No. 17-1184

In the Supreme Court of the United States

MICHAEL J. BIESTEK, PETITIONER

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER, SOCIAL SECURITY ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF DISABILITY REPRESENTATIVES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Page

Cases—continued:

Statute, regulations, and rule:

Miscellaneous:

Page

Miscellaneous—continued:

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INTEREST OF *AMICUS CURIAE*

The National Association of Disability Representatives (NADR) is a nonprofit voluntary membership organization dedicated to advancing the fair and efficient administration of the Nation's disability insurance system.[1] NADR was founded in 2000, and its membership has since

[1] No counsel for a party authored this brief in whole or in part, and no counsel or entity other than *amicus curiae* or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Petitioner's consent to the filing of *amicus* briefs is filed with the Clerk. *Amicus* received Respondent's consent to file this brief by letter and has filed that letter with the Clerk.

grown to more than 600 attorney and non-attorney members across all 50 states. Roughly one-third of NADR's members are former employees of the Social Security Administration (SSA), including administrative law judges (ALJs). Twenty percent of NADR's members are former vocational experts. Collectively, NADR's members act as representatives of Social Security disability claimants in over 100,000 cases each year, both at the agency level and on judicial review. Accordingly, NADR has a substantial interest in safeguarding "the orderly and sympathetic administration" of the Nation's disability insurance system. *Heckler* v. *Day*, 467 U.S. 104, 106 (1984).

SUMMARY OF ARGUMENT

The opportunity to cross-examine a vocational expert (VE) to obtain "a full and true disclosure of the facts" is essential to the "integrity and fundamental fairness" of a disability hearing. *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971). The question presented goes to the heart of a claimant's ability to carry out that critical function: Must the VE disclose the underlying data supporting her conclusions about the claimant's ability to find "other work"? *See* 20 C.F.R. § 404.1520(a)(4)(v).

Amicus agrees with Petitioner that the answer to that question is "yes" *in cases like this one*, where the VE relies on *private* data. In these circumstances, basic principles of procedural fairness require that the claimant have access to the data so he can explore the basis for the VE's opinions. The Sixth Circuit's contrary decision accordingly should be reversed. But because this case is readily resolved on that narrow ground, which applies in a small minority of cases in the Social Security system, the Court need go no further. Given the uncommon facts of this case and the variety of other situations in which a claimant may

plausibly seek data from a VE, *amicus* believes the contours of any disclosure requirement in other circumstances (*e.g.*, those involving VE testimony based on publicly-available data) are better developed in subsequent cases featuring those facts.

A. For more than 50 years, courts have insisted that, when opposing a request for disability benefits, SSA introduce concrete evidence that the claimant can find other work. In response to this repeated judicial prodding, SSA turned to VEs to testify on two key points: (1) the occupations available to the claimant given his limitations and the vocational factors of age, education, and prior work experience and (2) the number of jobs for such occupations that are available in the national economy.

B. This case involves an uncommon fact pattern implicating only the second point. In cases where, as here, a VE cites private data as the foundation for her opinion, a substantial problem arises. Because such data is kept from the claimant and the ALJ, neither has any practical means to ensure the reliability of the VE's testimony. Put another way, neither the ALJ nor the claimant can tell "if vital testimony has been conjured out of whole cloth." *Donahue* v. *Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002).

Petitioner's case illustrates the problem. The VE here testified that she relied on both government data and "[her] own individual labor market surveys" in reaching conclusions about the incidence of jobs Petitioner allegedly could seek. Pet. App. 119a. After the ALJ failed to inquire into the data in those surveys, Petitioner's counsel asked the VE to share the surveys, with redactions as necessary, on cross-examination. *Ibid.* The VE declined, and the ALJ refused to require disclosure of what the VE described as "private confidential files." *Id.* at 118a. Accordingly, neither the ALJ nor Petitioner had the means to

discern whether the private surveys that the VE cited actually supported her testimony that 240,000 bench assembler jobs and 120,000 sorter jobs exist nationally. *Id.* at 111a. The ALJ nevertheless concluded that Petitioner "was capable of making a successful adjustment to other work that existed in significant numbers in the national economy," and, on that potentially unsupported evidentiary basis, denied him essential benefits. *Id.* at 112a; *see also* 20 C.F.R. § 404.1520(a)(4)(v).

The Sixth Circuit's approach in this case incorrectly and unfairly permits a matter of utmost importance to be decided based on flimsy findings grounded in secret data. That approach ignores what essentially every other court of appeals to have considered the issue has agreed upon: The evidence relied upon by an ALJ cannot be "substantial" for purposes of judicial review if it has been "conjured out of whole cloth." *Donahue*, 279 F.3d at 446. By depriving the claimant of access to critical data that is potentially outcome-determinative—and the more basic opportunity to determine whether such data even exists—the decision below insulates a class of VE testimony from any meaningful scrutiny, and so invites increased reliance on undisclosed, private data. This Court should reject that flawed approach and hold that an ALJ must provide access to a VE's private data upon the claimant's request.

But it is unnecessary to go further in deciding this case because the situation described above is the exception, not the rule. In most cases, VEs ground their conclusion as to the number of jobs available to a claimant on government data or two commercially-available compilations of such data. In those circumstances, the ALJ is familiar with these resources and the claimant, at least when represented, can access and examine them. Those (more common) cases are different from this case in multiple

ways. The necessity and scope of any disclosure obligation in those cases is therefore better addressed in one of those cases.

ARGUMENT

UPON A CLAIMANT'S REQUEST, AN ALJ SHOULD ORDER DISCLOSURE OF PRIVATE DATA RELIED ON BY A VOCATIONAL EXPERT.

A. SSA's Reliance On Testimony From Vocational Experts Is A Response To Judicial Insistence That The Agency Rely On Concrete Vocational Evidence.

1. The introduction of VE testimony as an important element in the evaluation of disability claims can be traced to Judge Friendly's opinion in *Kerner* v. *Flemming*, 283 F.2d 916 (2d Cir. 1960). The claimant in *Kerner* had suffered a heart attack and lived with diabetes, but SSA denied disability benefits because he had not shown a "complete inability" to do other work. *Id.* at 918. Interpreting broad statutory language that defined disability (and thus eligibility for SSA benefits) as the inability to engage in "any substantial gainful activity," Judge Friendly concluded that the relevant questions under the statute were "what can applicant do, and what employment opportunities are there for a man who can do only what applicant can do?" *Id.* at 921.

Mere speculation about job opportunities available to the claimant, Judge Friendly held, would not justify denying benefits. In his view, a "[m]ere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available." *Ibid.* In *Kerner*, the agency had offered "nothing save speculation to warrant a finding that an applicant thus handicapped could in fact obtain substantial gainful employment."

Ibid. The court accordingly remanded the case so that the agency could "furnish information as to the employment opportunities . . . , or the lack of them, for persons of plaintiff's skills and limitations." *Id.* at 922.

Beyond rejecting "speculation" as evidence, *Kerner* observed that SSA—not the claimant—was obligated to bring forward concrete evidence concerning the claimant's future employment opportunities. *Id.* at 921. *Kerner* thus represented an early recognition of the now well-accepted principle that Social Security Act proceedings are not adversarial, but reflect "the 'investigatory model.'" Bernard Schwartz, *Administrative Law* 470 (4th ed. 1999) (quoting Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1290 (1975)). Under this non-adversarial approach, "[i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims* v. *Apfel*, 530 U.S. 103, 111 (2000) (plurality op.); *see also* 20 C.F.R. § 404.900(b) ("In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner."). ALJs thus wear "three hats": They represent the claimant, they represent the government, and then they must make an independent decision. Schwartz, *Administrative Law* at 471 (quoting *Rausch* v. *Gardner*, 267 F. Supp. 4, 6 (E.D. Wis. 1967)).[2]

2. SSA initially, and unsuccessfully, responded to the so-called "*Kerner* criteria" by citing government and industrial studies in disability hearings. 1 David F. Traver, *Social Security Disability Advocate's Handbook* § 1302

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[2] In time, the burden of production with respect to the claimant's job opportunities, at what is now step five of the SSA's sequential evaluation process, was formally shifted to the agency. *See* 20 C.F.R. § 404.1512(b)(3).

(2009). But these attempts floundered as "speculative and theoretical" because they insufficiently accounted for "the claimant's particular and highly individual situation." Social Security Administration, *History of SSA During the Johnson Administration 1963-1968* <tinyurl.com/SSA-history>. In 1962, SSA introduced the VE program and entered into contracts with 600 VEs to provide testimony in its hearings. *Ibid.* Given the "'non-adversary' procedure" of disability hearings, VEs were "expected to remain completely objective and impartial" with the sole goal of "dispassionately contribut[ing] [their] vocational evidence toward an equitable decision." *Ibid.*

By the mid-1960s, SSA "was relying heavily upon the use of vocational experts in adjudicated hearings to supply the proof required to meet its new evidentiary burden in labor market work adjustment cases." Jon C. Dubin, *Overcoming Gridlock:* Campbell *After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 Admin. L. Rev. 937, 949 (2010) (hereinafter, "Dubin, *Overcoming Gridlock*"). Not long thereafter, courts noted that "the testimony of a vocational counselor [had become] essential" in disability adjudications, *Garrett* v. *Richardson*, 471 F.2d 598, 604 (8th Cir. 1972), and that SSA "invite[d] reversal" if it proceeded without such testimony or other similar evidence, *Taylor* v. *Weinberger*, 512 F.2d 664, 669 (4th Cir. 1975).

3. Notwithstanding the VE program's origins as a response to judicial criticism about the insufficiency of agency evidence, courts have begun to question the reliability, credibility, and arbitrariness of VE testimony. Indeed, doubts about "the reliability of a vocational expert's job numbers, or the evidentiary basis for those numbers"

have become "familiar and recurring" in the courts of appeals. *Shaibi* v. *Berryhill*, 883 F.3d 1102, 1108 (9th Cir. 2017) (collecting cases).

Among the critics, the Seventh Circuit, and then-Judge Posner in particular, have been especially outspoken. *See, e.g.*, *Browning* v. *Colvin*, 766 F.3d 702, 709 (7th Cir. 2014) (courts "have no idea [about] the source or accuracy" of VE job incidence data) (Posner, J.); *Herrmann* v. *Colvin*, 772 F.3d 1110, 1114 (7th Cir. 2014) (Posner, J.) (faulting ALJ's reliance on an "arbitrary estimate" by VE); *Alaura* v. *Colvin*, 797 F.3d 503, 508 (7th Cir. 2015) (Posner, J.) (expressing concern about "preposterous" methodology leading to numbers that "seem[ ] likely, therefore, to be a fabrication"); *Forsythe* v. *Colvin*, 813 F.3d 677, 681 (7th Cir. 2016) (Posner, J.) ("It is high time that the Social Security Administration turned its attention to obtaining the needed data."); *see also* Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* 136–37 (2016) ("I am embarrassed to confess that I had never questioned the accuracy of the statistics offered by the vocational expert," as "I discovered to my surprise that there is no reliable source of [job incidence] statistics.").

B. Vocational Experts' Use Of Secret Job Incidence Data Undermines The Fairness And Integrity Of Disability Hearings.

A VE's reliance on private data that was withheld from the ALJ and Petitioner may be uncommon, but it is a substantial problem nonetheless. By refusing to require the disclosure of the VE's evidence, the ALJ deprived both herself and Petitioner of a meaningful opportunity to assess the reliability and credibility of the VE's testimony.

A finding grounded in such untested evidence is not supported by "substantial evidence." 42 U.S.C. § 405(g). But VE testimony more commonly is based on government and otherwise accessible data. This case does not involve such testimony, and so it is not a suitable vehicle for determining the necessity and scope of any disclosure obligation in those circumstances.

1. When VEs identify occupations in response to questions from the ALJ or claimant, they frequently refer to the *Dictionary of Occupational Titles* (DOT). Yet the DOT "describes only job duties and requirements, without also reporting an estimate of how many of those positions exist in the national economy." *Chavez* v. *Berryhill*, 895 F.3d 962, 965 (7th Cir. 2018). That means VEs must look to another resource for job incidence data. And the "basic problem" presented in all cases is that while the DOT focuses on "narrow categories of jobs," government job incidence data is published in "broad categories" that do not contain the necessary granularity. *Forsythe*, 813 F.3d at 681. Each of the resources VEs may draw on to solve this data-matching problem pose different challenges for the ALJ and the claimant in attempting to meaningfully test the reliability of the VE's conclusions.

2. Among the various resources that VEs may draw upon for job incidence data, reliance on undisclosed private data raises the most fundamental concerns about procedural fairness. As Petitioner explains (Br. 46–47), reliance on "private labor market surveys" without disclosure to the ALJ and claimant effectively denies them any opportunity to verify the VE's testimony. Even if the ALJ or claimant is able to question the VE about her methodology and perhaps elicit high-level information about the data itself, neither can obtain a "full and true disclosure of the facts." *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971).

Without access to the data, there is no way to determine whether it supports the VE's conclusion or even exists.

As the petition for certiorari explained (Pet. 12–19), the courts of appeals have been unable to agree on a universal rule that encompasses the variety of situations in which a disability claimant may seek the underlying data allegedly supporting a VE's testimony. But whatever dissonance there may be among the courts of appeals, *see Brault* v. *Soc. Sec. Admin.*, 683 F.3d 443, 449 (2d Cir. 2012), there is consensus on one basic point that permits an easy resolution of this case: Testimony that is "conjured out of whole cloth" cannot amount to substantial evidence for purposes of judicial review. *See Donahue*, 279 F.3d at 446; *see also* Pet. App. 22a ("[I]t is undoubtedly true that vocational expert testimony that is 'conjured out of whole cloth' cannot be considered substantial evidence." (quoting *Donahue*)); *Brault*, 683 F.3d at 450 ("We do *not* hold that an ALJ *never* need question reliability, and we agree with the Seventh Circuit that evidence cannot be substantial if it is 'conjured out of whole cloth.'" (quoting *Donahue*)). Or, as Justice Souter recently put it for the First Circuit, a court should not go to the "extreme" of approving reliance on VE testimony where the VE can do nothing more than identify the resource that she relied upon. *Purdy* v. *Berryhill*, 887 F.3d 7, 16 (1st Cir. 2018).

There is nothing in the record in this case to rule out the possibility that the VE's testimony about her labor market surveys was "conjured out of whole cloth." *Donahue*, 279 F.3d at 446. After the ALJ refused to require disclosure of the data, neither she nor Petitioner could determine whether the surveys that the VE invoked supported her testimony. The VE's labor market surveys *may* be "evidence having rational probative force," *Perales*, 402 U.S. at 407, but it is impossible to know with any

"modicum of confidence," *Chavez*, 895 F.3d at 969.

The ALJ's conclusion that the VE was a credible witness does not solve the problem. *See* Pet. App. 22a. Credibility is not the same as reliability. *See* Pet. Br. 49–51. Whether the VE subjectively believed her own testimony (credibility) does not bear on whether the data actually supported her belief (reliability). As to reliability, it is not necessary that the VE be "consciously lying"—it is enough that the VE, "due to faulty information or observation, ha[d] been mistaken." Charles T. McCormick, *The Borderland of Hearsay*, 39 Yale L.J. 489, 490 (1930). And without disclosure of the VE's data, the ALJ and claimant are unable to discern whether a mistake was made. "Trust without verifying" is not a way to run a system that provides essential benefits to millions of Americans.[3]

Requiring disclosure of only private data avoids that substantial problem without implicating any of the broader complications of drawing on Rule 702 and *Daubert* in attempting to craft a broader disclosure obligation.

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[3] *Amicus* disagrees with the Seventh Circuit's conclusion that a claimant forfeits the ability to challenge the ALJ's reliance on unreliable VE testimony if the issue is not raised at the ALJ hearing. *See Donahue*, 279 F.3d at 446. In the context of SSA's Appeals Council, a plurality of this Court observed that "the adversarial development of issues by parties . . . simply does not exist" because "[t]he Council, not the claimant, has primary responsibility for identifying and developing the issues." *Sims* v. *Apfel*, 530 U.S. 103, 112 (2000). Likewise, "[i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* at 111 (citing *Perales*, 402 U.S. at 400–01). Thus, just as a claimant does not on judicial review waive issues that were not raised before the Council, *id.* at 105, the same should hold true for issues not raised before the ALJ. *See id.* at 107 (reserving ruling on that question). The Court need not address the issue here, however, because Petitioner raised the issue before the ALJ and there is no suggestion of forfeiture.

The Sixth Circuit's contrary decision should therefore be reversed on that narrow ground.

3. Although Petitioner was entitled to disclosure of the VE's private data, other resources relied upon by VEs may implicate different considerations that should be addressed, if at all, in a case that actually involves those issues. *See Brault*, 683 F.3d at 449.

a. In the majority of cases, VEs have relied, at least in part, on third-party commercial compilations of government data. One such resource, *Occupational Employment Quarterly* (OEQ), compiles data from the Bureau of Labor Statistics (BLS) and the Census Bureau to provide "estimates" that are "intended to be used in conjunction with local labor market expertise and research." *See* U.S. Publishing, *Data Source References* <tinyurl.com/USPubOEQ>. VEs routinely rely on the OEQ. *See, e.g.*, *Anders* v. *Berryhill*, 688 F. App'x 514, 522 (10th Cir. 2017); *Herrmann*, 772 F.3d at 1113; *Guiton* v. *Colvin*, 546 F. App'x 137, 141 (4th Cir. 2013); *Liskowitz* v. *Astrue*, 559 F.3d 736, 744 (7th Cir. 2009).

Likewise, in recent years, "Job Browser Pro," a software program, has also gained substantial popularity. VEs often invoke it. *See, e.g.*, *Purdy*, 887 F.3d at 14 (noting Job Browser Pro software has been recognized "to be widely relied upon by vocational experts"). And claimants do too, to rebut contrary VE testimony. *See, e.g.*, *Buck* v. *Berryhill*, 869 F.3d 1040, 1047 (9th Cir. 2017); *Anders* v. *Berryhill*, 688 F. App'x 514, 523 (10th Cir. 2017). Like the OEQ, Job Browser Pro compiles data from BLS and the Census Bureau to create "estimates" of jobs "at the DOT-level," using a methodology disclosed on its website. *See* SkillTRAN, *Job Numbers* <tinyurl.com/SkillTranJBP>.

In the experience of *amicus*'s members, these resources have proved popular among VEs for several reasons. First, these resources translate complicated information into a digestible form—VEs rarely if ever have training in statistics, let alone the high-level facility in statistical analysis needed to distill BLS and census data. *See generally* Dubin, *Overcoming Gridlock* at 968. Second, because these resources are publicly available and are now familiar to ALJs and claimants' representatives, their advantages and shortcomings are well-known, which helps minimize the appearance of unfairness. *See, e.g.*, *Herrmann*, 772 F.3d at 1114 (criticizing OEQ's equal distribution methodology as "arbitrary").

b. The lower courts are in the process of working out the standards that should apply when these resources are used. Some courts have held that it is unnecessary to turn over the underlying data for such commercial compilations where the resource at issue is generally accepted and the VE is able to explain the basics of the resource's methodology. *See, e.g.*, *Purdy*, 887 F.3d at 16–17; *Lesner* v. *Colvin*, No. 12-CV-7201, 2015 WL 5081267, at *8 (N.D. Ill. Aug. 24, 2015) (noting that SkillTRAN is "publicly available labor market software" and thus not "untestable"). Even in these circumstances, the Seventh Circuit has concluded that it is not onerous for VEs to make available the handful of pages of data that they are relying on. *See, e.g.*, *Britton* v. *Astrue*, 521 F.3d 799, 804 (7th Cir. 2008) (concluding that offer to provide "copies of the pages [from the OEQ] on which the VE relied" was sufficient to enable meaningful testing of VE's testimony).

Other courts have determined that it is unnecessary to require disclosure of underlying data where a VE "use[s] proper governmental data and clearly explain[s] her reasoning." *See, e.g.*, *Ronning* v. *Colvin*, No. 13-CV-8194,

2015 WL 1912157, at *9 (N.D. Ill. Apr. 27, 2015). In such cases, a citation to a government publication can be sufficient to permit the claimant, ALJ, or reviewing court to uncover errors in a VE's testimony, even if the underlying data is not actually provided at the hearing. *See, e.g.*, *Farias* v. *Colvin*, 519 F. App'x 439, 440 (9th Cir. 2013) (concluding that VE cited incorrect numbers from BLS data).

The Court need not take a side in this broader debate about "what it means for a VE's step five testimony to be reliable," and doing so would be premature. *Chavez*, 895 F.3d at 968. The substantial evidence standard is "extremely flexible" and "gives federal courts the freedom to take a case-specific, comprehensive view of the administrative proceedings." *Brault*, 683 F.3d at 449. The lower courts are working out how that broad standard should apply to forms of evidence that do not implicate the same fundamental concerns as private, undisclosed data. Questions about the necessity and scope of disclosure in those cases therefore should not be resolved by the Court at this early juncture.

* * * * *

To resolve this case, it is enough to hold that an ALJ must provide access to a VE's private data upon the claimant's request. Where the ALJ fails to do so and makes a finding based on secret materials, the ALJ's decision should be set aside for want of substantial evidence. Holding otherwise, as the Sixth Circuit did, would undermine the fairness and integrity of the Social Security system.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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