."

23 Dr. Tulloch's statement demonstrates that Mr. Kapche is  
24 not substantially limited in his ability to care for himself  
25 when he takes his insulin.

1           Now, you heard Mr. Griffin testify that, while he may  
2 be able to eat and care for himself, it's his management of his  
3 diabetes that itself is the substantial limitation. What were  
4 the burdens that Mr. Kapche actually testified to?

5           Well, we heard the testimony in this case that  
6 Mr. Kapche takes a few shots a day, that these shots take less  
7 than a minute per shot, and that he's been taking injections  
8 since he was 16 years old. Dr. Gavin acknowledged that taking  
9 insulin is something that all Type I diabetics have to do.

10           Now, ladies and gentlemen, remember that being a  
11 diabetic is not per se a disability. You have to look at  
12 Mr. Kapche as an individual. The fact that all individuals with  
13 Type I diabetes have to take insulin injections is simply  
14 insufficient.

15           You also heard Mr. Kapche testify that he has to count  
16 his carbohydrates. What did Mr. Kapche say about that? He said  
17 it was ritualistic, meaning that it was so easy for Mr. Kapche  
18 to count his carbohydrates that it was no burden at all, let  
19 alone a substantial limitation.

20           Ladies and gentlemen, it's hard to reconcile something  
21 being ritualistic with something being a substantial limitation.  
22 Again, counting carbohydrates, as Dr. Gavin testified, is  
23 something all diabetics are expected to do.

24           Finally, you heard that Mr. Kapche has to test his  
25 blood glucose. He does it three to five times a day, takes less

1 than a minute in time. You heard that all Type I diabetics are  
2 expected to test their blood glucose.

3 Ladies and gentlemen, the fact that Mr. Kapche, like  
4 all Type I diabetics, are expected to test their blood glucose,  
5 simply does not demonstrate that this was a substantial  
6 limitation on his ability to care for himself.

7 Now, most importantly, ladies and gentlemen, remember  
8 what Mr. Kapche himself said. Mr. Kapche characterized his  
9 diabetes management treatment regime as a hassle. Ladies and  
10 gentlemen, a hassle is a far cry from a substantial limitation.

11 Now, you also heard the testimony from Dr. Gavin. And  
12 Dr. Gavin testified about a number of burdens imposed upon  
13 Type I diabetics generally. But remember what Dr. Gavin said,  
14 and this is critically important: When Dr. Gavin was asked,  
15 "How does Mr. Kapche handle his diabetes?"

16 "I don't know."

17 "How many shots a day does he take?"

18 "I don't know."

19 "How many times a day does he test his blood glucose?"

20 "Don't know that."

21 "How many times does he go see a doctor?"

22 "I don't know that either."

23 The point of this, ladies and gentlemen, is that you  
24 must conduct an assessment of Mr. Kapche as an individual.  
25 Dr. Gavin's testimony simply does not fit that bill.

1           Now, you also heard Mr. Griffin claim in this case, and  
2 I think this is his overall theme, that the government wants to  
3 have it both ways: The government wants to argue on the one  
4 hand that Mr. Kapche is not disabled under the law, but that he  
5 cannot safely perform the job functions of an FBI special agent.

6           Well, I think I've got at least two responses to that.  
7 First, there's nothing inconsistent at all with the government's  
8 position. Mr. Kapche as a matter of law can eat as he wishes  
9 and care for himself in a manner that's equivalent to a  
10 nondiabetic. But the fact that he can eat and care for himself  
11 doesn't translate into the fact that he can safely perform the  
12 essential functions of the job. Many people can eat what they  
13 wish, many people can care for themselves, but not everyone can  
14 be an FBI special agent. Frankly, I think you're looking at  
15 someone who probably fits that category.

16           More fundamentally, though, think about the  
17 implications of the plaintiff's claim. The plaintiff wants you  
18 to believe that he is substantially limited in his ability to  
19 care for himself, but he could care for you and I as an FBI  
20 special agent. Ladies and gentlemen, I would submit, that is an  
21 inconsistent position.

22           Now, Mr. Kapche at the end of the day has failed to  
23 meet his burden of showing that he is substantially limited in  
24 his ability to eat or to care for himself. And if you conclude  
25 that he has failed to meet this burden, then you're done. You

1 don't even need to get into the medical science in this case.  
2 And we urge you to conclude that the evidence in this case more  
3 than supports a no answer to whether Mr. Kapche is disabled.

4 Now, as the Court explained to you when he was giving  
5 some of his preliminary instructions, even if you conclude that  
6 the plaintiff has met his burden to show that he is a qualified  
7 individual with a disability, and that the FBI did not hire him  
8 because of that disability, a verdict for the plaintiff is still  
9 inappropriate if you conclude that the pump requirement is job  
10 related and consistent with business necessity. That's the  
11 second question I want to focus on this afternoon.

12 And while the FBI has the burden on this issue, it's a  
13 burden that we embrace because it's a burden that's clearly been  
14 met.

15 Now, in considering where the pump is job related and  
16 consistent with business necessity, it's important at the outset  
17 to remember that consensus is not required. The fact that  
18 Mr. Kapche and his experts may disagree is not a basis to  
19 disregard the pump requirement so long as the pump requirement  
20 is supported by credible medical evidence. And as I'm about to  
21 discuss with you, there is more than sufficient evidence to meet  
22 that bill.

23 The second point I wanted to make, and this will be  
24 somewhat counterintuitive, is that although the term is called  
25 business necessity, the government does not have to prove that

1 the pump is a necessity. That seems incredibly confusing. The  
2 Court has explained you, the legal definition of business  
3 necessity is not as strict as the common sense term necessity;  
4 rather, as Judge Robertson has already explained, the government  
5 only must show that the pump furthers legitimate employment  
6 goals in a significant way, that it substantially promotes safe,  
7 efficient, or successful job performance, and the pump  
8 requirement has a credible scientific basis. The evidence in  
9 this case supports all three of those questions.

10 Now, let's talk first principles. It's undisputed that  
11 safety is a critical goal of the FBI. You heard Mr. Kapche's  
12 own expert, Dr. Schatz, acknowledge that fact. And this may  
13 have been glossed over because it was read into the record, but  
14 Dr. Tulloch himself said he had concerns about Type I diabetics  
15 performing in public safety positions because of the incidence  
16 of hypoglycemia.

17 You also heard from Dr. Crantz in this case.  
18 Dr. Crantz is an endocrinologist who works in Northern Virginia,  
19 with over 30 years of experience in treating diabetics. And  
20 unlike the plaintiff's experts, who acknowledged they have no  
21 idea what an FBI special agent does, Dr. Crantz actually treats  
22 FBI special agents. He's intimately familiar with all the  
23 different tasks and job functions that FBI special agents must  
24 perform. Plaintiff's experts fell far short of that  
25 understanding.

1 Dr. Crantz explained in his testimony the serious risks  
2 with high blood sugar and low blood sugar. And what did he  
3 explain about that? Well, with respect to the high blood sugar,  
4 Dr. Crantz explained that symptoms can include an inability to  
5 think clearly, decreased motor skills, dizziness and weakness,  
6 blurring of vision, and in extreme circumstances, a loss of  
7 consciousness.

8 He also explained, and again this is undisputed, that  
9 low blood sugar could also result in the inability to  
10 concentrate, confusion, unsteadiness, slurred speech, a loss of  
11 concentration, coma, and in very extreme circumstances, death.

12 Now, why is this important? Why do we care about any  
13 of this in this case? Well, it's because the FBI must consider  
14 the consequences of serious problems associated with Type I  
15 diabetics when it hires special agents.

16 And you heard Agent Heimbach. He explained that  
17 special agents are called upon to make split-second decisions.  
18 And if an agent is experiencing high or low blood sugar, that  
19 ability to make that split-second decision is compromised.

20 And as you heard with Agent Kavanagh in this case, a  
21 diabetic agent who is in a high-stress situation, working long  
22 hours, who experiences a loss of concentration due to high or  
23 low blood sugar, he runs the risk of seriously injuring himself  
24 or putting his partners in danger.

25 Dr. Crantz summarized these risks the best. Dr. Crantz

1 was asked, "Dr. Crantz, knowing what you know about what FBI  
2 special agents do, tell us why it's important that FBI special  
3 agents with Type I diabetes need to avoid these highs and lows."

4 It's a very long answer. Let me summarize it for you:  
5 The bottom line is that 50 percent, 50 percent of those with  
6 just mild elevated high blood sugar exhibited signs of  
7 impairment. And it's that risk of impairment that is so  
8 important in considering the needs of the FBI special agent  
9 position.

10 Now, you heard from both Agent Raucci and  
11 Agent Heimbach in this case. And in fact, I should mention this  
12 up front. I was thinking about this last night. I think all of  
13 you now know more about what is required of an FBI special agent  
14 than any of plaintiff's experts. You've actually heard and  
15 considered the testimony from those that are out in the field,  
16 doing what special agents do. The plaintiff's experts frankly  
17 did not have the benefit of that testimony.

18 And you heard what Agent Raucci and Agent Heimbach had  
19 to say: Counterterrorism is the number one priority. You heard  
20 how almost all cases now have some sort of international angle  
21 to them, and you heard how FBI agents are expected to travel,  
22 both domestically and abroad. As Agent Heimbach explained,  
23 agents are expected to follow leads wherever those leads may  
24 take them.

25 You also heard how special agents must be flexible.

1 You heard how agents have to move from assignment to assignment,  
2 often with seconds notice. As Agent Heimbach explained: We  
3 come to work, we never know what's going to be in our job  
4 assignment that particular day. You may have one thing, but you  
5 have to be very reactive and respond.

6 You heard Agent Heimbach testify that special agents  
7 are on call 24/7, 365 days a year. They work 10 to 12 hours a  
8 day and must be available to travel on extremely short  
9 circumstances.

10 You heard Agent Keith, who echoed all of these  
11 sentiments when he explained, "I don't want to say there's ever  
12 a typical day with an agent. You just never know what's going  
13 to happen."

14 Now, why does this flexibility of the FBI special agent  
15 position have any relevance to the issue of Type I diabetes?  
16 Well, because the need for insulin changes throughout the day.  
17 Remember, Dr. Crantz testified about the dawn phenomena, that  
18 even before you wake up, your blood sugar is about 20 percent  
19 elevated. And you also heard about, when you eat and when you  
20 experience stress, your blood sugar also goes up, and that when  
21 you're exercising your blood sugar goes down. The bottom line,  
22 ladies and gentlemen, is that insulin levels change minute by  
23 minute in the human pancreas.

24 So what do we have? We have an unpredictable job, we  
25 have insulin levels that can go up and down many times

1 unpredictably. And what's the consequence of that? Simply put,  
2 ladies and gentlemen, the unique requirements of the FBI special  
3 agent position make the insulin needs a Type I diabetic faces  
4 unpredictable.

5 For example, you heard how special agents routinely  
6 need to travel across time zones at a moment's notice. And as  
7 Dr. Crantz explained, crossing time zones for someone on  
8 injection therapy creates certain challenges. Because remember,  
9 you're using long-acting insulin, and there's oftentimes  
10 confusion and difficulty as to, okay, now I'm three hours behind  
11 and I shot up my long-acting injection; what do I do next? With  
12 an insulin pump, it only uses short-acting insulin, and all you  
13 do is push a button.

14 You heard Dr. Crantz explain that people go from  
15 sitting at their desk to running out in the streets and running  
16 after bad guys in an unpredictable fashion. Again, these types  
17 of minute-to-minute changes in a job affect the amount of  
18 insulin you need.

19 There's no dispute about any of this. Even Dr. Gavin  
20 acknowledged that it is more demanding for a person with Type I  
21 diabetes when there is unpredictability with respect to eating  
22 and physical activity.

23 And remember, ladies and gentlemen, just to drive this  
24 all back home, it's precisely because of all of these concerns  
25 that before 2001 the FBI concluded there was no safe and

1 effective way to hire Type I diabetes. It's that insulin pump  
2 that opened the door.

3 So once again we have a job that has a tremendous  
4 amount of variability. We have Type I diabetics whose insulin  
5 levels vary throughout the day. What's the question for you,  
6 then?

7 Well, the question for you, ladies and gentlemen, is:  
8 How does the insulin pump promote safe job performance for the  
9 special agent position? And the testimony in this case shows  
10 that the insulin pump reduces the risk of high and low blood  
11 sugars. And it does this, as Dr. Crantz explained, because the  
12 insulin pump more closely mimics the human pancreas. It follows  
13 that up and down that even Dr. Schatz testified to.

14 And remember, although Dr. Schatz was awful reluctant  
15 to admit this point, he ultimately conceded that the insulin  
16 pump, as compared to injections, more closely matches the human  
17 pancreas. And that flexibility, ladies and gentlemen, is  
18 because all you have to do is push a button.

19 This is the actual key chain that David Keith uses. As  
20 he mentioned, it just goes right on his flight jacket, not on  
21 his microphone, and all he has to do is push it.

22 Now, let's compare those benefits to some of the issues  
23 or limitations with injection therapy. Injections use  
24 long-acting insulin. And what does that mean? Well, that means  
25 that the injections are harder to adjust, because once you

1 inject 24 hours of insulin, you can't take it back. It's there,  
2 and you've got to live with that insulin and work around that  
3 insulin. Unlike with the pump, that's just using the  
4 short-acting insulin at a click of a button, and as you've  
5 heard, with the pump a person can quickly and easily get their  
6 insulin.

7 At bottom, ladies and gentlemen, the evidence  
8 demonstrates that the insulin pump provides a significant  
9 advantage over injections in the context of the special agent  
10 position. This is not a case, ladies and gentlemen, about  
11 whether generally, categorically, insulin pumps are better than  
12 injections. The injection is not on trial in this case. The  
13 question is whether, in the context of a very specific position,  
14 the insulin pump provides benefits that injection therapy cannot  
15 provide. The evidence is overwhelming in this case that the  
16 pump provides those benefits.

17 Now, what is the advantage of the insulin pump? We  
18 have this big buildup here. What's the answer? It's  
19 flexibility. Dr. Crantz said it best: "The flexibility that's  
20 necessary to fulfill the job requirements of the special agent  
21 makes pump therapy vastly preferable."

22 Now, I was kind of scratching my head a bit during the  
23 plaintiff's closing statement, when he said that no one has  
24 refuted Dr. Crantz -- or Dr. Schatz's testimony about there  
25 being no difference between pumps and injections. The way I

1 heard the testimony, and we actually quote the testimony up  
2 here, I think it's pretty clear that Dr. Crantz absolutely  
3 rejects Dr. Schatz's opinions.

4 And you need look no further, ladies and gentlemen, for  
5 a medical justification for the pump requirement than Dr. Schatz  
6 and his own studies that he identified. Remember, Dr. Schatz  
7 identified those 11 studies. We had the chart here that was  
8 probably bigger than myself, which isn't saying much these days,  
9 and that chart reflected the fact that of those 11 studies, the  
10 overwhelming majority of them supported the notion that the pump  
11 provided benefits that injection therapy simply did not provide.

12 And what were those benefits? Well, you saw that --  
13 and Dr. Schatz acknowledged that all these studies said this.  
14 He didn't say he agreed with them all, but he acknowledged that  
15 these studies showed the pumps increased flexibility regarding  
16 the timing of meals and snacks, as compared to injections. He  
17 acknowledged that the studies showed that the pumps improved  
18 metabolic control and reduced frequency of low blood sugar.  
19 Again, remember what the consequences of low blood sugar are.

20 He acknowledged that the studies showed that the pumps  
21 lead to better glycemic control than using even Mr. Kapche's  
22 form of insulin, Glargine, that the pump prevented or reduced  
23 the likelihood of the low and high blood sugar that we just  
24 talked about that is particularly dangerous in the context of  
25 the special agent position relative to Mr. Kapche's own form of

1 insulin.

2           What did those studies also show? Three more quick  
3 ones, and I promise we'll move on. These studies showed that  
4 the absorption of insulin in the pump is more predictable than,  
5 again, Mr. Kapche's own therapy using Glargine. These studies  
6 showed that pumps resulted in significantly higher reductions of  
7 Alc levels. Remember, the Alc is the measure of control. The  
8 pump was determined to result in significant higher reductions  
9 in Alc levels, even as compared to injection therapy using  
10 Mr. Kapche's form of insulin, Glargine.

11           Perhaps most fundamentally, and I am going to read this  
12 one, "Glargine is not the ideal basal insulin because it does  
13 not provide a variable basal rate. And the pump remains the  
14 only" -- the only -- "current method of providing the correct  
15 basal insulin supplementation on a physiological manner.

16           Ladies and gentlemen, study after study shows what  
17 otherwise is common sense: When you have a device that more  
18 closely mimics the human pancreas, that is always going to be  
19 better. It's that simple.

20           Now, you heard Mr. Griffin talk about the one study,  
21 the one study on the chart that wasn't marked off, that talks  
22 about the infamous DKA. Well, what did you hear about DKA? You  
23 heard that in Dr. Crantz's practice, which is largely a  
24 pump-based practice, he's never, ever had a patient experience  
25 DKA. And Dr. Crantz himself explained why that one study was

1 misleading at best. Because in that study, remember, the people  
2 that were using the pump that were experiencing DKA were people  
3 that had relatively poor control to begin with.

4 Of course, as the evidence has made clear in this case,  
5 the FBI would only hire special agents that demonstrate good  
6 control. That one study that showed that 12 people got DKA  
7 simply has no relevance in this case.

8 In fact, ladies and gentlemen, you may recall that  
9 Dr. Schatz referred to himself as a default pump person, and he  
10 acknowledged that while he wasn't an expert in insulin pumps,  
11 his colleagues are. And those colleagues have reached complete  
12 opposite conclusions as to whether the pump is superior with  
13 injection therapy. I mean, Dr. Schatz acknowledged, he  
14 disagrees with his colleagues all the time.

15 Why do we care about any of this? Why is this  
16 important? It's because, again, the FBI does not need to show  
17 medical consensus. They need to show there is a credible  
18 medical basis. Plainly, Dr. Schatz and his own studies and  
19 Dr. Crantz meet that bill.

20 And aside from the science, ladies and gentlemen, you  
21 heard about the practical benefits of the insulin pump. You  
22 heard from David Keith in this case about how, when he had to  
23 wear a flight jacket and a bulletproof vest and night goggles,  
24 all he had to do was click a button. You heard about when he  
25 was in a bloody crime scene during a football game, a college

1        football game, all he had to do was push a button. He didn't  
2        have to remove any clothing, he didn't have to excuse himself.  
3        In fact, you recall David Keith testified that he was even able  
4        to interrogate a witness without that witness ever even knowing  
5        that he used insulin, by just discreetly clicking a button.

6                    And perhaps the most dramatic example of this is the  
7        bank robbery. You guys remember the bank robbery where, right  
8        after lunch, Agent Keith is called out to the bank. There's a  
9        hostage situation. He's wearing a flight jacket, he's wearing a  
10       bulletproof vest, he's geared to the teeth, and he's standing at  
11       the back door waiting for the hostage, or potentially the  
12       hostage-taker, to run out of that door. He's laying prone on  
13       his belly on the ground, holding a gun, waiting for the guy to  
14       come out, and he feels his blood sugar beginning to change.

15                    What does he do? Pushes a button. He doesn't have to  
16        remove his flight gear, doesn't even have to lay his gun down;  
17        he pushes a button.

18                    And remember, David Keith testified, he didn't think he  
19        would be able to do all of those types of activities if he had  
20        to use injections.

21                    Remember also that Mr. Griffin has made quite a bit of  
22        the fact that somehow pumps are prone to failure. What did the  
23        testimony show about the incidence of failure with an insulin  
24        pump? You heard from Agent Keith that when he's had issues with  
25        his pump, they've been like nothing. They've been very easy to

1 fix. Simply puts it back in, does the tube, ready to go. It's  
2 a non-issue for Agent Keith. And you heard from Dr. Crantz in  
3 this case that he's never had an incidence of pump failure.

4 Ladies and gentlemen, the evidence in this case more  
5 than supports the conclusion that the FBI's pump requirement is  
6 job related, and consistent with business necessity. And if you  
7 find that that is the case, you're done and a verdict for the  
8 FBI is once again appropriate.

9 Now, I want to change gears very quickly. I know it's  
10 after lunch, you-all want to get to deliberate, and I'm going to  
11 make that happen quickly. But there are a couple of really  
12 quick points I want to make in response to the plaintiff's  
13 statements during closing.

14 Mr. Griffin spent quite a bit of time talking about the  
15 lack of an individualized assessment in this case. Let's take  
16 some mystery out of this individualized assessment. First, an  
17 individualized assessment is irrelevant for any issue you need  
18 to consider in this case, whether Mr. Kapche is a qualified  
19 individual with a disability and he did not get the job off that  
20 disability. Individualized assessment doesn't fit anywhere  
21 within that construct, nor does it fit anywhere within the  
22 business necessity defense. It's simply a non-issue.

23 But let's take this issue head-on. Dr. Yoder testified  
24 that he did conduct an individualized assessment. Dr. Crantz  
25 testified that when you conduct an assessment, you need

1 criteria, you need parameters, and the insulin pump is one of  
2 those parameters.

3 I was frankly stunned this morning, and I do mean  
4 stunned, when I heard Mr. Griffin say that Agent Keith got an  
5 individualized assessment where Mr. Kapche did not. Ladies and  
6 gentlemen, it was the exact same assessment. Both Mr. Kapche  
7 and Mr. Keith were both told that the FBI would require them to  
8 switch to an insulin pump before they hired them. Agent Keith  
9 had the benefit of having the time to make that switch,  
10 demonstrate sufficient blood glucose levels, blood sugar levels,  
11 and was ultimately able to be hired. Mr. Kapche was six days  
12 away from the age cutoff of 37. And Mr. Kapche has not  
13 challenged that age cutoff, and that age cutoff is presumed to  
14 be valid.

15 Ladies and gentlemen, it's the same assessment; and the  
16 only difference is Mr. Kapche's age.

17 Mr. Griffin has also made much of this hidden pump  
18 requirement, arguing that while it's not legally required to  
19 publish information about the pump, somehow that creates an  
20 issue. I'm not sure what that issue is exactly, but let's  
21 address this issue head-on.

22 I agree with Mr. Griffin, the FBI does not publicly  
23 make available information about the insulin pump, or any other  
24 treatment for any other disease. Because as Dr. Yoder himself  
25 explained, if the FBI had to take the time to publicly make

1 available, on the web site or otherwise, all treatments for all  
2 illnesses for anyone who might possibly apply for the FBI  
3 special agent position, that would be a full-time job and a  
4 half.

5           Instead, what does the FBI do? They communicate with  
6 the individual applicant about what the needs are. And when  
7 there's time to make that change, well, then, we know what  
8 happens. We saw what happened with Agent Keith. The only  
9 reason why Mr. Kapche wasn't notified about the pump requirement  
10 was because he was six days away from turning 37. Simply put,  
11 there is nothing Mr. Kapche could have done in those six days to  
12 switch to an insulin pump and demonstrate good control for  
13 30 days, at a minimum.

14           Finally, with respect to Mr. Griffin's comments during  
15 the closing, he identified I think five different what he terms  
16 excuses for the FBI's denial of Mr. Kapche's application. And I  
17 think you need to look no further than Dr. Yoder's January 11th,  
18 2005, memo. It's Plaintiff Exhibit Number 7, which you're going  
19 to be able to take back with you, to show how incorrect that  
20 statement is.

21           In fact, when you look at that document, you'll notice  
22 that the five excuses Mr. Griffin alluded to all stem from the  
23 act same fact: Specifically, that the insulin pump is more  
24 flexible. Dr. Yoder explained this in his testimony. Remember,  
25 Dr. Yoder's memo reflected his view that diabetes treated with

1 injections were incompatible with the special agent position,  
2 and that Mr. Kapche, while on injections, did not have  
3 sufficient control to be an FBI special agent. This was all  
4 laid out in Dr. Yoder's memo. There's no hidden agenda or plot  
5 here. It was all laid out.

6 And remember, Dr. Yoder explained that the use of the  
7 terms "reliable and flexible," those are simply interchangeable  
8 to him. And as I just mentioned, the issue of Mr. Kapche's age,  
9 about himself being six days away, six days away from turning  
10 37, was highlighted in this same memo.

11 At bottom, this isn't a case about excuses for the  
12 FBI's decision, because there's nothing that the FBI needs to be  
13 excused from. The FBI has a credible medical basis for its pump  
14 requirements, and the plaintiff has done nothing to rebut that.

15 Finally, and I do mean finally, I want to talk about  
16 Mr. Kapche's claimed emotional distress damages in this case.  
17 Now, just a couple of very quick points. Even if you find that  
18 Mr. Kapche has met his burden on all the other issues in this  
19 case, there's a lack of any compelling evidence supporting  
20 Mr. Kapche's claimed emotional distress.

21 Once again, the Court will instruct you on what the law  
22 is. But just very briefly, two points I want to keep in your  
23 mind. Mr. Kapche has the burden of showing his emotional  
24 distress, and Mr. Kapche must show that any emotional distress  
25 that he claims he had, he suffered from, were caused by the FBI.

1           Now, what does the evidence in this case show about  
2 emotional distress? In fact, let me posit a different question:  
3 What did the evidence not show about his emotional distress?  
4 For example, you didn't hear from a single doctor, psychiatrist,  
5 psychologist, clinician in this case that discussed Mr. Kapche's  
6 emotional distress. When asked, "Mr. Kapche, did you go see a  
7 doctor?" "No."

8           Now, I want to ask you this: If Mr. Kapche's emotional  
9 distress was, quote, "tearing his family apart," as his wife  
10 claims, why didn't she ever ask him to go see a doctor?

11           Second, you did not see a single piece of written  
12 information that reflects this emotional distress: No e-mails,  
13 no journals, no diaries, no cards, nothing. The only evidence  
14 you heard came from Mr. Kapche and his wife Nora.

15           Third, Mr. Kapche never took a single day off of work  
16 to cope with the fact that the emotional distress was tearing  
17 his family apart. Again, you can ask yourself: How consistent  
18 is it, if someone suffering from extreme emotional distress,  
19 that they don't even take a single day off of work?

20           And you can also consider the duration of this  
21 emotional distress. You heard that Mr. Kapche suffered from  
22 some headaches, not every day but some days; sleeplessness,  
23 again not every day, but some days, and that this lasted several  
24 months. I think it was anywhere from three to five months. He  
25 couldn't put a ballpark on it. But that was it.

1           And finally, you heard testimony in this case that all  
2 of this emotional distress stems from the fact that the pursuit  
3 of becoming an FBI special agent was a lifelong dream. Ladies  
4 and gentlemen, remember, Mr. Kapche applied to the FBI when he  
5 was 33 years old. And he acknowledged on the stand that he knew  
6 when he applied at 33 that there was an age 37 cutoff. And he  
7 also acknowledged that he knew there was no guarantee he was  
8 going through in four years.

9           And if this was the pursuit of a lifelong dream, why  
10 did Mr. Kapche apply to about a half dozen other jobs in the law  
11 enforcement field: Secret Service, the Houston police  
12 department, San Antonio, a constable somewhere?

13           Ladies and gentlemen of the jury, I would submit to you  
14 that pursuing a job in your mid 30s, after applying to a  
15 scattershot of law enforcement positions elsewhere, is hardly  
16 consistent with the pursuit of a lifelong dream.

17           I want to finish up where I started, and thank you for  
18 your time and attention this week. You've heard quite a bit of  
19 evidence in this case about Mr. Kapche and his disability, and  
20 about the insulin pump requirements. And we urge you to  
21 consider that this is a case about safety coming first, while at  
22 the same time opening doors as widely as possible.

23           And we urge you to conclude that, in this case,  
24 Mr. Kapche has failed to meet his burden of showing that he is a  
25 qualified individual with a disability, and we urge you to

1 return a verdict for the FBI. Thank you.

2 THE COURT: Ms. Butler?

3 MS. BUTLER: Yes, thank you. Excuse me, Your Honor.

4 Let me gear up.

5 Ladies and gentlemen of the jury, they can't have it  
6 both ways anymore. The time for that is over, because this case  
7 is getting ready to be in your hands.

8 You know, the combination of ignorance and prejudice,  
9 that's toxic. That's a toxic combination. And that's the  
10 combination that got Jeff Kapche when Dr. Yoder refused to  
11 consider him.

12 You know, Mr. Gardner was just saying that really there  
13 had been no difference in the FBI's story over all these years.  
14 But let's look at that. Let's look at that Plaintiff's  
15 Exhibit 7 he was talking about.

16 And what's the first excuse, which is at the bottom?  
17 It's that the pump is a more dependable means of insulin  
18 delivery. Nobody said that, ladies and gentlemen. Nobody said  
19 that in this case, because it's not true. Whether you put it in  
20 through a pump or you put it in through the pen, it gets in your  
21 body. It's not more dependable. And that's why they dropped  
22 that.

23 And then they tell you, medical concerns regarding  
24 diabetes relate to requirements for unexpected emergency travel,  
25 to gruelling schedules, austere environments. So what did we

1 show you? We showed you Dr. Schatz, who explained that is the  
2 exact wrong location for anybody to have a pump. You're not  
3 going to be able to call FedEx and say, "Get it here overnight,"  
4 if you're in the mountains of Afghanistan. What are you going  
5 to do? If your pump goes out, you're going to go back to the  
6 tried and true method, the insulin pen. And if it's good enough  
7 in an emergency, ladies and gentlemen, it's good enough every  
8 day. That's the one you can always count on.

9           And we're not anti-pump, but we're taking them at their  
10 word, at Dr. Yoder's word, that this is why he was doing what he  
11 did. That's what he wrote. He didn't write it once; you will  
12 see it four times. He wrote one memo that day, he wrote another  
13 memo that day, then his boss wrote another memo, and another  
14 memo. There is nothing about flexibility in any of that. That  
15 is an insult to the intelligence of this group that's sitting in  
16 front of me, is what that is.

17           Do you remember as a parent or maybe as a kid, the old  
18 story, you've got this kid that comes up, the mother realizes  
19 something is gone from the cookie jar, and the kid has all this  
20 stuff on his mouth. And the mother says, "Why did you take that  
21 cookie?" The kid said, "I didn't take that cookie. I haven't  
22 been inside all day."

23           And then, "Wait a minute, you took that cookie."

24           "No, no. That was Susie. Susie took that cookie."

25           Ladies and gentlemen, by the time the kid gets to the

1 third or fourth excuse, everybody knows what's going on. You've  
2 got to come up with something. But you still have that stuff  
3 that's around your mouth.

4 That's what we have in this case. They have come up  
5 with various excuses. And when they wrote Mr. Kapche -- if you  
6 go back to Exhibit 7, we know what they said: Your diabetes is  
7 not sufficiently controlled. In Exhibit 7 Yoder says, "It's  
8 well controlled." So they're telling the guy a falsehood. How  
9 many stories do they get?

10 But okay, let's move forward. Let's move forward.  
11 Nobody said it wasn't dependable. Nobody said Jeff wasn't well  
12 controlled. In fact, they said the opposite.

13 But let's look at this flexibility. Flexibility? All  
14 of a sudden, even though Dr. Yoder said, "We're worried about  
15 the mountains of Afghanistan," you didn't hear Mr. Gardner say  
16 anything about that. Now they're bailing out. They're saying,  
17 "You've got to be real flexible as an FBI agent. You've got to  
18 be able to drop and go, grab your stuff and go, around the  
19 country, around the world. Was there even one person who got on  
20 that stand who said Jeff Kapche wasn't ready to do that, he  
21 wasn't able to do that?

22 Ladies and gentlemen, that's why they test these  
23 people. That's why they have Dr. Burpeau figure out, can this  
24 guy run 7.2 miles, can he drop off the building, can he take  
25 somebody down. They test them. They don't just speculate.

1 That's why he's doing this. He played by the rules. He went  
2 through everything they wanted to do. And so even on  
3 flexibility they're not where they were before. Now they're  
4 saying -- you know, they're saying something totally different.

5 But Jeff Kapche said -- I asked him, "Are you ready to  
6 go anywhere, any time, any place, for the FBI? He said, "Yes."  
7 Did they ever get him to indicate another story? Did they ever  
8 ask him anything that would show that he wasn't ready to do  
9 that? He was exquisitely ready.

10 And they say, "How come he only applied when he was  
11 33?" He wanted to be ready. This isn't a trivial thing for  
12 Jeff Kapche. You just don't throw it out there and say, "Well,  
13 maybe I'll get to be an FBI agent. I don't know." You become  
14 ready. You get the background.

15 And frankly, we've all heard what happened. He was  
16 afraid he would go through the same stuff he's gone through  
17 before, with somebody saying, well, diabetes, I'm sorry. And he  
18 found out that wasn't true. He said the FBI, they were going to  
19 consider him on his own merits.

20 I still don't understand what they're saying about  
21 following their official policy. They've got a policy that says  
22 case-by-case. They have a policy that says it's illegal to  
23 discriminate. And they just put it in a file and close it up  
24 and move on to the next guy. Ladies and gentlemen, our country  
25 is better than that. We know that. How in the world --

1           Okay, they say business necessity. They said it  
2 doesn't really mean necessity, even though the judge tells you  
3 it's business necessity. How can it ever be a necessity for  
4 somebody to stay ignorant? Does it make any sense to you?

5           We had two therapies here. Okay? They have to prove  
6 that it's necessary to ban one of them. But when Dr. Crantz got  
7 on the stand and he was asked by Mr. Griffin, "Wouldn't it be  
8 reasonable to look at everybody with insulin injection therapy  
9 on a case-by-case basis?"

10           "I wasn't asked to do that."

11           You can't say something is necessary or not when you're  
12 not looking at both sides of the coin. That's just ignorance  
13 and prejudice.

14           So they didn't even want Dr. Crantz to look at the  
15 major issue on which they have the burden of proof in this case.  
16 They wouldn't let him do it. But Dr. Schatz did. Dr. Schatz  
17 said, "This ban makes no sense."

18           Now, let me ask you to look at one of the defendant's  
19 slides, if I could. And I thought this was very important.  
20 This is from Dr. Crantz's testimony. Because they're trying to  
21 tell you that the only way to get there -- there's only one way  
22 to get there. What does he say? He says, "Anything that's  
23 going to make it more likely that an agent's blood sugar is  
24 within a normal range is to me very important, very critically  
25 important."

1           Ladies and gentlemen, this case is not about  
2 high-priced gadgets, it's about keeping your blood sugar in that  
3 range, being able to do it. It's not how you do it, it's that  
4 you do it. Because remember that what they have to show is that  
5 the pump requirement is job related.

6           If you look at the next slide, they admit at the top  
7 that's what they have to show. And then they show -- then they  
8 say that the FBI must show that the pump does all this thing.  
9 No. No, they have to show that their demand, their ban is job  
10 related. Why were they telling you something different?

11           The only thing that is holding Jeff Kapche back, that  
12 has held Jeff Kapche back, is raw prejudice. And I also thought  
13 it was interesting, when you went through all those slides, you  
14 didn't see anything about Dr. Yoder. They weren't telling you  
15 anything about Dr. Yoder. This is Dr. Yoder's ban. Dr. Yoder  
16 could not explain a credible scientific basis for this because  
17 he admitted he doesn't understand one half of the deal. He  
18 doesn't understand the kind of insulin that Jeff Kapche uses.  
19 He likes the pump, he thinks it's cool. Maybe it's kind of  
20 a Star Wars kind of deal. But he doesn't understand the  
21 fundamentals. It cannot be a necessity to miss the  
22 fundamentals. You sort of wonder how many more fundamentals  
23 he's missing over there at the FBI. That's not a good thing.

24           Now, you know, with the intention that Dr. Yoder brings  
25 to this thing, I have this image: An FBI agent goes out to a

1 crime scene and they see a person there, they don't know if  
2 they're a witness, suspect, or whatever, they arrest them.  
3 They're there, it's easy. They close the door.

4 That's not -- that's what Dr. Yoder is doing. He  
5 doesn't bother to find out. He's had eight years to learn  
6 something about Jeff Kapche's therapy, and he still hasn't done  
7 it. He didn't know about it when he came to this courtroom.

8 That's not what we have a right to expect from the FBI.  
9 Because that's discrimination, if you just let ignorant people  
10 sit there and do the same thing over and over again. That makes  
11 no sense. That's not helping anybody.

12 Now, I noticed that Mr. Gardner said that they -- "Hey,  
13 there's no evidence that Mr. Kapche has a disability." But did  
14 you hear what he said? The FBI has to consider the serious  
15 problems associated with Type II (sic) diabetics. That's the  
16 point. This issue, there can be -- as a group, there can be  
17 some serious challenges that these people have to face, and  
18 that's why Mr. Kapche has worked so hard to overcome them.

19 But when this guy is telling you there are all these  
20 serious problems, he's admitting that Jeff Kapche has a  
21 disability. The guy is working hard. It's like Dr. Gavin told  
22 you. What did Dr. Gavin say? He said these are the people that  
23 show it can be done. And when you have somebody like that, who  
24 shows it can be done, and is working so successfully, you've got  
25 a person that you go, "That's the guy I want working for me."

1 In fact, the more you find out about the FBI job, the more you  
2 know that Jeff Kapche should be doing it. Because he is  
3 prepared, he has educated himself, he is ready to go.

4 In this country, we can move beyond stereotypes. What  
5 in the heck is Dr. Yoder's excuse? He says he doesn't want to  
6 write it down because we would have to write so many conditions  
7 down. Okay, what about this: What about picking up the phone,  
8 and you say, "Dr. Burpeau, couldn't help but notice, we're  
9 paying you \$257,000 a year, and you think this guy is a real  
10 good candidate. Why?"

11 I mean, he knows. He's sitting there at his desk  
12 knowing: "I don't know a thing about this therapy that  
13 Jeff Kapche uses." He can't call John Burpeau and say, "Look, I  
14 see you're a clinician. You deal with these things every day."  
15 What does that tell you? It's prejudice. Because when you're  
16 prejudiced, you don't want to gather information. You have your  
17 reactions that you're going to have, and you're not going to  
18 bother to be educated out of them.

19 Why didn't he call Dr. Tulloch? Dr. Tulloch thought he  
20 could do the job. They're trying to tell you Dr. Tulloch has  
21 concerns about Jeff Kapche doing this job. You will see three  
22 separate letters in the exhibits that Dr. Tulloch wrote for  
23 Jeff Kapche. If somebody had wanted to call him, it would have  
24 been an easy thing to do. But nobody did. They made  
25 Jeff Kapche turn on a moment's notice: Give me a letter

1 saying -- you know, describing your condition and how you can  
2 use firearms. So he did that, too. And how does it close out?  
3 It says, "Please call if you have any questions." But they  
4 didn't call. They'll never call, unless you guys tell them  
5 they've got to call.

6 Got to wrap it up here. Mr. Kapche's damages. They're  
7 faulting him for not keeping a diary. Okay? He's a law  
8 enforcement officer. How many male law enforcements do you know  
9 keep diaries? If he had kept a diary they would have said,  
10 "What is this guy doing except trying to put something before  
11 you that's not true, that he wrote after the fact?"

12 You heard from Jeff, and you heard from his wife. You  
13 heard, this thing is destroying their family. And just like the  
14 discipline that Jeff Kapche has brought to his diabetes care, he  
15 finally summoned inner strength to turn a corner and move on so  
16 that he could talk one day to you folks through us. That's not  
17 something that he should be faulted for. It's just another sign  
18 of what an amazing individual he is, an amazing individual that  
19 deserves to be judged on his own merits and not lumped together  
20 with everyone else. It's the beauty of our country, it's the  
21 beauty of what you do as jurors.

22 In fact, Thomas Jefferson once said, "If I had to pick  
23 between the right to jury service and the right to vote for  
24 people in this country, I would pick jury service because you're  
25 closer to making decisions that really matter."