No. 17-1184

IN THE
Supreme Court of the United States

MICHAEL J. BIESTEK,
Petitioner,

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

REPLY ON PETITION FOR CERTIORARI

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As three Courts of Appeals, and now also the First Circuit (with Justice Souter writing), *see Purdy v. Berryhill*, 887 F.3d 7, 15-16 (1st Cir. 2018), have explicitly recognized, there is a clear and entrenched conflict on the question presented: In the Seventh Circuit, a vocational expert's opinion cannot constitute substantial evidence of "other work" available to an applicant for social security benefits if the expert refuses to produce, upon demand, the data underlying their opinion. In the Second, Third, Sixth, and Ninth Circuits, the expert's testimony standing alone can constitute "substantial evidence." This case presents an unusually clean vehicle for the Court to resolve this important question that arises in hundreds of thousands of benefits determinations annually. Pet. 20-21.

The Government does not claim any vehicle issue precludes the Court resolving the question presented and, tellingly, devotes the majority of its brief to arguing that the decision below was correct. BIO 8-13. That argument is wrong, *see* Pet. 21-24; *infra* 9-12, and in any event is no reason to deny certiorari when a clear conflict exists. And, the Government's attempt to distinguish away the conflict fails: It concedes that in the Seventh Circuit a vocational expert must produce "the data and reasoning underlying [their] opinions . . . on demand," BIO 15 (quoting *McKinnie v. Barnhart*, 368 F.3d 907 (7th Cir. 2004) (per curiam)), and that here the Sixth Circuit affirmed the ALJ's decision notwithstanding that "petitioner's counsel asked the vocational expert to produce data supporting her professional opinions," and the expert refused, *id.* 6-7. Nonetheless, the Government notes in *McKinnie* the expert refused to produce the data due to a lack of monetary

compensation, whereas here the expert refused to produce the data out of a concern for confidentiality. *Id.* 15. But that is no distinction at all. The Seventh Circuit's legal rule applies *regardless* of the expert's basis for refusing to produce data upon demand. Indeed courts in the Seventh Circuit have reversed benefits determinations under *McKinnie* precisely because an ALJ permitted an expert not to produce data on the ground that the data was purportedly covered by client confidentiality, *exactly* the situation here. *See Ramzan v. Colvin*, No. 12 C 7362, 2015 WL 5921811, at *7 (N.D. Ill. Oct. 9, 2015). That the Government considers the "SSA guidance," a non-binding orientation handbook, worth discussing at all is surprising. As evidenced by the Government's own quotations, *id.* 17-18, the "guidance" does not even address, let alone resolve, the question presented.

The petition for a writ of certiorari should be granted.

I. THERE IS A CLEAR CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

The Government claims the Sixth Circuit made a "factbound determination" that the ALJ had adequately weighed the credibility of the witnesses in petitioner's proceeding. BIO 10. That characterization of the Sixth Circuit's decision is impossible to square with the decision itself. The vocational expert testified that in light of Mr. Biestek's disability, there would be a reduction in the "sorter and bench assembler jobs by about 20 to 30 percent." Pet. App. 117a. As the Sixth

Circuit recognized, "petitioner's counsel requested the vocational expert produce underlying data or analyses in support of her statements," the expert refused, and "the ALJ declined to require her to produce such information, even in a redacted format." *Id.* 20a, 111a. Petitioner thus "allege[d] reversible error because . . . such testimony falls short of 'substantial evidence.'" *Id.* 20a.

The Sixth Circuit acknowledged "the Seventh Circuit obliges vocational experts to provide the data and reasoning used in support of their conclusion upon request," and petitioner "would like us to establish a similar rule for the Sixth Circuit." *Id.* 21a. Recognizing "a divide . . . between the Seventh Circuit and several other circuits that have staked out a position," the Sixth Circuit joined the "courts of appeals [that] have followed the Second Circuit's lead," and rejected the Seventh Circuit's rule. *Id.* 20a-21a (citing *Brault v. Comm'r of Soc. Sec.*, 683 F.3d 4439, 449 (2d Cir. 2012); *Welsh v. Comm'r of Soc. Sec.*, 662 F. App'x 105, 109–10 (3d Cir. 2016); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005)).

The Sixth Circuit's holding is thus the opposite of a "factbound" determination—it is a ruling that as a matter of law a vocational expert's testimony can constitute substantial evidence of the "other work" available to an applicant for social security benefits, even when the expert refuses to produce upon demand the underlying data upon which that testimony is based. And, as the Sixth Circuit acknowledged, its holding squarely conflicts with the rule in the Seventh Circuit. Pet. App. 20a-21a.

The Government argues the Seventh Circuit cases upon which petitioner relies "involved meaningfully different circumstances." BIO 14. That is incorrect. In *McKinnie*, exactly like here, the vocational expert testified regarding "the number of jobs available" to an applicant in light of the applicant's disability. 368 F.3d at 909. Then, again like here, the applicant's lawyer asked the expert to "show us how you arrived at your figures." *Id.* But, once again like here, the ALJ refused to require the expert to "supplement the record with the data and references that she had relied upon," in that case because the applicant would not provide compensation. *Id.* Applying Judge Easterbrook's holding in *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002), that a vocational expert's must make their "underlying data and reasoning . . . available on demand," *McKinnie* held "[t]he data and reasoning underlying a vocational expert's opinions are not 'available on demand' if the claimant must pay for them," 368 F.3d at 911.

The sole "meaningfully different circumstance[]," BIO 14, the government points to is that in *McKinnie* the vocational expert's reason for refusing to provide the requested data was the applicant's refusal to pay the expert, whereas here the vocational expert claimed the data contained confidential client files. *Id.* 15-16. The Government does not even attempt to explain why this distinction is relevant. The reason a vocational expert refuses to produce underlying data is wholly irrelevant to the Seventh Circuit's legal rule that the expert's testimony cannot constitute substantial evidence if the data is not produced upon demand by the applicant.

Indeed, in *Ramzan*, a vocational expert refused to produce the data underlying her opinion of the reduced number of jobs available to an applicant in light of his disability. 2015 WL 5921811, at *7. Reversing the ALJ's denial of benefits, the district court observed "[w]hile such work product by a vocational expert may be confidential, the ALJ identified no applicable privilege, and the Court cannot discern one. The ALJ could have ordered their production to Plaintiff's counsel subject to a protective order." *Id.* A refusal to produce underlying documents based on claimed confidentiality is, of course, exactly the situation presented in petitioner's case, and *Ramzan* is only further proof that petitioner's case would have come out differently in the Seventh Circuit.[1]

The Government's other attempts to minimize the disagreement between the Circuits are equally unavailing. *First*, the Government notes that both the Seventh and Second Circuits agree on the unremarkable proposition that "evidence cannot be substantial if it is 'conjured out of whole cloth.'" BIO 16 (quoting *Brault*, 683 F.3d at 450; *Donahue*, 279 F.3d at 446). But courts' agreement that an expert cannot simply make up facts from thin air hardly demonstrates agreement on whether an expert's testimony alone can constitute substantial evidence of other work when the expert refuses to provide the data underlying their opinions. Likewise, that the Second, and Ninth Circuits have held there may be some situations where credibility or

[1] Precisely because petitioner did not have the data upon which the expert formed her opinions, it is irrelevant that he (like the plaintiff in *Donahue*) was able to cross-examine the expert. *See* BIO 15 (quoting *Donahue*, 279 F.3d at 447).

reliability issues are "too striking to be ignored" speaks not at all to the question presented. *Id.* 16 (quoting *Buck v. Berryhill*, 869 F.3d 1040, 1051 (9th Cir. 2017)).

Second, the Government concedes that "several courts of appeals have understood the Seventh Circuit to have adopted a diverging approach," but claims—without any analysis of the underlying decisions—that "petitioner has not shown that these abstract expressions of disagreement have yielded meaningfully different results." *Id.* 17. Petitioner explained at length how his case would have come out differently had it arisen in the Seventh Circuit, and how it would have come out the same in the Second and Ninth Circuits. *See* Pet. 12-19. There is nothing "abstract" about the fundamentally different legal rules these circuits apply.

Third, the Government's cursory suggestion that the Seventh Circuit might "reevaluate its approach" is probably false. *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008), which the Government quotes, "refus[ed] to endorse a system that drags out every Social Security hearing to an interminable length." *Britton* then *reaffirmed*—three years after the Ninth Circuit's contrary decision in *Bayliss*—the *McKinnie* rule that "data underlying a [vocational expert's] testimony must be available on demand to facilitate cross-examination and testing of the [vocational expert's] reliability," and suggested ways to manage the disclosure obligation efficiently. *Id.* Moreover, the *McKinnie* rule is followed every day in benefits proceedings within the Seventh Circuit, and district courts reverse benefits

determinations in the rare instances in which an ALJ erroneously allows an expert to refuse disclosure.[2]

II. THE NON-BINDING SSA VOCATIONAL EXPERT HANDBOOK HAS NO RELEVANCE TO THE QUESTION PRESENTED.

The Government suggests that "in light of recent updates to SSA guidance, any disagreement [on the question presented] *may* be of little prospective importance." BIO 8 (emphasis added). Even that equivocal invocation of the guidance dramatically overstates its importance—it is entirely irrelevant to the issues here.

The "SSA guidance" is an update to an existing, purely advisory, handbook provided to new vocational experts which, by its own description, "provides the basic information you will need when you participate in administrative law judge . . . hearings." *See* SSA, *Vocational Expert Handbook* at i (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (*Handbook*). The *Handbook*—directed as it is to vocational experts—contains no guidance at all for ALJs, let alone a requirement that ALJs cannot accept an expert's testimony as "substantial evidence" when the expert refuses to disclose upon demand the data underlying

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[2] *See, e.g.*, *Morrow v. Berryhill*, No. 16 C 8430, 2017 WL 4164171, at *2 (N.D. Ill. Sept. 20, 2017) ("[T]he ALJ erred by refusing plaintiff's request for production of the VE's surveys."); *Ramzan*, 2015 WL 5921811, at *7.

their opinions. In short, the *Handbook* has no relevance to the question presented.

Even as regards vocational experts, the *Handbook* does not address the question of the disclosures an expert must make to applicants. For one, the *Handbook* is an entirely non-binding collection of advice and guidelines, and the Government does not suggest to the contrary.[3] Thus, given that the issue here only arises when experts refuse to turn over voluntarily the data underlying their opinions, non-mandatory guidance achieves nothing. But, even if the guidance here were mandatory, the *Handbook* says *nothing* about an expert's disclosure obligations. The *Handbook* advises that experts: "should be prepared to provide a complete explanation for [their] answers to hypothetical questions;" "should have available . . . any vocational resources materials [on which they] are likely to rely;" and "should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." BIO 18 (quoting *Handbook* at 37) (alterations in original). The Government's quotations are notable for what they *do not* say: that experts must produce upon demand the data underlying their opinions to applicants. Thus, because it does not address the issue upon which courts are divided, the *Handbook* simply

[3] Courts agree the Handbook "does not set out a list of requirements," and applicants *cannot* challenge an ALJ's reliance on vocational expert testimony merely because the expert failed to meet the Handbook's criteria. *Black v. Berryhill*, No. 2:17 CV 00153, 2018 WL 1472525, at *24 (D. Utah. Mar. 7, 2018).

does not render "any disagreement among the courts of appeals . . . of limited prospective importance." *Id.* 18.

The Government's claim that "[a]t a minimum" the *Handbook* demonstrates social security benefits applicants are already able "to challenge the reliability of vocational expert testimony" is of no moment. *Id.* While various means exist through which an applicant can challenge a testifying expert, that does not ameliorate the problem that arises when an expert propounds opinions about the number of jobs available after accounting for an applicant's disability, but then refuses to produce the data underlying that opinion so the applicant can challenge the expert's methodology and conclusions. The fact that an applicant may have other means of challenging an expert's reliability does not address the applicant's ability to hold the Government to its burden on this critical point.

III. THE SIXTH CIRCUIT'S DECISION IS INCORRECT.

The Government devotes the majority of its brief to arguing that the Sixth Circuit's decision was correct. BIO 8-13. Even if the Government were correct on the merits, that is not a reason to deny certiorari. But, in any event the Government is incorrect.

In satisfying its burden to demonstrate "other work" available to an applicant, the Government frequently relies upon the testimony of vocational experts. As the Seventh Circuit recognized, "[p]resumably a vocational expert establishes the foundation for her opinions before she expresses them at a hearing." *McKinnie*, 368 F.3d

at 911. Thus, as was the case here, if a vocational expert opines that 6,000 "bench assembler" jobs exist in Southeast Michigan, and the number of available jobs should be reduced by 20 to 30 percent based on petitioner's disability, she presumably has a statistical source for that information or else she would have no basis for furnishing the opinion. Yet, despite the fact that the data exists, the Government nonetheless claims an expert's testimony alone can constitute "substantial evidence" of the jobs available to an applicant, even when the expert refuses to produce the data upon demand. The Government's arguments in support of its position are not persuasive.

First, the Government argues "[a]n ALJ . . . need not determine that a vocational expert has satisfied the requirements for expert testimony under Federal Rule of Evidence 702, or any other evidentiary rules applicable in court, before her testimony may be admitted and relied upon at a disability benefits hearing." BIO 8. This argument is a strawman. Petitioner has never argued that the Federal Rules of Evidence apply in social security proceedings, or that a vocational expert's obligation to disclose their underlying data arises from the Rules. To the contrary, as Judge Easterbrook correctly underscored in *Donahue*, "the idea that experts should use reliable methods *does not depend on Rule 702 alone*, and it plays a role in the administrative process because every decision must be supported by substantial evidence." 279 F.3d at 446 (emphasis added). Likewise, Petitioner has no quarrel with the general proposition that ALJs may "consider a broader range of potentially relevant

information than would be admissible in an ordinary court of law." BIO 10. But that high-level description of the admissibility rules in social security hearings is unresponsive to petitioner's, and the Seventh Circuit's, point that an expert cannot provide "substantial evidence" by refusing to produce their underlying data and relying on say-so alone.

Second, the Government notes that an applicant is permitted "to question a vocational expert . . . regarding the basis for the expert's testimony and to present arguments concerning the reliability of that testimony." *Id.* 9. Similarly, the Government notes that an applicant can "raise objections to the reliability of the vocational expert's testimony." *Id.* 10. But these procedural safeguards are effectively meaningless if an applicant is denied access to the data underlying an expert's opinion that would allow the applicant to delve into the expert's methodology and expose (through objections or cross-examination) inconsistencies or flaws in the data and opinions. It is no answer, moreover, for the Government to claim that petitioner "did not submit any evidence that contradicted [the expert's] estimates." *Id.* 13. It was the *Government's* burden to demonstrate the number of jobs available to petitioner and thus petitioner need not have introduced any evidence at all. And, before both the ALJ and the Court of Appeals, petitioner argued that the Government could not sustain its burden by relying on the expert's testimony alone when the expert refused to produce her underlying data.

Third, the Government argues that petitioner has identified no "statute, regulation, or decision of this Court" that requires the Seventh Circuit's rule. *Id.* 11.

But, the Social Security Act requires an ALJ's decision be supported by "substantial evidence," 42 U.S.C. § 405(g), and this standard "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The Government claims the ALJ could satisfy this standard by relying on the expert's "11 years of professional experience as a vocational rehabilitation consultant," BIO 8, yet it never even attempts to explain how 11 or even 111 years of experience would allow an expert to opine on the percentage by which the number of bench assembler jobs available in Southeast Michigan from 2009-2013 should be reduced due to a particular disability. *See Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004) ("For [the vocational expert] to offer the number 24,500 with no indication of how he adjusted the numbers in the dictionary to reflect Barrett's diminished capacity leaves us in the dark about the actual basis of his testimony" (Posner, J.)). That opinion could only be based on a statistical data source, and absent production of the source the ALJ could not rely upon the expert's testimony.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] Sensibly, the Government does not contest that federal courts have myriad ways of ensuring the confidentiality of material produced to opposing parties.

Respectfully submitted,

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