

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 70

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MICHAEL J. BIESTEK,)
Petitioner,)
v.) No. 17-1184
NANCY A. BERRYHILL, ACTING)
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. And when the expert
16 refuses upon request to provide those sources,
17 the expert's testimony, standing alone, cannot
18 constitute substantial evidence for three
19 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 when 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 & Light is an important precedent
2 in this respect because, there, the Court noted
3 that the testimony, the well-founded testimony
4 of an expert may be enough if firsthand
5 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 -- the judge intervenes and says no,
12 that's not required, why does that create doubt
13 about the validity of the expert's testimony?
14 The expert hasn't refused to produce that
15 evidence. It's been the intervention by the
16 ALJ.

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

23 And I would note that the government
24 doesn't defend in this Court the
25 confidentiality rationale. And I think the

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

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

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

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

25 MR. BHABHA: Your -- I understand your

1 point, Your Honor --

2 JUSTICE BREYER: Okay.

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

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

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

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

1 the hundreds up to 480,000.

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

10 JUSTICE BREYER: But what you're
11 telling me is that the expert should -- they
12 should have gone into it in this case because
13 it was really rotten. You have a pretty good
14 bar, and you would think that the bar there
15 would find a case -- maybe it's yours -- and go
16 to the court of appeals and say: Look, you
17 should have looked into this one. And then,
18 when they look into that one, if they disagree
19 with you, you would have said just what you're
20 saying now.

21 What I don't understand, you see --
22 and you might have won. And maybe you should
23 win. What I don't understand is having an
24 absolute rule that every expert who's
25 vocational, regardless of what he relied on or

1 how much trouble it would be, would have to,
2 without cross-examination or a strong basis in
3 the law, or in the -- in the facts of the case,
4 why he'd have to produce all this stuff. Maybe
5 it is confidential. Maybe sometimes he should.
6 Maybe sometimes he shouldn't.

7 You see, that's my problem.

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

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

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

18 JUSTICE SOTOMAYOR: That was after --

19 JUSTICE KAGAN: Well, there --

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

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

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

1 Can I go back to Justice Breyer's
2 initial question, and perhaps Justice Alito's.
3 You say very explicitly in your reply brief
4 you're not asking for an absolute rule that an
5 -- that an expert must, before testifying,
6 produce these materials. You make an exception
7 for when it's asked for.

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

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

22 Is that what you're trying --

23 MR. BHABHA: Not --

24 JUSTICE SOTOMAYOR: -- to get us to --

25 MR. BHABHA: -- not exactly, Justice

1 Sotomayor, if I can be very clear on the rule
2 that the Seventh Circuit has held and that we
3 are arguing for in this Court.

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

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

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

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

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

1 How many people did you do research on
2 with respect to this issue?

3 I contacted about 15 businesses.

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

7 Yes, a hundred of them.

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

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

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

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

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

24 JUSTICE SOTOMAYOR: All right, the
25 potential extremes we have. But no one asked

1 any of those questions below for us to make a
2 judgment about whether the ALJ's ruling was
3 reasonable or not.

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

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

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

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

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

1 critical is that's at least in the hundreds,
2 and likely in the thousands.

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

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

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

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

1 that's necessary in your particular case?

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

4 I think initially I will just say as a
5 factual matter, and I think the record bears
6 this out, as soon as my client's or claimant's
7 representative asked for the surveys, the ALJ
8 made clear she wasn't going to give them. So I
9 don't think there was any opportunity even to
10 proffer reasons.

11 But even beyond that, Your Honor, it
12 is the government's burden at this stage. And
13 given the nature of this type of statistical
14 testimony, even at cross-examination, when, as
15 in our case, an expert says I relied on public
16 data and I relied on private data, it is hard
17 for me to conceive of what kind of a meaningful
18 cross you could do of the private data. The
19 expert then provides her answers about this is
20 what the data said, this is what I did to the
21 data, but there's no way of verifying any of
22 those kind of answers.

23 CHIEF JUSTICE ROBERTS: Well, one way
24 -- one way to be -- to look at the publicly
25 available data, right, and there was no

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

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

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

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

1 codes, which is what the AL -- the VE is
2 required to identify.

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

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

24 CHIEF JUSTICE ROBERTS: Well, that's a
25 good -- it strikes me that that's a good

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

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

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

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

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

1 in order to meaningfully challenge the
2 conclusions of the expert.

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

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

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

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

1 types of surgeries that were conducted, and the
2 results after surgery.

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

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

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

1 In a situation like this, where you're
2 talking about specific numbers that the agency
3 is relying on as the sole basis to deny my
4 client benefits for the applicable period,
5 there, I think, when the expert points to data
6 sources that she has modified in order to come
7 up with these numbers, there, substantial
8 evidence requires more.

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

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

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

1 MR. BHABHA: Your Honor, certainly, we
2 would win if the -- if the rule was that
3 vocational experts have to give over their
4 testimony regardless of a request or not, we
5 would win.

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

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

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

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

21 And I think that is where the question
22 and the answer play into the test. And I think
23 that's the rationale of the Seventh Circuit.
24 They haven't elucidated it exactly in those
25 terms, but that is what I take those decisions

1 to say, which is that, when the testimony is
2 given alone, if it's not challenged, then maybe
3 it's enough. But, when you ask a witness what
4 is your data and the witness doesn't give it
5 over -- and, again, the government isn't
6 defending here the confidentiality rationale --
7 that does create doubt.

8 And I think the adverse inference
9 cases show that intuition in the law.

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

15 MR. BHABHA: Well, Your Honor, I
16 think --

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

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

1 correct here because you cannot waive the
2 substantial evidence standard. That is a
3 reviewing standard that the court must apply in
4 any circumstance.

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

22 And that is why, particularly in a
23 context such as this when you have multiple
24 outdated data sources which vocational experts
25 have to bring together, when vocational experts

1 come up with numbers that vary enormously for
2 the same jobs, and all the more so when this is
3 the sole basis upon which disability benefits
4 applicants are being denied, I think more than
5 just the conclusory statements of the expert
6 are what is required.

7 And again --

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

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

21 And I think the reason, again,
22 particularly in this context of vocational
23 experts, why this data is so important and why
24 the failure to provide it is so practically
25 harmful, in addition, we think, to being in

1 conflict with the substantial evidence
2 standard, is because these experts are bringing
3 together very old definitions of jobs with
4 entirely different taxonomy of job numbers,
5 putting the numbers together and coming up with
6 a result, and then, in certain circumstances,
7 reducing that result further based on further
8 hypotheticals posed by the ALJ.

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

18 Mr. Chief Justice, if I may reserve
19 the remainder of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Yang.

23 ORAL ARGUMENT OF ANTHONY A. YANG
24 ON BEHALF OF THE RESPONDENT

25 MR. YANG: Mr. Chief Justice, and may

1 it please the Court:

2 I'd like to address two general
3 subjects: First, how Social Security hearings
4 work and how vocational experts decide whether
5 there are significant numbers of relevant jobs
6 in the national economy. Excuse me.

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

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

22 The question then here --

23 JUSTICE SOTOMAYOR: Then doesn't that
24 solve this case? Because your agency now has
25 in its handbook that every expert has to come

1 prepared to cite the sources that they relied
2 upon and to produce the materials. So, if
3 they've made that judgment, why shouldn't we
4 make the same judgment, that a failure to do so
5 goes to the heart of the expert's
6 unreliability?

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

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

16 JUSTICE SOTOMAYOR: Do you want to
17 show me where in the handbook --

18 MR. YANG: I think --

19 JUSTICE SOTOMAYOR: -- that's said so
20 I know -- so I can follow you?

21 MR. YANG: The citation --

22 JUSTICE SOTOMAYOR: The source.

23 MR. YANG: -- is in -- in our brief in
24 opp. At page 9, we discuss it, and then on
25 page 18. I don't have the handbook in front of

1 me, unfortunately. The language that the
2 handbook says is cite, explain, and furnish any
3 sources you rely on to support your testimony.
4 But the reason we think this is talking about
5 resource -- vocational resource materials is
6 because an expert just doesn't know the
7 questions and -- and the granularity of the
8 questions that the expert's going to rely -- be
9 asked.

10 So, for example, there's two stages of
11 questioning --

12 JUSTICE SOTOMAYOR: So they are
13 picking numbers from the air?

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

19 JUSTICE SOTOMAYOR: Aren't they given
20 the -- the file before they come to testify --

21 MR. YANG: No.

22 JUSTICE SOTOMAYOR: -- on the
23 individual claimant?

24 MR. YANG: No. They are given the
25 relevant vocational background but know nothing

1 about the disabilities of these claimants. In
2 fact, ALJs are prohibited from communicating
3 with vocational experts prior to the hearing
4 because vocational experts are intended to be
5 impartial experts brought by an impartial
6 agency to adjudicate a case.

7 There are then --

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

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

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

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

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

1 Then the expert relies on public
2 sources, statistical sources like the BLS that
3 provide numbers in the national and local
4 economies.

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

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

22 And in this case, at page 10, for
23 instance, of the reply brief, Petitioner
24 acknowledges that the testimony of the
25 vocational expert -- that if her numbers would

1 be reduced by about 20 to 30 percent, if the
2 Petitioner could not lift above his head or
3 lift more than five pounds, that's the second
4 level of inquiry.

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

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

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

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

23 And so she says she gets it from her
24 experience doing job analyses. A few lines
25 down: Can you provide the job analyses? The

1 expert says, I cannot. It doesn't say that.
2 She just says -- observes those would be part
3 of people's, that is, individuals', private
4 confidential files.

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

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

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

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

24 JUSTICE KAGAN: Well, without the
25 data, how is somebody to cross-examine her on

1 that and how is the ALJ to verify that
2 conclusion?

3 MR. YANG: Well, you cross-examine by
4 simply asking basic questions. Well, when you
5 say doing job analyses, what does that mean?
6 Where are you getting this information? When
7 you talk about your confidential files, what is
8 the information in the confidential file?
9 Where do you develop that information?

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

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

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

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

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

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

1 has this specific type of -- of depression that
2 requires X, Y, and Z.

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

9 So the only --

10 JUSTICE SOTOMAYOR: Mr. Yang --

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

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

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

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

24 MR. YANG: Well, the non-guidance --
25 the non-binding guidance is written for

1 non-lawyers. It's not intended to be a
2 statute. And I think it has --

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

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

9 JUSTICE GORSUCH: Can I ask a --

10 JUSTICE ALITO: Well --

11 JUSTICE GORSUCH: -- different --

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

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

25 Why isn't the same true here?

1 MR. YANG: If that were all that's
2 standing alone, that may well be true.

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

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

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

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

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

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

22 JUSTICE GORSUCH: Fine.

23 MR. YANG: The adjudicator --

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

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

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

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

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

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

14 JUSTICE GORSUCH: Not a process
15 problem.

16 MR. YANG: -- to contest it.

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

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

1 expert, I think that's a tough -- a tough call,
2 because --

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

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

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

25 Now is that reversible error?

1 MR. YANG: No.

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

5 MR. YANG: The --

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

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

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

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

1 person would not have relied upon that. That's
2 -- that's a different --

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

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

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

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

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

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

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

1 in court litigation. It happens here.

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

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

9 MR. YANG: The --

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

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

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

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

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

24 JUSTICE SOTOMAYOR: Does it matter
25 who --

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

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

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

10 MR. YANG: Right, but just --

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

15 MR. YANG: The question --

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

18 MR. YANG: The question --

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

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

1 because the substantial evidence depends on --

2 JUSTICE SOTOMAYOR: No.

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

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

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

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

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

24 JUSTICE SOTOMAYOR: And he said
25 because --

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

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

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

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

25 So we're talking about numbers. The

1 testimony at 360,000, and you got to get it so
2 far -- it's got to be so off that it can't even
3 be ball-parked to 6,000. And so it doesn't
4 matter whether the job number is 100,000 or 250
5 or 360, since all of it is far beyond what
6 would matter. And, remember, this individual
7 --

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

14 (Laughter.)

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

17 MR. YANG: Right.

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

22 MR. YANG: I totally understand.

23 JUSTICE KAGAN: -- when somebody --

24 MR. YANG: Yes.

25 JUSTICE KAGAN: -- says one of these

1 numbers?

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

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

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

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

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

1 of them. You're asked initially to provide an
2 illustrative DOT number.

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

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

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

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

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

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

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

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

11 MR. YANG: Well, no, this is -- I'll
12 give you a few questions I think would have
13 clarified this case considerably.

14 The -- with respect to the job
15 numbers, the -- the expert testified that she
16 relied on BLS numbers. Now, remember, BLS
17 provides both national and regional numbers for
18 various types of jobs. And she additionally
19 relied on her individual market surveys.

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

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

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

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

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

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

24 So there are all kinds of
25 cross-examination questions that would have

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

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

10 MR. YANG: It's their --

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

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

23 But that doesn't mean that the
24 claimant can simply say, well, I want a report,
25 and if you don't provide a report from your

1 private clients, there's not substantial
2 evidence. You're at least going to have to
3 require cross-examination to be able to discern
4 what was this -- how relevant is this report
5 and how does it affect the bottom line.

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

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

1 substantial evidence.

2 That ignores what's in the evidence,
3 as several questions pointed to. It's not a
4 substantial evidence question. It's a
5 procedural question. It's also not coherent
6 because, if it's true, as Petitioner has argued
7 --

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

14 If it's the key thing in dispute, and
15 the expert has said I -- I want to keep my
16 evidence on which I'm relying secret, it's not,
17 as in Justice Breyer's example, saying I'm
18 basing it on my experience over 30 years in the
19 industry, and then you could maybe ask about
20 that, and you could have your own expert with
21 30 years in the industry could opine on that.

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

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

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

12 JUSTICE GORSUCH: Yeah.

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

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

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

24 Having bracketed that, I will admit
25 there are some answers that can undermine a

1 bottom line response.

2 Now we can quibble about where -- you
3 know, how far down that road you have to go to
4 --

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

12 MR. YANG: Certainly.

13 JUSTICE GORSUCH: All right.

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

18 JUSTICE BREYER: Would you object --

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

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

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

24 JUSTICE BREYER: Would you object,
25 because, obviously, there's some kind of a

1 problem. I mean, that -- that's apparent from
2 a lot of the briefs and so forth.

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

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

25 And they mentioned the Seventh

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

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

23 There's no tradition in the Seventh
24 Circuit or anywhere requiring this categorical
25 rule that this Court granted cert on. And it

1 would substantially impair the operations of
2 the social administration --

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

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

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

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

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

24 JUSTICE GINSBURG: What -- what is --
25 what is the experience in the Seventh Circuit

1 that -- that has --

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

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

11 CHIEF JUSTICE ROBERTS: Is the
12 requirement --

13 JUSTICE GORSUCH: Oh, sorry.

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

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

24 JUSTICE GORSUCH: Is the government's
25 argument that its failure to provide timely

1 hearings should be an excuse not to comply with
2 other requirements?

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. YANG: Thank you.

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

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

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

24 I'd just like to respond to three
25 things the government said.

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

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

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

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

19 Firstly, their administrability
20 arguments are inconsistent with the policy the
21 Social Security Administration itself is
22 telling vocational experts. And on the
23 specific question of workability in the Seventh
24 Circuit, I disagree with my friend from the
25 SG's office that this isn't the rule that's

1 being applied.

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

11 And it's not always provided --

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

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

25 But if it doesn't, then there is the

1 opportunity to submit a memorandum to the ALJ.

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

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

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

20 But, if you don't know particular
21 questions and you don't have the specific
22 data-driven answers, you can't be answering the
23 question in the first place. So, by
24 definition, if they give an answer that there
25 are 3,000 nut sorter jobs or 6,000 bench

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

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

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

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

25 MR. BHABHA: That is not, Justice

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

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

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

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

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