

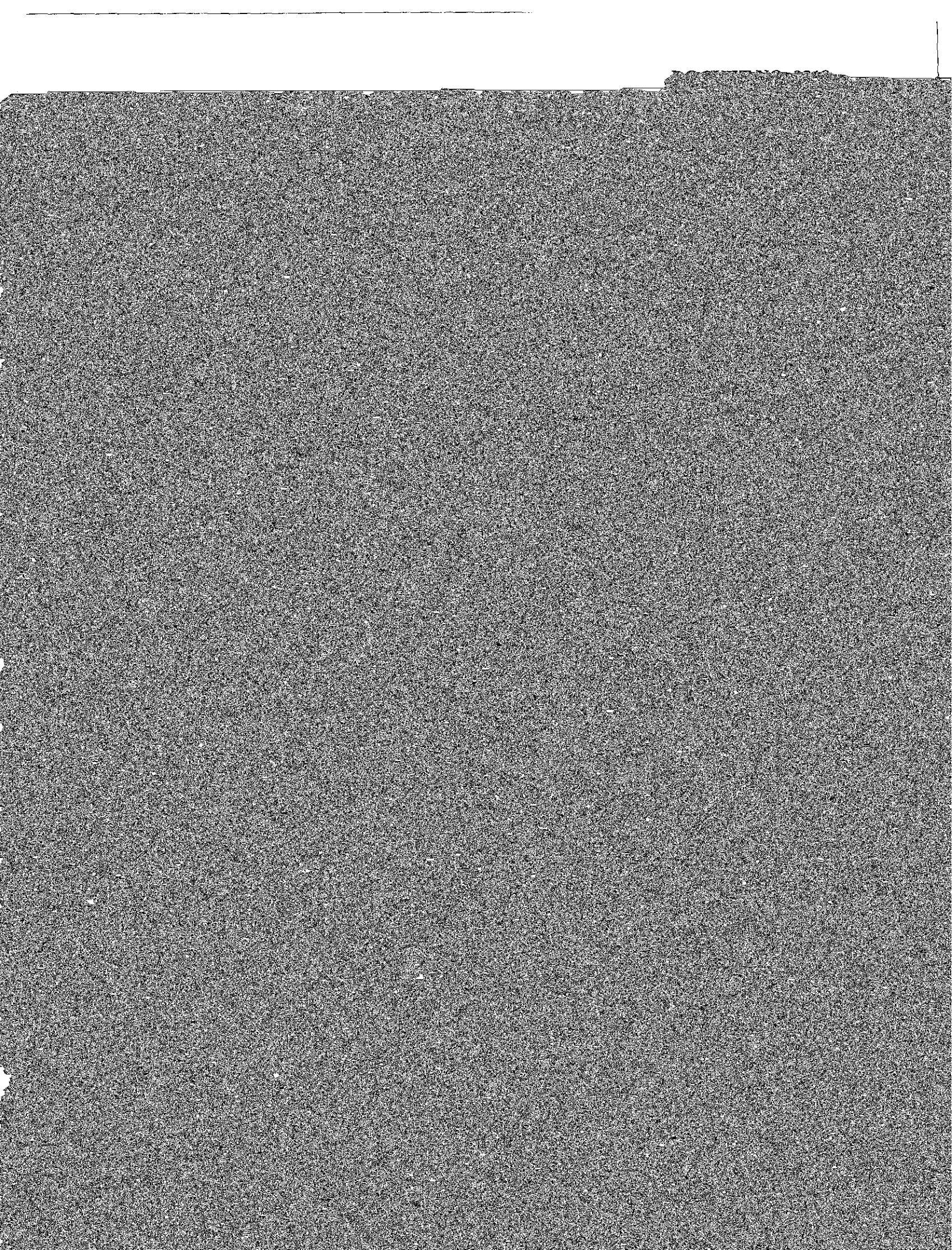


I. INTRODUCTION

Respondents have raised both Constitutional and non-Constitutional defenses to the law enforcement action the Federal Trade Commission ("FTC" or "Commission") initiated against them on June 15, 2004. On July 30, 2004, after the Administrative Law Judge ("ALJ") denied Respondents' motions challenging the Commission's pleading, Respondents answered the Administrative Complaint. Respondents' Answers contain several Additional Defenses predicated on the Commission's repeated violations of Respondents' fundamental rights that underlie this proceeding. Certain of the FTC's past and present actions violate Respondents' rights under the First and Fifth Amendments to the U.S. Constitution and constitute arbitrary and capricious action under the Administrative Procedure Act ("APA"). Respondents asserted these























commercial speech after advertisers have spoken on the Commission's long standing













The D.C. Circuit *rejected* the FDA's argument that health and safety claims lacking *sufficient* scientific evidence could be deemed "inherently misleading." *Pearson I*, 164 F.3d at

65 ("...drink this beverage is about six years"). Both products claim that consuming





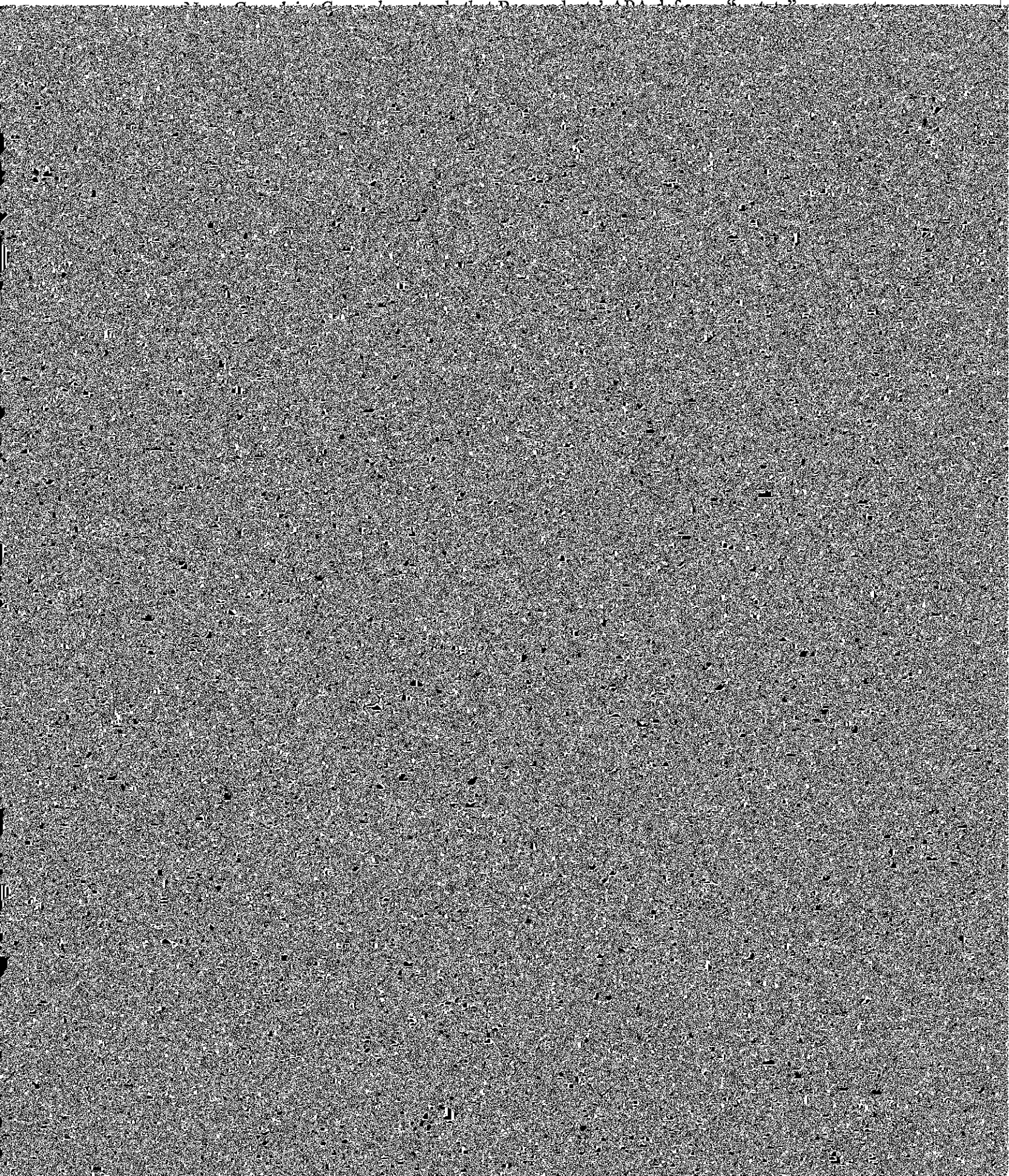
However, even if addressed, Complaint Counsel's arguments have no merit.

**1. The Commission's Regulatory Scheme Governing Respondents' Commercial Speech Constitutes Final Agency Action.**

*Complaint Counsel first argues that Respondents' APA defenses do not challenge final*



**2. Respondents' APA Defenses Are Adequately Pled.**



























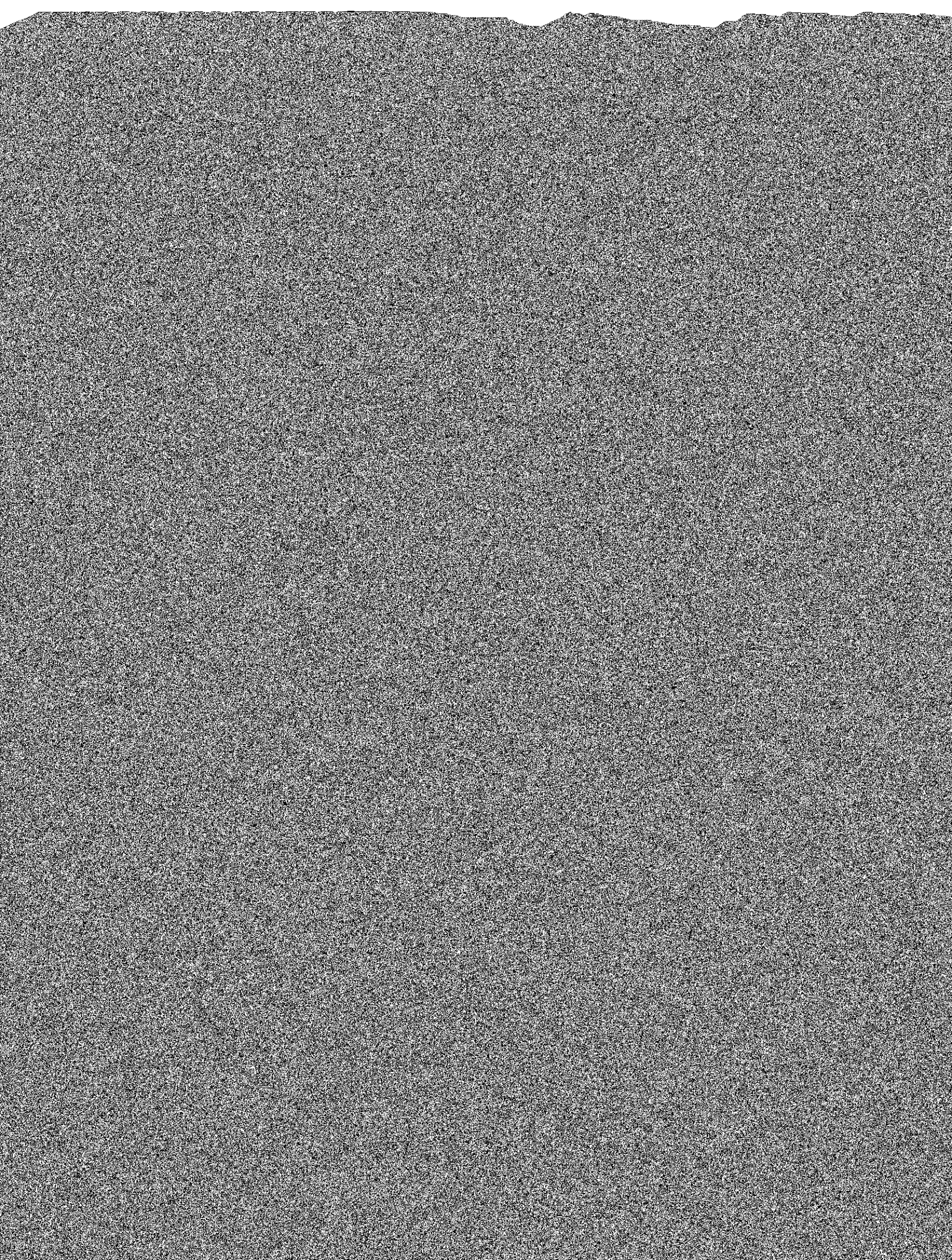


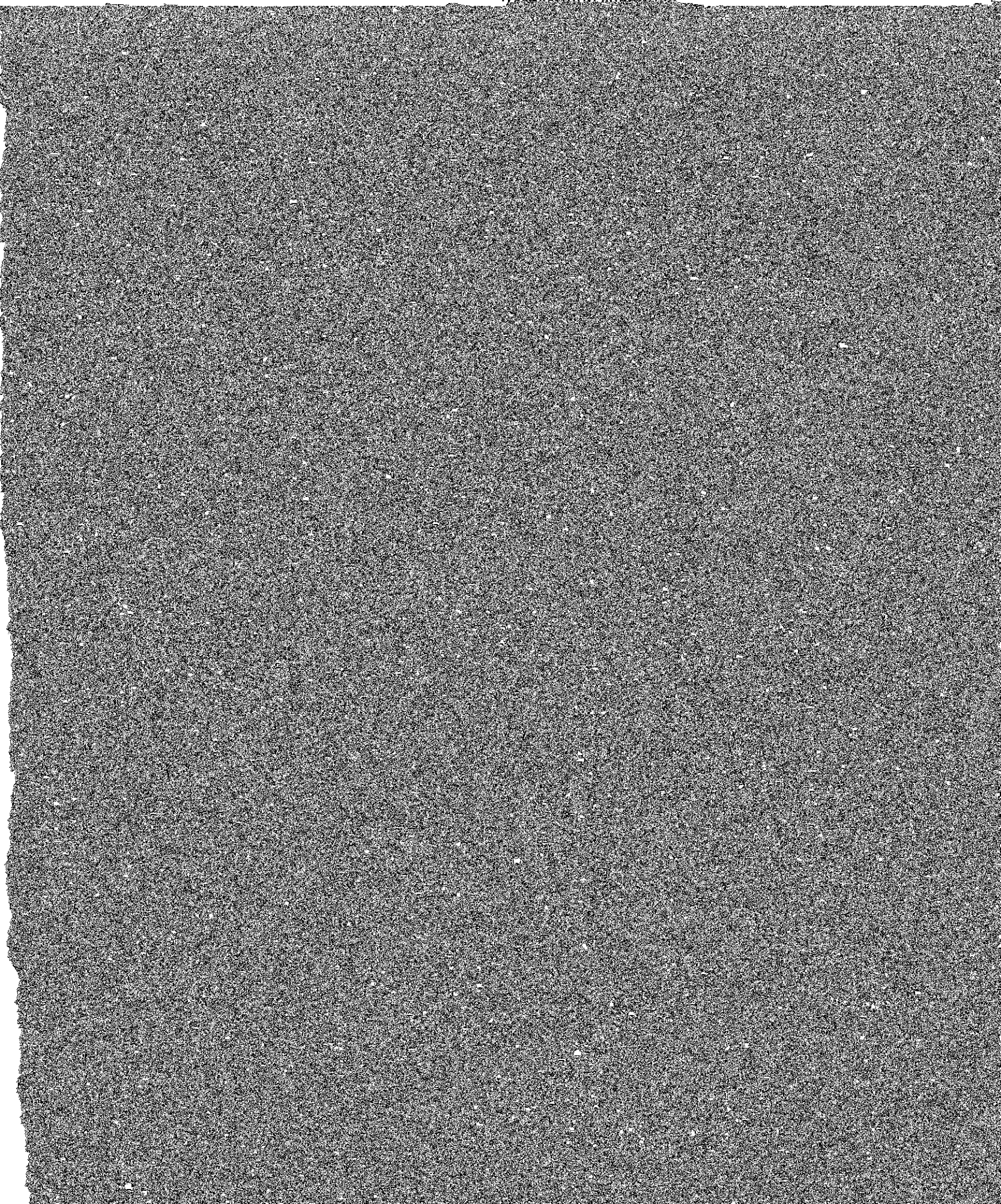


[whether equitable estoppel applies] open in the past and do so again today"). In *ATC Petroleum v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988), the D.C. Circuit held that "the fundamental principle of equitable estoppel applies to government agencies, as well as private parties." While the court noted in *Phillip Morris* that equitable estoppel would apply only in compelling circumstances, the very purpose of discovery is to allow a party to adduce evidence in support of



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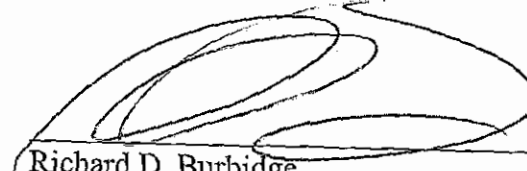






DATED this 9<sup>TH</sup> day of SEPTEMBER 2004.

BURBIDGE & MITCHELL

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above the printed name.

Richard D. Burbidge  
Attorneys for Respondent Dennis Gay





[The remainder of the page is obscured by a heavy, grainy black redaction.]

**CERTIFICATION FOR ELECTRONIC FILING**