

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL J. BIESTEK, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 17-1184  
 )  
 NANCY A. BERRYHILL, ACTING )  
 )  
 COMMISSIONER OF SOCIAL SECURITY, )  
 )  
 Respondent. )  
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Pages: 1 through 70

Place: Washington, D.C.

Date: December 4, 2018

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COMMISSIONER OF SOCIAL SECURITY, )  
Respondent. )  
- - - - -

Washington, D.C.

Tuesday, December 4, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

ISHAN BHABHA, ESQ., Washington, D.C.; on behalf of the Petitioner.

ANTHONY A. YANG, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 17-1184,  
5 Biestek versus Berryhill.

6 Mr. Bhabha.

7 ORAL ARGUMENT OF ISHAN BHABHA

8 ON BEHALF OF THE PETITIONER

9 MR. BHABHA: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 When a vocational expert testifies  
12 about the existence of a specific number of  
13 jobs in a specific location at a specific time,  
14 that testimony can only be based on statistical  
15 data-driven sources.

16 And when the expert refuses upon  
17 request to provide those sources, the expert's  
18 testimony, standing alone, cannot constitute  
19 substantial evidence for three reasons.

20 First, this Court's definition of the  
21 term "substantial evidence" and its application  
22 of that term in reviewing the decisions of  
23 administrative tribunals. Second, because the  
24 government's arguments as to why the expert's  
25 testimony standing alone is sufficient are

1 unpersuasive. And, third, because this is the  
2 rule that has worked since 2002 in the Seventh  
3 Circuit and, indeed, is consistent with the  
4 government's own policy as encapsulated in the  
5 Social Security Administration's Vocational  
6 Expert Handbook.

7 JUSTICE GINSBURG: The counsel for the  
8 claimant asked for the source material but then  
9 didn't engage in any cross-examination of -- of  
10 the witness, of the expert witness.

11 MR. BHABHA: Your Honor, as a factual  
12 matter, after being denied the material, he did  
13 engage in some cross-examination that appears  
14 in the record, but I think critical, Your  
15 Honor, is that, without the material itself,  
16 any meaningful cross-examination regarding the  
17 expert's methodology, the provenance of the  
18 expert's labor market surveys was impossible.

19 And I would note that it would be a  
20 rare case where you would be asked to  
21 cross-examine a statistical expert who is  
22 opining upon specific numbers that the expert  
23 has then modified through calculations without  
24 actually seeing the data sources itself.

25 I think this Court's decision in

1 Florida Power and Light is an important  
2 precedent in this respect because, there, the  
3 Court noted that the testimony, the  
4 well-founded testimony of an expert may be  
5 enough if firsthand information is unavailable.

6 And, here, particularly because there  
7 were two sources the expert relied upon, the  
8 Bureau of Labor Statistics data, which was  
9 public, but then also her private labor market  
10 surveys, which the ALJ never saw and we never  
11 saw, that made any form of cross-examination or  
12 meaningful inquiry into the basis for these  
13 numbers impossible.

14 JUSTICE ALITO: Well, what I don't  
15 understand about your argument is how it  
16 connects with the substantial evidence  
17 question. Substantial evidence refers to a  
18 quantum of proof. And I -- it's hard for me to  
19 see why that inquiry is different depending on  
20 whether the underlying information in -- in  
21 question was requested or not.

22 The -- the argument that you're making  
23 sounds like a procedural question, a due  
24 process question, whether it was unfair not to  
25 require the expert to produce the underlying

1 data.

2 Can -- can you just explain how the  
3 procedural question that seems to be at the  
4 core of what you're arguing fits in with the  
5 substantial evidence test?

6 MR. BHABHA: Of course, Your Honor.  
7 So I think we have two answers to that  
8 question.

9 First and foremost, we are not asking  
10 for the document-on-demand procedural rule that  
11 the government characterizes us. The  
12 government, who bears the burden at step 5, is  
13 choosing in these cases to only rely on the  
14 testimony of a vocational expert.

15 Now the government has at its  
16 availability to enter other evidence into the  
17 record as well. If the government chose to  
18 submit its own labor market surveys, we would  
19 not say and are not saying that there's a  
20 stand-alone constitutional violation because  
21 the vocational expert didn't give her surveys.

22 JUSTICE ALITO: Well, I know you're  
23 not saying that, but you have a quantum of  
24 evidence; it's substantial or it's not  
25 substantial. Explain, if you can, why the

1 question of -- the issue of substantiality  
2 depends on whether the evidence was asked for  
3 or not.

4 MR. BHABHA: Your Honor, I think it  
5 flows from the basic intuition that when you  
6 question an expert about data, if the expert  
7 cannot then back up their testimony, that  
8 creates doubt.

9 And although I don't think it's an  
10 exact match, I think a useful analogy are the  
11 adverse inference cases, which this Court has  
12 recognized when a party or a witness says I am  
13 presenting evidence to the court, but there is  
14 better evidence somewhere else that  
15 substantiates what I am saying --

16 JUSTICE ALITO: Well, I -- I see that  
17 argument. Now, in this case, was it the  
18 attorney for -- who was it who said that the --  
19 the expert was not required to produce the  
20 evidence? Was there opposition on -- by your  
21 adversary, or was it the -- the ALJ?

22 MR. BHABHA: It was the ALJ. And so,  
23 Your Honor, what I think is critical here is  
24 that, when the government says the record is  
25 exactly the same, it is not. If, for example,



1 the expert had said when questioned for the  
2 data I have a source, but I'm not going to  
3 identify it, I'm not going to show it to you, I  
4 think that would create real doubt. And here  
5 --

6 JUSTICE ALITO: Yeah, I -- I see that.  
7 But, when the -- the expert says this is my  
8 opinion, and you say produce the underlying  
9 evidence, and the expert doesn't say no, I'm  
10 not going to do that, I won't do that, somebody  
11 -- the judge intervenes and says no, that's not  
12 required, why does that create doubt about the  
13 validity of the expert's testimony? The expert  
14 hasn't refused to produce that evidence. It's  
15 been the intervention by the ALJ.

16 MR. BHABHA: So, Your Honor, if I can  
17 just clarify. It was both here. The expert  
18 said that data is in my confidential client  
19 files and, therefore, I don't want to produce  
20 it. And the ALJ said, I'm not going to require  
21 that.

22 And I would note that the government  
23 doesn't defend in this Court the  
24 confidentiality rationale. And I think the  
25 reason for that, Your Honor, is that, as the

1 claimant's lawyer said below, it would be easy  
2 to redact or black out the names of the  
3 clients. Indeed, federal courts and  
4 administrative agencies deal with highly  
5 sensitive information about national security  
6 or intellectual property every day.

7 JUSTICE BREYER: But here's the thing  
8 I don't understand. Sure, maybe he made a --  
9 you're right in this case, maybe. But, I mean,  
10 even if we were in court, experts rely on all  
11 kinds of things. And if you -- the other side  
12 makes a case, says what -- what are you relying  
13 on for your conclusion, he says, I'm relying on  
14 Ptolemy. Not Copernicus? No, Ptolemy.

15 Well, that might be a good ground for  
16 going into it. And so whether there's a good  
17 ground for going into it or not depends on the  
18 case. And why -- why would it be any different  
19 here, where, in fact, it's not even a court,  
20 and you have a law which says you don't even  
21 have to use court rules of evidence.

22 I -- I -- you see my point? Maybe  
23 you're right. But do I repeat it?

24 MR. BHABHA: Your -- I understand your  
25 point, Your Honor --

1 JUSTICE BREYER: Okay.

2 MR. BHABHA: -- but with respect, I --  
3 I disagree with it, and for two reasons.

4 JUSTICE BREYER: Well, I'm not -- I'm  
5 asking a question. I'm saying why is it  
6 different from even a trial where the standard  
7 is less, and in a trial, my understanding is --  
8 is that what you disagree with? Or, here,  
9 certainly, it would depend on the case.

10 MR. BHABHA: So, Your Honor, I have a  
11 practical answer to your question and a legal  
12 answer, and I'd like to give both if I might.

13 As a practical matter, vocational  
14 expert testimony has been widely criticized in  
15 the courts of appeals, with courts noting that  
16 the methodology is at times preposterous,  
17 leading to numbers that are likely  
18 fabrications. And as the NOSSCR amicus brief  
19 demonstrates, for the exact same jobs that our  
20 vocational expert in this case opined there  
21 were 120,000 jobs -- that was for the nut  
22 sorter or the sorter category of jobs --  
23 experts for that exact same job in almost  
24 identical time periods have given numbers from  
25 the hundreds up to 480,000.

1           And the reason for this huge range in  
2 the answers experts give is it's not simply  
3 like an expert in these cases is Googling the  
4 number of appellate lawyers in Washington, D.C.  
5 They have to go first to the Dictionary of  
6 Occupational Titles, a book that was written in  
7 1977 and was last updated in 1991, and  
8 involves all --

9           JUSTICE BREYER: But what you're  
10 telling me is that the expert should -- they  
11 should have gone into it in this case because  
12 it was really rotten. You have a pretty good  
13 bar, and you would think that the bar there  
14 would find a case, maybe it's yours, and go to  
15 the court of appeals and say: Look, you should  
16 have looked into this one.

17           And then, when they look into that  
18 one, if they disagree with you, you would have  
19 said just what you're saying now. What I don't  
20 understand, you see -- and you might have won.  
21 And maybe you should win. What I don't  
22 understand is having an absolute rule that  
23 every expert who's vocational, regardless of  
24 what he relied on or how much trouble it would  
25 be, would have to, without cross-examination or

1 a strong basis in the law, or in the -- in the  
2 facts of the case, why he'd have to produce all  
3 this stuff.

4 Maybe it is confidential. Maybe  
5 sometimes he should. Maybe sometimes he  
6 shouldn't. You see, that's my problem.

7 MR. BHABHA: I understand your  
8 problem, Justice Breyer, and let me see if I  
9 can address it.

10 The government itself, I would note,  
11 as a policy matter tells experts you should be  
12 prepared to explain, cite, and furnish the  
13 sources upon which you rely.

14 In the handbook that the Social  
15 Security Administration gives to experts, it  
16 says that five times.

17 JUSTICE SOTOMAYOR: That was after --

18 JUSTICE KAGAN: Well, there --

19 JUSTICE SOTOMAYOR: -- that was after  
20 this case.

21 MR. BHABHA: That's correct, Your  
22 Honor. That was --

23 JUSTICE SOTOMAYOR: All right. So  
24 that wasn't in place at the time.

25 Can I go back to Justice Breyer's

1 initial question, and perhaps Justice Alito's.  
2 You say very explicitly in your reply brief  
3 you're not asking for an absolute rule that an  
4 -- that an expert must, before testifying,  
5 produce these materials.

6 You make an exception for when it's  
7 asked for. But you also concede in your reply  
8 brief that there might be situations where it's  
9 not necessary, where the expert opines, doesn't  
10 produce their materials, but there's other  
11 independent evidence that's reliable and could  
12 be relied upon to constitute substantial  
13 evidence.

14 And so there's no absolute rule  
15 according to you. But what you're asking us  
16 now to hold, I think, is that, as a matter of  
17 law, an expert who opines on something and  
18 refuses to provide the sources is sufficiently  
19 unreliable that it doesn't constitute  
20 substantial evidence. Is that what you're  
21 trying --

22 MR. BHABHA: Not --

23 JUSTICE SOTOMAYOR: -- to get us to --

24 MR. BHABHA: -- not exactly, Justice  
25 Sotomayor, if I can be very clear on the rule

1 that the Seventh Circuit has held and that we  
2 are arguing for in this Court.

3 In this context, when an expert is  
4 providing statistical data and then cites to  
5 statistical sources they rely upon, and say  
6 these are the sources, and these are not public  
7 sources, this expert relied on two sources, one  
8 of which was private. We had never seen it.  
9 The ALJ never saw it.

10 In that situation, the Seventh Circuit  
11 has held that if you ask the expert, just show  
12 me the sources that you yourself are relying  
13 upon, so that the agency can make a  
14 determination and so that we can conduct a  
15 meaningful cross-examination, in that  
16 situation, the say so is not enough.

17 JUSTICE SOTOMAYOR: All right. You're  
18 defining meaningful. But let's -- let me pose  
19 a hypothetical.

20 Expert says what this expert says and  
21 you get up and say: How many of these people  
22 had the same conditions as my client has?

23 And the expert says: Virtually every  
24 one of them.

25 How many people did you do research on

1 with respect to this issue?

2 I contacted about 15 businesses.

3 Have you placed these kinds of  
4 individuals in the kinds of jobs you've talked  
5 about?

6 Yes, a hundred of them.

7 Whatever -- do you believe that, in  
8 that circumstance, you could stand here and say  
9 that there wasn't substantial evidence from  
10 which the ALJ could rely upon, even if you had  
11 not seen the underlying records?

12 MR. BHABHA: Your Honor, I think --

13 JUSTICE SOTOMAYOR: I'm giving you the  
14 best case for them, because the better case for  
15 you is for her to say: Well, I've never really  
16 placed anyone with that -- with those  
17 conditions. I only checked one employer. But  
18 I'm extrapolating from that some sort of  
19 methodology that really could be questionable.

20 Those are the two extremes we have,  
21 isn't it?

22 MR. BHABHA: That's right, Your Honor.

23 JUSTICE SOTOMAYOR: All right, the  
24 potential extremes we have. But no one asked  
25 any of those questions below for us to make a



1 judgment about whether the ALJ's ruling was  
2 reasonable or not.

3 MR. BHABHA: So, Your Honor, if I can  
4 answer your question in two ways.

5 First, I think ours is the easier case  
6 because here the expert didn't say it was my  
7 experience. She said labor market surveys.  
8 And so the expert explicitly didn't say, I have  
9 placed a number of people.

10 But taking Your Honor's hypothetical  
11 head on, in a situation in which the vocational  
12 expert says I've placed a number of people over  
13 my 10-year career in this position or in these  
14 sets of positions, I think it is likely that  
15 would not be substantial evidence, and here's  
16 why, Your Honor.

17 Section 423(d)(2)(A), the statutory  
18 provision here, requires that there be a  
19 significant number of jobs in the national  
20 economy.

21 Now that number has -- what  
22 "significant" means is a subject of some  
23 debates in the courts of appeals and it appears  
24 to be a multi-factor test. But what is  
25 critical is that's at least in the hundreds,

1 and likely in the thousands.

2 And these types of jobs that are  
3 getting placed are very specific jobs with  
4 people with very specific limitations. So even  
5 if an expert said I've placed 15 people over  
6 the last 10 years in these jobs with similar  
7 limitations to your client, that doesn't  
8 provide a basis to know that there are hundreds  
9 or thousands of those jobs.

10 And I think it's for that reason the  
11 vocational experts rely on surveys and not only  
12 their own personal experience in propounding  
13 their testimony.

14 JUSTICE SOTOMAYOR: But I think you're  
15 missing the point, which is you wouldn't have  
16 needed the surveys to make the argument you  
17 just made. You could have questioned the  
18 expert and shown the lack of a sufficient basis  
19 for their conclusion and then made that  
20 argument to the ALJ.

21 What I'm trying to get at is I  
22 understand the need in some situations to  
23 actually see the surveys, but don't you have to  
24 lay at least some predicate ground for why  
25 that's necessary in your particular case?

1           MR. BHABHA: I understand your  
2 question, Your Honor.

3           I think initially I will just say as a  
4 factual matter, and I think the record bears  
5 this out, as soon as my client's or claimant's  
6 representative asked for the surveys, the ALJ  
7 made clear she wasn't going to give them.

8           So I don't think there was any  
9 opportunity even to proffer reasons. But even  
10 beyond that, Your Honor, it is the government's  
11 burden at this stage. And given the nature of  
12 this type of statistical testimony, even at  
13 cross-examination, when, as in our case, an  
14 expert says I relied on public data and I  
15 relied on private data, it is hard for me to  
16 conceive of what kind of a meaningful cross you  
17 could do of the private data. The expert then  
18 provides her answers about this is what the  
19 data said, this is what I did to the data, but  
20 there's no way of verifying any of those kind  
21 of answers.

22           CHIEF JUSTICE ROBERTS: Well, one way  
23 -- one way to be -- to look at the publicly  
24 available data, right, and there was no  
25 questioning about that, was there? I mean, to

1 the extent the Bureau of Labor Statistics  
2 information shows you say 8,000 jobs in  
3 southwestern Michigan, if that's where it was,  
4 and the Bureau of Labor Statistics shows a  
5 different number, why did you choose eight?

6 In other words, there -- there were  
7 fields, I'm not saying there are ample fields,  
8 but there are fields for fertile  
9 cross-examination that weren't explored, I  
10 think.

11 MR. BHABHA: Mr. Chief Justice, I  
12 think it is certainly a different case if an  
13 expert only relies on public data. Then I  
14 absolutely agree you have exactly what the  
15 expert relied upon.

16 In a case like this, however, and I  
17 think in many cases like this -- and this is  
18 why vocational expert testimony has been a  
19 subject of criticism -- the public data alone  
20 is not only not enough, but it is often of an  
21 entirely different character because the  
22 taxonomy in the public data, in the BLS data,  
23 uses a far larger definition of jobs than what  
24 the DOT, the Dictionary of Occupational Titles  
25 codes, which is what the AL -- the VE is

1 required to identify.

2           So what happens is, in our case, for  
3 example, the SOC, the Standard Occupational  
4 Classification codes in the Census, encompass  
5 in some cases hundreds of DOT codes. And so,  
6 when you look at the overall number that comes  
7 from the Census, that could be in the thousands  
8 or in the hundred thousands, but the critical  
9 question, and this is what the vocational  
10 expert is required to do, is to say how many  
11 jobs with somebody with this level of  
12 education, this skill level, these kind of  
13 disabilities, how many jobs are available for  
14 them.

15           So, while I agree that BLS source was  
16 available, it was a very partial source at  
17 best. And I think the critical question, and  
18 that's why the experts in this situation didn't  
19 only rely on the BLS data, was because there  
20 needed to be a significant winnowing of those  
21 numbers to get to the answers to the ALJ's  
22 hypo.

23           CHIEF JUSTICE ROBERTS: Well, that's a  
24 good -- it strikes me that that's a good  
25 argument to have made before the ALJ, at which

1 point the ALJ may have said, well, I see that  
2 now, and you should have access to the private  
3 data and you can just redact it. But that  
4 wasn't -- that wasn't done here.

5 MR. BHABHA: Well, Your Honor, the one  
6 thing that was done -- I agree, that wasn't  
7 laid out to the ALJ.

8 What was laid out the first time that  
9 we asked for the data and were refused,  
10 immediately counsel said: Look, it's a  
11 substantial evidence standard. These vague  
12 conclusions are not enough.

13 So I think it was certainly put in  
14 issue to the ALJ, we need something more. And  
15 I would just note that this is a very specific  
16 type of testimony. This is testimony where a  
17 witness is giving statistical answers  
18 identifying statistical sources.

19 And I think it would be rare in  
20 administrative procedure in that situation for  
21 an agency to say: Yes, there are these data  
22 sources, they are the sole basis for the  
23 testimony, but no regulated party or no party  
24 before the agency, you can't see those sources  
25 in order to meaningfully challenge the

1 conclusions of the expert.

2 And I think, Your Honors, Perales is  
3 an interesting case in this respect. Now we  
4 agree with the government for sure Perales  
5 discusses procedural due process. But equally  
6 crucial in Perales, Perales came under Section  
7 405(g) of the Social Security Act, the very  
8 same provision we have at issue here.

9 And the question presented by the  
10 government in Perales to the Court was whether  
11 or not the medical expert testimony in that  
12 context could be substantial evidence.

13 And I think what's important about  
14 Perales is that, in part 5 of the opinion,  
15 while certainly also discussing procedural due  
16 process issues, the Court in Perales gives  
17 indicia of why the testimony there had  
18 probative value and why it was reliable. And I  
19 think it's very important to look at that case  
20 because, there, the medical experts didn't just  
21 give conclusions.

22 What the Court noted specifically in  
23 Perales was that they laid out the tests that  
24 were conducted, the results of those tests, the  
25 types of surgeries that were conducted, and the

1 results after surgery.

2 JUSTICE ALITO: But your reliance on  
3 that case raises the interesting question, a  
4 question I think is interesting, which is  
5 whether there would be any basis for limiting  
6 the rule that you're asking us to adopt to the  
7 specific situation here, which you have  
8 stressed where it's testimony, it's statistical  
9 testimony by a vocational expert in a Social  
10 Security disability hearing.

11 Why wouldn't the rule that you're  
12 asking us to adopt apply whenever there is the  
13 question if a determination by an agency is  
14 supported by substantial evidence?

15 MR. BHABHA: Well, Your Honor, I think  
16 for sure the term "substantial evidence" is one  
17 that applies throughout administrative law, but  
18 what this Court has made clear in a number of  
19 cases is that, of course, substantial evidence  
20 looks at the record and, thus, inherent in the  
21 question -- in the answer as to what  
22 substantial evidence means is, what is the  
23 question that the agency is trying to address?

24 In a situation like this, where you're  
25 talking about specific numbers that the agency



1 is relying on as the sole basis to deny my  
2 client benefits for the applicable period,  
3 there, I think when the expert points to data  
4 sources that she has modified in order to come  
5 up with these numbers, there, substantial  
6 evidence requires more.

7 But in other situations, Your Honor,  
8 for example, qualitative testimony, even  
9 testimony such as these are the kind of jobs in  
10 my experience I believe somebody with these  
11 sorts of limitations can do, i.e., the first  
12 part of what vocational experts testify, I  
13 think that's entirely different.

14 But I do think in this situation it  
15 would be very normal when an administrative  
16 agency comes up with specific numbers and bases  
17 a determination on specific numerical  
18 conclusions, it is the norm to then make the  
19 agency or make the expert show their work.  
20 I --

21 JUSTICE KAGAN: Why wouldn't your  
22 argument be the same if there had been no  
23 request at all?

24 MR. BHABHA: Your Honor, certainly, we  
25 would win if the -- if the rule was that

1 vocational experts have to give over their  
2 testimony regardless of a request or not, we  
3 would win.

4 JUSTICE KAGAN: I -- I'm just asking,  
5 why is that part of your proposed rule?

6 MR. BHABHA: Your Honor, no court of  
7 appeals has ever held that there is a  
8 requirement, but I think -- I'm sympathetic to  
9 the rationale behind that rule, but I think --

10 JUSTICE KAGAN: It seems to me that  
11 your rationale suggests that the on-demand part  
12 of your test is irrelevant.

13 MR. BHABHA: Your Honor, I don't think  
14 it's irrelevant. And as I said, I don't think  
15 it's irrelevant for the reason that, when you  
16 question a witness and the witness then doesn't  
17 give you the testimony -- the very data sources  
18 they rely upon, that introduces doubt.

19 And I think that is where the question  
20 and the answer play into the test. And I think  
21 that's the rationale of the Seventh Circuit.  
22 They haven't elucidated it exactly in those  
23 terms, but that is what I take those decisions  
24 to say, which is that when the testimony is  
25 given alone, if it's not challenged, then maybe

1 it's enough, but when you ask a witness what is  
2 your data and the witness doesn't give it  
3 over -- and, again, the government isn't  
4 defending here the confidentiality rationale --  
5 that does create doubt.

6 And I think the adverse inference  
7 cases show that intuition in the law.

8 JUSTICE KAGAN: Yeah. I guess I just  
9 -- I'm just not getting it because either it's  
10 enough or it's not enough. It doesn't have  
11 anything to do with whether somebody --  
12 somebody demands the -- the information.

13 MR. BHABHA: Well, Your Honor, I  
14 think --

15 JUSTICE KAGAN: Unless the demand part  
16 of the test is something about have you  
17 forfeited the right to complain about it.

18 MR. BHABHA: Well, Your Honor, the  
19 Seventh Circuit and the Ninth Circuit, which  
20 has also applied a similar standard, have  
21 talked about this in terms of forfeiture or  
22 waiver. But I don't think, from a legal  
23 perspective, the term "forfeiture" is exactly  
24 correct here because you cannot waive the  
25 substantial evidence standard. That is a

1 reviewing standard that the court must apply in  
2 any circumstance.

3           So the way I read those cases is to  
4 essentially say, if you question somebody that  
5 cannot back up the data -- and I think it would  
6 be analogous, Your Honor, if you asked a  
7 witness in exactly the same case where did you  
8 get your data sources from, and the witness  
9 said either I'm not going to tell you or they  
10 said, well, they occurred to me one day, I  
11 looked up something, but I'm not going to  
12 identify what it is on the Internet for you,  
13 that does create doubt in a record, Your Honor,  
14 just as, here, the failure to look at those  
15 numbers when requested, even when the  
16 claimant's representative said I don't need  
17 your clients' names, you can redact those  
18 clients' names, that creates doubt in the  
19 record.

20           And that is why, particularly in a  
21 context such as this when you have multiple  
22 outdated data sources which vocational experts  
23 have to bring together, when vocational experts  
24 come up with numbers that vary enormously for  
25 the same jobs, and all the more so when this is

1 the sole basis upon which disability benefits  
2 applicants are being denied, I think more than  
3 just the conclusory statements of the expert  
4 are what is required.

5 And again --

6 JUSTICE ALITO: Can you draw an  
7 adverse inference against the expert if the  
8 expert sincerely believes, perhaps mistakenly,  
9 but sincerely believes that what is requested  
10 is confidential?

11 MR. BHABHA: Your Honor, I think the  
12 adverse inference case law, again, it's not  
13 directly controlling here, for sure, but I  
14 think you can use the same intuition from those  
15 cases, because there's a very easy method,  
16 which, again, the government doesn't dispute  
17 here, to redact that information and provide  
18 only the crucial information.

19 And I think the reason, again,  
20 particularly in this context of vocational  
21 experts, why this data is so important and why  
22 the failure to provide it is so practically  
23 harmful, in addition, we think, to being in  
24 conflict with the substantial evidence  
25 standard, is because these experts are bringing

1 together very old definitions of jobs with  
2 entirely different taxonomy of job numbers,  
3 putting the numbers together and coming up with  
4 a result, and then, in certain circumstances,  
5 reducing that result further based on further  
6 hypotheticals posed by the ALJ.

7 So it is a data-intensive process.  
8 The vocational expert identified as much in her  
9 testimony. And not even having the numbers  
10 that the vocational expert is admitting she  
11 relied upon hampers not only the claimant's  
12 representative's ability to cross-examination  
13 but also crucially the ALJ's ability to  
14 actually determine whether there are real  
15 numbers here.

16 Mr. Chief Justice, if I may reserve  
17 the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Yang.

21 ORAL ARGUMENT OF ANTHONY A. YANG  
22 ON BEHALF OF THE RESPONDENT

23 MR. YANG: Mr. Chief Justice, and may  
24 it please the Court:

25 I'd like to address two general

1 subjects: First, how Social Security hearings  
2 work and how vocational experts decide whether  
3 there are significant numbers of relevant jobs  
4 in the national economy. Excuse me.

5 Second, I'd like to address the  
6 substantial evidence theory, which is evolving  
7 and it is built on a procedural predicate that  
8 is incorrect.

9 Each year, there are about 2.6 million  
10 initial disability claims that are filed with  
11 SSA, and at the third level of review, the SSA  
12 conducts 670,000 hearings. That's about 200 --  
13 2500 a day. Over 1 million people are waiting  
14 for just a response for their hearing, and they  
15 wait on average about 605 days. There is no  
16 adjudicatory process on a scale comparable to  
17 this. And Congress has properly vested SSA  
18 with broad authority to determine the right  
19 process to develop records.

20 The question then here --

21 JUSTICE SOTOMAYOR: Then doesn't that  
22 solve this case? Because your agency now has  
23 in its handbook that every expert has to come  
24 prepared to cite the sources that they relied  
25 upon and to produce the materials. So, if

1 they've made that judgment, why shouldn't we  
2 make the same judgment, that a failure to do so  
3 goes to the heart of the expert's  
4 unreliability?

5 MR. YANG: The Vocational Expert  
6 Handbook that -- that we're talking about, the  
7 informal guidance, really is referring to  
8 vocational resource materials that they use.  
9 There are -- and not individual case client  
10 files.

11 And if I can explain, there's two  
12 levels of analysis that a vocational expert  
13 goes --

14 JUSTICE SOTOMAYOR: Do you want to  
15 show me where in the handbook --

16 MR. YANG: I think --

17 JUSTICE SOTOMAYOR: -- that's said so  
18 I know -- so I can follow you?

19 MR. YANG: The citation --

20 JUSTICE SOTOMAYOR: The source.

21 MR. YANG: -- is in -- in our brief in  
22 opp. At page 9, we discuss it, and then on  
23 page 18. I don't have the handbook in front of  
24 me, unfortunately. The language that the  
25 handbook says is cite, explain, and furnish any



1 sources you rely on to support your testimony.  
2 But the reason we think this is talking about  
3 resource -- vocational resource materials is  
4 because an expert just doesn't know the  
5 questions and -- and the granularity of the  
6 questions that the expert's going to rely -- be  
7 asked.

8 So, for example, there's two stages of  
9 questioning --

10 JUSTICE SOTOMAYOR: So they are  
11 picking numbers from the air?

12 MR. YANG: No, I wouldn't say from the  
13 air. I'd say from experience, which can be  
14 educated by the jobs that they do for  
15 individual disability clients. If I can  
16 explain, there's basically two levels.

17 JUSTICE SOTOMAYOR: Aren't they given  
18 the -- the file before they come to testify --

19 MR. YANG: No.

20 JUSTICE SOTOMAYOR: -- on the  
21 individual claimant?

22 MR. YANG: No. They are given the  
23 relevant vocational background but know nothing  
24 about the disabilities of these claimants. In  
25 fact, ALJs are prohibited from communicating

1 with vocational experts prior to the hearing  
2 because vocational experts are intended to be  
3 impartial experts brought by an impartial  
4 agency to adjudicate a case.

5 There are then --

6 JUSTICE SOTOMAYOR: You're worrying me  
7 that this is, in fact, what all of the critics  
8 are saying.

9 MR. YANG: If -- if you can --

10 JUSTICE SOTOMAYOR: That these are  
11 numbers pulled out of a hat as a person sits  
12 there.

13 MR. YANG: If I can explain, there are  
14 two levels. I think this will help to address  
15 your concern.

16 There -- at the first level of  
17 inquiry, the vocational expert is determining a  
18 category of jobs based on generally things in  
19 -- in the Dictionary of Occupational Titles  
20 that discuss exertional limitations and such  
21 for those jobs. So, for instance, sedentary  
22 jobs that do not require any kind of advanced  
23 or -- education, unskilled jobs.

24 Then the expert relies on public  
25 sources, statistical sources like the BLS that

1 provide numbers in the national and local  
2 economies.

3 And the expert -- they don't map  
4 exactly, so the expert's going to have to use  
5 some judgment to extrapolate. Those are  
6 questions that can be explored fully at hearing  
7 and, in fact, are -- the guidance suggests that  
8 they should provide these. These are things  
9 that you predict in advance.

10 But there's a second level. At the  
11 hearing, there are very specific types of  
12 impairments that are not addressed by the  
13 grids. The grids take into account these  
14 high-level impairments, but there are things  
15 like non-exertional impairments, depression,  
16 ability to concentrate, things like unable to  
17 lift above your head, or more than five pounds.  
18 These are things that you just don't know until  
19 you come into the hearing.

20 And in this case, at page 10, for  
21 instance, of the reply brief, Petitioner  
22 acknowledges that the testimony of the  
23 vocational expert, that if her numbers would be  
24 reduced by about 20 to 30 percent, if the  
25 Petitioner could not lift above his head or

1 lift more than five pounds, that's the second  
2 level of inquiry.

3 And that is what's educated by the  
4 vocational expert's experience, reflected in  
5 her own surveys done for individual clients.  
6 And remember, this --

7 JUSTICE GINSBURG: Can you -- can you  
8 explain, what is the confidentiality here? She  
9 says she relies on the Bureau of Labor  
10 Statistics and her own independent research.

11 What is your own independent research?  
12 I can't tell you because that would -- that's  
13 part of client files.

14 MR. YANG: I think it would help to  
15 look at page 118 and 119a of the petition  
16 appendix because that's the actual testimony.  
17 The first time this comes up in the -- is in  
18 the context of where the expert got her number  
19 -- her on-task percentage. That is, you have  
20 to be on task about 80 percent.

21 And so she says she gets it from her  
22 experience doing job analyses. A few lines  
23 down: Can you provide a job analysis? The  
24 expert says I cannot. It doesn't say that.  
25 She just says -- observes those would be part

1 of people's, that is, individuals', private  
2 confidential files.

3 Now, remember, this expert, her resume  
4 is in the record and she was certified as a --  
5 a vocational expert.

6 JUSTICE GINSBURG: But what are the --  
7 what are the -- what are the people? I -- I  
8 don't have a grasp on whose confidentiality is  
9 at stake.

10 MR. YANG: These are individuals that  
11 have disabilities. This vocational expert  
12 works as a rehabilitation consultant to find  
13 jobs for people. That's her job. So she is  
14 very well situated to take a person, have  
15 hypothetical questions about what the person  
16 can do, and answer questions.

17 And this is precisely what she's  
18 doing. She's saying on my experience you need  
19 to be able to focus, be on task 80 percent of  
20 the time. That's the type of information that  
21 you find --

22 JUSTICE KAGAN: Well, without the  
23 data, how is somebody to cross-examine her on  
24 that and how is the ALJ to verify that  
25 conclusion?

1           MR. YANG: Well, you cross-examine by  
2 simply asking basic questions. Well, when you  
3 say doing job analysis, what does that mean?  
4 Where are you getting this information?

5           When you talk about your confidential  
6 files, what is the information in the  
7 confidential file? Where do you develop that  
8 information?

9           There's a whole string of questions  
10 about methodology, sources, that can be  
11 explored. And if there -- you -- you can get  
12 to a point, and there are case law, we cite a  
13 case, at least one case in our brief where, if  
14 you go down the cross-examination path and the  
15 expert simply is not able to provide cogent  
16 responses, that will undermine the testimony  
17 and maybe render it not -- not substantial  
18 evidence.

19           But, here, there was no  
20 cross-examination. The judge intervenes. The  
21 judge says: I'm not going to require that. If  
22 it's an individual -- confidential files of  
23 individual people, I'm not going to require it.  
24 It's not -- there's no adverse inference.

25           The judges or the -- the expert simply

1 is explaining that those -- this subset of  
2 data, not the high level, but the second level  
3 of data, is in confidential files. Then she  
4 goes on to the job numbers.

5 Now, remember, the job numbers are,  
6 again, on two different levels. There's the  
7 high-level job numbers, that is 360,000 jobs  
8 between bench assemblers and sorters, and then  
9 there's an -- an additional one when -- when  
10 you're given the hypothetical about lifting.  
11 That's going to be reduced 20 to 30 percent.  
12 And counsel asks --

13 JUSTICE GINSBURG: Can we go back to  
14 what you said, you would dismiss the -- the  
15 handbook, but I think this is an accurate quote  
16 from it: At all hearings, you, the vocational  
17 expert, should be prepared to cite, explain,  
18 and furnish any sources you rely on to support  
19 your testimony.

20 MR. YANG: I -- I -- that is probably  
21 an exact quote. But what I will say is that  
22 there's no way -- a vocational expert cannot  
23 know they're going to ask can you lift five  
24 pounds, can you lift seven pounds. This person  
25 has this specific type of -- of depression that

1 requires X, Y, and Z.

2           You don't have public sources for  
3 that. The expert's relying on expertise that's  
4 built and may be reflected in confidential  
5 client files. But you can't bring your entire  
6 source of your files through your professional  
7 experience to the hearing. That's impossible.

8           So the only --

9           JUSTICE SOTOMAYOR: Mr. Yang --

10          MR. YANG: -- we think the only  
11 reasonable way to read this is we're talking  
12 about the upper order, the first order of  
13 things, BLS data, Dictionary of Occupational  
14 Data, that kind of stuff can be reasonably be  
15 expected to be brought. But this other stuff,  
16 it would be impossible.

17          JUSTICE GORSUCH: So -- so any doesn't  
18 mean any?

19          MR. YANG: Like some agency  
20 pronouncements, they're not --

21          JUSTICE GORSUCH: We shouldn't defer  
22 to the agency's handbook on "any" in this case?

23          MR. YANG: Well, the non-guidance --  
24 the non-binding guidance is written for  
25 non-lawyers. It's not intended to be a



1 statute. And I think it has --

2 JUSTICE GORSUCH: It's written for the  
3 -- for the experts, right?

4 MR. YANG: It's written for the  
5 experts. But, again, if you're a vocational  
6 expert and you know how the game is played, you  
7 know how this -- this -- this proceeds --

8 JUSTICE GORSUCH: Can I ask a --

9 JUSTICE ALITO: Well --

10 JUSTICE GORSUCH: -- different --

11 MR. YANG: -- there's no way you can  
12 bring all your files.

13 JUSTICE GORSUCH: -- just a slightly  
14 different line of questioning. If we were in  
15 federal district court -- and I know we're not,  
16 and forget about the Rules of Evidence, but if  
17 -- if on the key issue in the case the evidence  
18 depended upon the testimony of an expert, and  
19 the expert said, ah, I'm not going to give you  
20 my underlying data, it's secret, I don't think  
21 we would hesitate to find that no rational jury  
22 could sustain a verdict in favor of the party  
23 propounding that expert.

24 Why isn't the same true here?

25 MR. YANG: If that were all that's

1 standing alone, that may well be true.

2 JUSTICE GORSUCH: Okay. So you admit  
3 the principle --

4 MR. YANG: But -- but I wouldn't -- I  
5 wouldn't --

6 JUSTICE GORSUCH: -- so -- so can we  
7 just be --

8 MR. YANG: -- I wouldn't concede that,  
9 though, because it depends on the entire  
10 record. And there --

11 JUSTICE GORSUCH: Yeah, sure it does.  
12 But my hypothetical is that that's the key  
13 point. And on that key point, the only piece  
14 of evidence is an expert who says I have secret  
15 data. You'd agree that we would reverse?

16 MR. YANG: Likely reverse. However --  
17 however, I would like to point out some key  
18 differences. There's factual differences,  
19 which is, one, this expert's not refusing.  
20 There's a ruling by the adjudicator.

21 JUSTICE GORSUCH: Fine.

22 MR. YANG: The adjudicator --

23 JUSTICE GORSUCH: Fine. You can  
24 modify my hypothetical.

25 MR. YANG: But -- no, but --

1 JUSTICE GORSUCH: That doesn't make  
2 any difference, does it?

3 MR. YANG: Well, no, I actually not --

4 JUSTICE GORSUCH: If the district  
5 court said I'm not going to make the expert  
6 turn over his secret evidence, we'd still  
7 reverse because no rational jury could find.

8 MR. YANG: Actually, I'm not sure  
9 that's right. This Court has held that, for  
10 instance, there's no -- no process problem with  
11 admitting allegedly totally unreliable  
12 evidence, so long as you have the ability --

13 JUSTICE GORSUCH: Not a process  
14 problem.

15 MR. YANG: -- to contest it.

16 JUSTICE GORSUCH: Not a process  
17 problem. Sufficient evidence for a rational  
18 jury to reach a conclusion.

19 MR. YANG: But if this -- if this is a  
20 qualified expert, there's no contest on the  
21 qualifications, the expert testifies to a fact,  
22 now there may be additional things that  
23 undermine that, but there's otherwise no other  
24 evidence, no evidence that contradicts the  
25 expert, I think that's a tough -- a tough call,

1 because --

2 JUSTICE BREYER: How does that work?

3 I mean, I -- I actually don't know in a  
4 district judge. But -- but think of any kind  
5 of an expert, a house painter, or a doctor, and  
6 the plaintiff has a certain kind of injury to  
7 himself or his house, and the doctor says:  
8 Well, a person who coughs like that and a  
9 person who has that kind of lifting problem,  
10 I've looked up all the treatises, and they  
11 suggest there might be X or Y, and in my  
12 experience, I can refine that further because  
13 I've had thousands of clients. And when they  
14 cough like that, it means dah-dah-dah.

15 Okay? And that's all there is. And  
16 if that's all there is, does that expert -- or  
17 the house painter says the same thing about a  
18 -- about a rotten board. A rotten board in my  
19 experience means termites if it's like this,  
20 but not if it leads that.

21 And -- and I've talked to many doctors  
22 or many house painters, and I've seen a lot  
23 myself, and that's my experience.

24 Now is that reversible error?

25 MR. YANG: No.

1 JUSTICE BREYER: Well, then why would  
2 it be reversible error here if the vocational  
3 expert says exactly the same thing?

4 MR. YANG: The --

5 JUSTICE BREYER: You're going to say  
6 it isn't. Okay.

7 MR. YANG: No, the one thing that I'm  
8 holding out is -- is this standard looks to the  
9 whole record. And there are things that could  
10 -- evidence that can be admitted into the  
11 record that can undermine the bottom line  
12 conclusion.

13 So if, for instance, and there are  
14 cases like this, the vocational expert gives a  
15 bottom line number and then there's  
16 cross-examination and this -- the vocational  
17 expert cannot answer in any credible way how  
18 the expert came about doing this.

19 Well, you know, I'm a vocational  
20 expert. Well, that doesn't make any sense.  
21 We're asking you how. And you probe and you  
22 probe and it ends up under -- so undermining  
23 that testimony that the record evidence shows  
24 that not a reasonable person -- a reasonable  
25 person would not have relied upon that. That's

1 -- that's a different --

2 CHIEF JUSTICE ROBERTS: Well, but no  
3 matter how --

4 JUSTICE SOTOMAYOR: Mr. Yang, it's  
5 really -- I'm sorry.

6 CHIEF JUSTICE ROBERTS: -- no matter  
7 how much of an expert a person is, what you've  
8 basically said is -- is trust me. I've -- I've  
9 done this for a while and I think -- and it's  
10 not just trust me, I think, in general. Trust  
11 me, I think, it's 20, you know, 20 percent.

12 It does have a sense of being pulled  
13 out of -- pulled out of the air.

14 MR. YANG: There -- there are two  
15 points that I think are important.

16 One, there are many issues in a Social  
17 Security hearing, just like in other cases.  
18 This is one of them. And oftentimes issues are  
19 not contested, and when they're not contested,  
20 you don't have to develop much of a record on  
21 it.

22 The reason is you would -- if you had  
23 to develop a record on uncontested things, it  
24 would be an unmanageable process. It happens  
25 in court litigation. It happens here.

1           Secondly, what we're talking about is  
2 the question of --

3           JUSTICE GINSBURG: But there was --  
4 here, there was -- you said it was -- the  
5 expert didn't say no, but the expert -- the  
6 question to the expert was: Can you provide  
7 those surveys? No, they're confidential.

8           MR. YANG: The --

9           JUSTICE GINSBURG: Then -- so the  
10 expert said no, and then the ALJ backs her up.

11          MR. YANG: I'm not seeing that in the  
12 record, Justice Ginsburg. I see: "Can you  
13 provide the job analysis?"

14          "Answer: They would be part of  
15 people's confidential files."

16          The judge -- or the attorney says:  
17 "Well, you can black those out."

18          At that point, the ALJ jumps in and  
19 says, I'm not going to require that. Second  
20 time, it comes in: Can you provide your own?  
21 It would again be the same answer, as they're  
22 part of the confidential files. ALJ says yes.

23          JUSTICE SOTOMAYOR: Does it matter  
24 who --

25          MR. YANG: So it's not -- there is --

1 JUSTICE SOTOMAYOR: Mr. Yang, you seem  
2 to, in answering Justice Gorsuch, believe that  
3 because the ALJ was the one who said, I'm not  
4 going to order that, that that somehow elevates  
5 the prior answer into being reliable?

6 I mean, no expert is the judge in a  
7 case, correct? The judge has to accept the  
8 testimony.

9 MR. YANG: Right, but just --

10 JUSTICE SOTOMAYOR: All right? So how  
11 can an ALJ accept testimony for which it's  
12 blocked an answer about how the expert came to  
13 their conclusion?

14 MR. YANG: The question --

15 JUSTICE SOTOMAYOR: That -- that's his  
16 basic argument --

17 MR. YANG: The question --

18 JUSTICE SOTOMAYOR: -- which is this  
19 testimony is unreliable because I was blocked  
20 from being able to show a basis --

21 MR. YANG: I -- I understand that  
22 process argument. My point is, and I think as  
23 we've explored already, that that's a process  
24 argument, not a substantial evidence argument,  
25 because the substantial evidence depends on --



1 JUSTICE SOTOMAYOR: No.

2 MR. YANG: -- what actually comes into  
3 evidence.

4 JUSTICE SOTOMAYOR: I could get on the  
5 stand and say anything I want. And if the ALJ  
6 stops the other side from giving the bases for  
7 that, the record is devoid of a basis for that  
8 answer, and it's unreliable for that reason.  
9 That, I think, is the core of their argument.

10 MR. YANG: But, here, the ALJ, which  
11 is an impartial ALJ -- or, excuse me, an  
12 impartial expert, who's been -- whose  
13 qualifications are determined and not objected  
14 to, there's no reason to think that she's --

15 JUSTICE SOTOMAYOR: Well, that's --  
16 that's fascinating because there was a whole  
17 exchange at the beginning of this hearing where  
18 the ALJ asked the attorney to stipulate to the  
19 expertise of the expert, and the attorney  
20 refused to do so.

21 MR. YANG: Because the attorney  
22 thought --

23 JUSTICE SOTOMAYOR: And he said  
24 because --

25 MR. YANG: They thought that meant

1 they could not dispute anything the expert  
2 said, which the judge says no, no, no, and the  
3 attorney then clarifies, well, I don't object  
4 to the testimony then. So -- so there's a very  
5 different --

6 JUSTICE SOTOMAYOR: But not to the  
7 expertise and certainly not to the fact that  
8 the expertise matches the disabilities at issue  
9 in this case.

10 MR. YANG: Well, let -- let me step  
11 back a second, and I think this might help a  
12 little.

13 There's a -- a good reason why counsel  
14 doesn't probe numbers like this. There -- the  
15 numbers, the testimony here, were based on two  
16 categories of jobs that totaled about 360,000  
17 jobs in the national economy. The Sixth  
18 Circuit -- there's no magic number about what  
19 constitutes the standard of a significant  
20 number of jobs, but the Sixth Circuit, which is  
21 the governing circuit here, has held,  
22 consistent with other courts, that 6,000 is  
23 enough.

24 So we're talking about numbers. The  
25 testimony at 360,000, and you got to get it so

1 far -- it's got to be so off that it can't even  
2 be ball-parked to 6,000. And so it doesn't  
3 matter whether the job number is 100,000 or  
4 250,000 or 350, since all of it is far beyond  
5 what would matter. And, remember, this  
6 individual --

7 JUSTICE KAGAN: Well, why is there,  
8 Mr. Yang, such variance in the numbers that  
9 these experts give? I mean, Mr. Bhabha says  
10 that when talking about nut sorters -- and I  
11 guess I want to know why everybody talks about  
12 nut sorters too.

13 (Laughter.)

14 JUSTICE KAGAN: But it varies from 260  
15 to 470,000.

16 MR. YANG: Right.

17 JUSTICE KAGAN: And that's a huge  
18 variance, and it makes you think where is that  
19 coming from and what are to -- what are we to  
20 do --

21 MR. YANG: I totally understand.

22 JUSTICE KAGAN: -- when somebody --

23 MR. YANG: Yes.

24 JUSTICE KAGAN: -- says one of these  
25 numbers?

1           MR. YANG: I totally understand your  
2 point. I've got two basic responses.

3           Petitioner had their own expert that  
4 made very specific objections to the expert  
5 testimony presented. They did not contest the  
6 job numbers, and I think for good reason.

7           Now the -- the -- what Petitioner  
8 cites to is a amicus brief that provides for a  
9 list of -- of various numbers, right? Now, if  
10 you look at the cases that are cited, at the  
11 stage 1 of the analysis for the -- the  
12 vocational expert estimates, they have to do a  
13 few things, one of which is you have to  
14 determine the category of jobs.

15           Now, in this case, the category was  
16 sorter. These are sedentary positions, but  
17 that encompasses a whole number of jobs that  
18 were defined in the Dictionary of Occupational  
19 Titles.

20           Now different vocational experts are  
21 going to focus on different sets. So some of  
22 them may have a broader set of sorters; some of  
23 them have a lesser set. And you don't list,  
24 unless it's -- unless it's cross-examine, all  
25 of them. You're asked initially to provide an

1 illustrative DOT number.

2           The DOT number provided in this case  
3 is nut sorter. If you look it up, it's an  
4 agricultural nut sorter. We are not suggesting  
5 that there are 125 agricultural nut sorter --  
6 125,000 agricultural nut sorters in the  
7 country. It's illustrative of the type of  
8 sorter positions, sedentary sorter positions.

9           So, when you look at these cases, what  
10 you find are the courts simply saying there are  
11 so many either -- in one case, it's  
12 agricultural sorter; in one case, there was  
13 sorter; another case was sorter. But --

14           JUSTICE KAGAN: So you're saying  
15 they're all ask -- answering different  
16 questions?

17           MR. YANG: Different questions. You  
18 cannot tell from this. And the right way to  
19 examine that is to cross-examine it.  
20 Cross-examination, as the Court has -- has  
21 explained, is the time-tested way of discerning  
22 truth and -- and -- and accuracy in testimony.

23           And there's no reason to -- to exclude  
24 that here when --

25           CHIEF JUSTICE ROBERTS: Well, you

1 usually -- when you're having someone testify  
2 to data and numbers, the way you cross-examine  
3 is to ask what she relied on and then see if  
4 that testimony lines up.

5 MR. YANG: Yes. And so, for  
6 instance --

7 CHIEF JUSTICE ROBERTS: Well, yes.  
8 But here she said, I -- I can't give you the  
9 data on which I relied.

10 MR. YANG: Well, no, this is -- I'll  
11 give you a few questions I think would have  
12 clarified this case considerably. The -- with  
13 respect to the job numbers, the -- the expert  
14 testified that she relied on BLS numbers. Now,  
15 remember, BLS provides both national and  
16 regional numbers for various types of jobs.  
17 And she additionally relied on her individual  
18 market surveys.

19 But remember, in this context, she is  
20 an -- a expert who helps individuals find jobs.  
21 So her labor market surveys, one would assume,  
22 are for individuals finding jobs.

23 CHIEF JUSTICE ROBERTS: Well, they can  
24 redact the names, right?

25 MR. YANG: They -- they could redact

1 the names. But, if you would ask, well, what  
2 was -- when you say you rely on the BLS, and  
3 then you say you rely on the individual market  
4 surveys, what did you rely on the individual  
5 market surveys? And if the expert said, as I  
6 think is probably the case and as the ALJ  
7 probably assumed given the course of testimony,  
8 it was, well, there are about 20 to 30 percent  
9 of these sedentary jobs that are excluded when  
10 you have to lift above your head. Right? Then  
11 we would know --

12 CHIEF JUSTICE ROBERTS: Okay. But  
13 what if you think that's wrong?

14 MR. YANG: Well, then you can probe  
15 further. You can say, well, how did you --  
16 like, what is the basis? How many people are  
17 we talking about? How far did you -- you  
18 survey out?

19 All of these are things that go to the  
20 weight. But, again, to find no substantial  
21 evidence, you'd have to find that no rational  
22 decisionmaker could have relied upon that.

23 So there are all kinds of  
24 cross-examination questions that would have  
25 clarified this. And all we're saying -- and

1 we're not saying that when you cross-examine an  
2 expert, if for some reason this impartial  
3 expert who's already been certified as an  
4 expert, can't -- can't respond --

5 JUSTICE SOTOMAYOR: Doesn't that shift  
6 the burden? Isn't it your burden to prove that  
7 those jobs exist? Why is it their burden to  
8 show the basis for your expert's opinion?

9 MR. YANG: It's their --

10 JUSTICE SOTOMAYOR: It's me getting up  
11 there and just saying this is the number,  
12 believe me.

13 MR. YANG: This is a public right, and  
14 claimants bear the burden of proving  
15 disability. The way the Social Security  
16 Administration has administered the process is  
17 it has relieved them of the burden of  
18 production with respect to the step 5 inquiry  
19 by providing a vocational expert such that the  
20 vocational expert provides something that the  
21 claimant can respond to.

22 But that doesn't mean that the  
23 claimant can simply say, well, I want a report,  
24 and if you don't provide a report from your  
25 private clients, there's not substantial



1 evidence. You're at least going to have to  
2 require cross-examination to be able to discern  
3 what was this -- how relevant is this report  
4 and how does it affect the bottom line.

5 For instance, the job numbers that  
6 ultimately became relevant did not include a 20  
7 to 30 percent reduction because the ALJ did not  
8 find that the -- the claimant couldn't lift  
9 above her -- his head or lift more than five  
10 pounds. It may be completely irrelevant, but  
11 we don't know that because it's not in the  
12 record. Although we suspect that it is  
13 relevant, we can't show that.

14 So there are all kinds of reasons.  
15 Now, going to Petitioner's position,  
16 Petitioner, from the cert petition to their  
17 opening brief -- now it's shifted a little in  
18 the reply brief -- have asked for a categorical  
19 rule. It's substantial evidence and you can  
20 rely upon it if there's no demand. But, if  
21 there is a demand and you fail to respond to  
22 it, for instance, because the ALJ says I'm not  
23 going to require it and it's in your office,  
24 which you'd have to travel to, then it's not  
25 substantial evidence.

1           That ignores what's in the evidence,  
2           as several questions pointed to. It's not a  
3           substantial evidence question. It's a  
4           procedural question. It's also not coherent  
5           because, if it's true, as Petitioner has argued  
6           --

7           JUSTICE GORSUCH: Well, but if it's  
8           the key -- if it's the key fact in dispute --  
9           and it really is in all these cases, right? I  
10          mean, that's why you have a vocational expert,  
11          is how many jobs are there going to be that  
12          this person can -- could do.

13          If it's the key thing in dispute, and  
14          the expert has said I -- I want to keep my  
15          evidence on which I'm relying secret, it's not,  
16          as in Justice Breyer's example, saying I'm  
17          basing it on my experience over 30 years in the  
18          industry, and then you could maybe ask about  
19          that, and you could have your own expert with  
20          30 years in the industry could opine on that.

21          And, in fact, the Federal Rules of  
22          Evidence, of course, treat that kind of expert  
23          very differently than an expert who relies on  
24          data, as this one did.

25          This one says, I've got secret data.

1 All right? And it's the key question in the  
2 case. Well, then why doesn't that create an  
3 inference that -- that there -- an adverse  
4 inference that that witness is hiding  
5 something? And why doesn't that undermine  
6 substantial evidence?

7 MR. YANG: There -- there -- there's  
8 two questions. The adverse inference line of  
9 doctrine concerns permissible inferences.  
10 Right? Whether you can --

11 JUSTICE GORSUCH: Yeah.

12 MR. YANG: -- permissibly infer.  
13 There's a second question --

14 JUSTICE GORSUCH: Why wouldn't that be  
15 a compelling inference? I understand it's an  
16 analogy, but we're not -- we're not --

17 MR. YANG: Well, but it's meaningful  
18 when you're talking about review of a jury  
19 verdict or review here under substantial  
20 evidence where you have to find no reasonable  
21 adjudicator would have gone -- concluded that.  
22 So it's a -- it's a very different inquiry.

23 Having bracketed that, I will admit  
24 there are some answers that can undermine a  
25 bottom line response.

1                   Now we can quibble about where -- you  
2 know, how far down that road you have to go to  
3 --

4                   JUSTICE GORSUCH: But you'd agree that  
5 -- okay. So we -- we have some common ground,  
6 that -- that an expert could say something or  
7 withhold something in -- in a way that -- on a  
8 key question that would be sufficient to  
9 undermine substantial evidence, would raise  
10 enough doubt about --

11                  MR. YANG: Certainly.

12                  JUSTICE GORSUCH: All right.

13                  MR. YANG: I think that's right. But,  
14 again, look at what we're talking about here.  
15 This is on pages 118 and 119. There's nothing  
16 like that in this case.

17                  JUSTICE BREYER: Would you object --

18                  MR. YANG: There's no follow-up.

19                  JUSTICE BREYER: Would you -- would  
20 you --

21                  MR. YANG: There was questioning but  
22 not on the relevant issues.

23                  JUSTICE BREYER: Would you object,  
24 because, obviously, there's some kind of a  
25 problem. I mean, that -- that's apparent from

1 a lot of the briefs and so forth.

2 And suppose if I were writing a  
3 concurrence or something I'd put in a paragraph  
4 which said, if there really is a problem here,  
5 it's not -- it may or may not be dealt with in  
6 Gross. I -- I -- I'm not sure. But why  
7 doesn't -- why don't you find a test case or  
8 suggest to the bar find a test case where you  
9 do probe and, indeed, it does turn out to be  
10 resting on nothing, and you either win or you  
11 would lose.

12 And if you lose, you appeal it. And  
13 if you win, you have a model of how to proceed  
14 for others in the future.

15 MR. YANG: I --

16 JUSTICE BREYER: I mean, is there  
17 anything wrong with doing that? Could that  
18 help solve the problem?

19 MR. YANG: I think it would depend on  
20 how that's written, but I would like to just  
21 focus on, if it is contested, significantly  
22 with cross-examination, which is not in this  
23 case --

24 JUSTICE BREYER: Uh-huh.

25 MR. YANG: -- then I would be very

1 hesitant, though, to require things like  
2 personal confidential files that's going to  
3 require significant delays in the process.

4 JUSTICE BREYER: No, you wouldn't have  
5 to do that. I mean, the fed, you know, gets a  
6 lot of information on the basis of surveys that  
7 they certainly don't want to reveal. And that  
8 -- that can happen in various agencies, though  
9 sometimes you might have to reveal it.

10 MR. YANG: Well, there -- there are  
11 cases -- there are cases, I think, that -- that  
12 highlight exactly what you're talking about,  
13 where there's cross-examination -- and we cite,  
14 again, at least one or two of these in our  
15 brief -- where the -- the -- the -- on review  
16 this, like, you know, their -- this  
17 cross-examination so undermined the basic  
18 predicate of -- or the basic testimony that it  
19 can no longer be substantial evidence. We're  
20 not quibbling with that.

21 What we're saying is that the  
22 categorical document-on-demand rule, which they  
23 -- which, frankly, is not a coherent view of  
24 substantial evidence, would be imposed on the  
25 agency.

1           And they mentioned the Seventh  
2           Circuit. The Seventh Circuit does not apply to  
3           this rule. The Seventh Circuit has never  
4           required information from personal files.  
5           There's two Seventh Circuit cases that are  
6           central: Donahue, it's dicta; McKinnie, there  
7           was cross-examination by counsel, and the  
8           answer about -- from the -- the vocational  
9           expert about how the vocational expert got the  
10          numbers was basically, well, it was based on my  
11          knowledge as a VE. And he followed up and  
12          there was still nothing substantial after that.

13                 And so, in that context, that's not a  
14          big problem. The two district court cases that  
15          Petitioners cite at page 40 of their brief and  
16          then in reply on 24, both involve  
17          cross-examination. Powell reversed on other  
18          grounds, didn't reverse on the question that  
19          we're talking here, and simply encouraged  
20          revisiting the issue on remand. And in  
21          Reynolds, there were multiple problems with the  
22          VE testimony that was revealed on  
23          cross-examination.

24                 There's no tradition in the Seventh  
25          Circuit or anywhere requiring this categorical

1 rule that this Court granted cert on. And it  
2 would substantially impair the operations of  
3 the social administration --

4 JUSTICE KAVANAUGH: How? How would it  
5 substantially impair?

6 MR. YANG: Remember, these cases are  
7 -- hearings are tightly packed. The volume of  
8 the cases is immense. People wait all --

9 JUSTICE KAVANAUGH: I don't understand  
10 that as how that's going to substantially  
11 impair.

12 MR. YANG: Oh, the -- the reason is  
13 because you're not going to be able to predict  
14 in advance what documents might be relevant  
15 beyond the high-level documents that we're  
16 talking about. And you would have to get them  
17 from your files.

18 And that's going to require  
19 continuances. And having a continuance in the  
20 situation where claimants are already waiting  
21 on average, a million people, think about this,  
22 a million people are waiting 605 days on  
23 average just to get a response to their hearing  
24 request --

25 JUSTICE GINSBURG: What -- what is --



1 what is the experience in the Seventh Circuit  
2 that -- that has --

3 MR. YANG: We don't have much  
4 meaningful experience in the Seventh Circuit  
5 because the Seventh Circuit hasn't adopted the  
6 rule that Petitioners purport to it. Now  
7 there's some dicta that suggests it in -- in  
8 the Donahue opinion, but the Court has since  
9 stepped back for a minute.

10 JUSTICE GORSUCH: How -- how is the  
11 government --

12 CHIEF JUSTICE ROBERTS: Is the  
13 requirement --

14 JUSTICE GORSUCH: Oh, sorry.

15 CHIEF JUSTICE ROBERTS: Is the new --  
16 are the new requirements in the handbook going  
17 to slow things up?

18 MR. YANG: No, because we don't  
19 understand that to mean bring all your personal  
20 files. We understand that to mean bring things  
21 that you're likely to be relying -- citing from  
22 the BLS or other -- DOT, these publicly  
23 available sources that you can provide those  
24 upon request.

25 JUSTICE GORSUCH: Is the government's

1 argument that its failure to provide timely  
2 hearings should be an excuse not to comply with  
3 other requirements?

4 MR. YANG: Not -- not at all. But I  
5 will say that there is a -- a significant  
6 undertone of fairness and due process here.  
7 And what the Court did in Perales, which I  
8 think is undisputably a due process case, is it  
9 applied, before Mathews versus Eldridge, but it  
10 applied the same basic framework as what the  
11 Court solidified in Mathews versus Eldridge.

12 And one of the things to consider is  
13 the cost of the additional process. The cost  
14 of the additional process here would be  
15 significant.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 MR. YANG: Thank you.

19 CHIEF JUSTICE ROBERTS: Five minutes,  
20 Mr. Bhabha.

21 REBUTTAL ARGUMENT OF ISHAN BHABHA  
22 ON BEHALF OF THE PETITIONERS

23 MR. BHABHA: Thank you, Mr. Chief  
24 Justice, and may it please the Court:

25 I'd just like to respond to three

1 things the government said.

2 First and foremost, the government's  
3 lawyer represented that the Vocational Expert's  
4 Handbook simply requires them to bring public  
5 information they might perhaps rely on.

6 I'm sorry, but if you look at page 3  
7 of the handbook, it explicitly says at all  
8 hearings you should be prepared to cite,  
9 explain, and furnish any sources that you rely  
10 on to support your testimony.

11 But what if --

12 JUSTICE KAGAN: Well, I think, Mr.  
13 Bhabha, you're right about that, but, instead,  
14 it's just, well, that's the best practices  
15 rule. But the best practices rule is not  
16 necessarily a legal requirement.

17 MR. BHABHA: I agree with you, Justice  
18 Kagan, but what I take from the government's  
19 own handbook is two things.

20 Firstly, their administrability  
21 arguments are inconsistent with the policy the  
22 Social Security Administration itself is  
23 telling vocational experts. And on the  
24 specific question of workability in the Seventh  
25 Circuit, I disagree with my friend from the

1 SG's office that this isn't the rule that's  
2 being applied.

3 There is binding Seventh Circuit case  
4 law. We cite cases where this has been the  
5 basis for reversal. And my understanding from  
6 practitioners in the Seventh Circuit is that  
7 this is applied and that when data is not  
8 handed over and the case gets appealed to the  
9 Appeals Council, in some situations, the Social  
10 Security Administration lawyers agree to a  
11 remand so the data can then be provided.

12 And it's not always provided --

13 JUSTICE KAVANAUGH: The agency hasn't  
14 been applying it in the Seventh Circuit, right?

15 MR. BHABHA: Not voluntarily, Justice  
16 Kavanaugh, that's totally right. They haven't  
17 issued an acquiescence ruling. But the way it  
18 works in practice is that, if this sort of a  
19 request is made and the specific data is not  
20 there, it is not uncommon for the record to be  
21 held open for 14 days and the data is then sent  
22 to the ALJ and to the claimant's  
23 representative. Hopefully, they look at the  
24 data and it substantiates the testimony and  
25 that ends the matter.

1           But if it doesn't, then there is the  
2 opportunity to submit a memorandum to the ALJ.

3           And I will also say specifically on  
4 the timing issue, nationally, there are 164  
5 hearing officers. The average amount of time  
6 to process a claim is 536 days. For the  
7 hearing officers within the Seventh Circuit,  
8 based on my calculation, which I did last week,  
9 and I don't imagine the number has changed  
10 significantly, it's 529 days. So it's actually  
11 quicker in the Seventh Circuit.

12           Now these are obviously large numbers,  
13 but the basic point is this procedure which has  
14 existed since 2002 has not been shown to slow  
15 down the process.

16           The other thing I'll say is that the  
17 government lawyer says, well, you don't know  
18 what particular questions are going to be asked  
19 at a hearing, so how do you know what sources  
20 to have?

21           But, if you don't know particular  
22 questions and you don't have the specific  
23 data-driven answers, you can't be answering the  
24 question in the first place. So, by  
25 definition, if they give an answer that there

1 are 3,000 nut sorter jobs or 6,000 bench  
2 assembler jobs, there must be a data-driven  
3 basis for that, which is exactly what the  
4 expert again here identified as her source, not  
5 her experience, but a labor market survey that  
6 she then refused to permit.

7 In sum, Your Honors, what Petitioner  
8 is asking for here is a reaffirmation of a  
9 basic rule of administrative procedure, which  
10 is that an agency cannot make a determination  
11 based upon testimony that is premised on secret  
12 data without ever giving that data to a  
13 requesting claimant.

14 That's all the more so in a case like  
15 this, where this was the sole basis upon which  
16 my client was denied benefits for the relevant  
17 time period. This rule has worked without  
18 disruption in the Seventh Circuit since 2002,  
19 and it is entirely consistent with the very  
20 policy the Social Security Administration  
21 recognizes as good practice for vocational  
22 experts.

23 JUSTICE GINSBURG: The government says  
24 you are asking for more than the Seventh  
25 Circuit position. Is that so?

1                   MR. BHABHA: That is not, Justice  
2                   Ginsburg. We are asking for exactly the same  
3                   rule which is, succinctly put, that when a  
4                   vocational expert testifies and the expert  
5                   identifies data sources that she has relied  
6                   upon, if you request those data sources and  
7                   they are not provided, the say so of the  
8                   vocational expert alone cannot constitute  
9                   substantial evidence of the other work  
10                  available to an applicant.

11                  For these reasons, Your Honors, we ask  
12                  the decision of the Sixth Circuit to be  
13                  reversed. Thank you.

14                  CHIEF JUSTICE ROBERTS: Thank you,  
15                  counsel. The case is submitted.

16                  (Whereupon, at 11:04 a.m., the case  
17                  was submitted.)

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## Official - Subject to Final Review

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