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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: 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 question
21 -- in 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 sort --

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

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

17 JUSTICE KAGAN: Unless the -- the
18 demand part of the test is something about have
19 you 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 -- may
19 reserve 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 --

15 JUSTICE SOTOMAYOR: All right.

16 MR. YANG: -- from the air. I'd say
17 from experience, which can be educated by the
18 jobs that they do for individual disability
19 clients. If I can explain, there's basically
20 two levels.

21 JUSTICE SOTOMAYOR: Aren't they given
22 the -- the file before they come to testify --

23 MR. YANG: No.

24 JUSTICE SOTOMAYOR: -- on the
25 individual claimant?

1 MR. YANG: No. They are given the
2 relevant vocational background but know nothing
3 about the disabilities of these claimants. In
4 fact, ALJs are prohibited from communicating
5 with vocational experts prior to the hearing
6 because vocational experts are intended to be
7 impartial experts brought by an impartial
8 agency to adjudicate a case.

9 There are then --

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

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

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

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

20 There -- at the first level of
21 inquiry, the vocational expert is determining a
22 category of jobs based on generally things in
23 -- in the Dictionary of Occupational Titles
24 that discuss exertional limitations and such
25 for those jobs. So, for instance, sedentary

1 jobs that do not require any kind of advanced
2 or -- education, unskilled jobs.

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

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

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

24 And in this case, at page 10, for
25 instance, of the reply brief, Petitioner

1 acknowledges that the testimony of the
2 vocational expert -- that if her numbers would
3 be reduced by about 20 to 30 percent, if the
4 Petitioner could not lift above his head or
5 lift more than five pounds, that's the second
6 level of inquiry.

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

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

16 What is your own independent research?
17 I can't tell you because that would -- that's
18 part of client files.

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

1 And so she says she gets it from her
2 experience doing job analyses. A few lines
3 down: Can you provide the job analyses? The
4 expert says, I cannot. It doesn't say that.
5 She just says -- observes those would be part
6 of people's, that is, individuals', private
7 confidential files.

8 Now, remember, this expert, her resume
9 is in the record and she was certified as a --
10 a vocational expert.

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

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

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

1 that you find --

2 JUSTICE KAGAN: Well, without the
3 data, how is somebody to cross-examine her on
4 that and how is the ALJ to verify that
5 conclusion?

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

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

23 But, here, there was no
24 cross-examination. The judge intervenes. The
25 judge says: I'm not going to require that. If

1 it's an individual -- confidential files of
2 individual people, I'm not going to require it.
3 It's not -- there's no adverse inference.

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

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

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

24 MR. YANG: I -- I -- that is probably
25 an exact quote. But what I will say is that

1 there's no way -- a vocational expert cannot
2 know they're going to ask can you lift five
3 pounds, can you lift seven pounds. This person
4 has this specific type of -- of depression that
5 requires X, Y, and Z.

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

12 So the only --

13 JUSTICE SOTOMAYOR: Mr. Yang --

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

21 JUSTICE GORSUCH: So -- so "any"
22 doesn't mean any?

23 MR. YANG: Like some agency
24 pronouncements, they're not --

25 JUSTICE GORSUCH: We -- we shouldn't

1 defer to the agency's handbook on "any" in this
2 case?

3 MR. YANG: Well, the non-guidance --
4 the non-binding guidance is written for
5 non-lawyers. It's not intended to be a
6 statute. And I think it has --

7 JUSTICE GORSUCH: It's written for the
8 -- for the experts, right?

9 MR. YANG: It's written for the
10 experts. But, again, if you're a vocational
11 expert and you know how the game is played, you
12 know how this -- this -- this proceeds --

13 JUSTICE GORSUCH: Can I ask a --

14 JUSTICE ALITO: Well --

15 JUSTICE GORSUCH: -- different --

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

18 JUSTICE GORSUCH: -- just a slightly
19 different line of questioning. If we were in
20 federal district court -- and I know we're not,
21 and forget about the Rules of Evidence -- but
22 if -- if on the key issue in the case the
23 evidence depended upon the testimony of an
24 expert, and the expert said, ah, I'm not going
25 to give you my underlying data, it's secret, I

1 don't think we would hesitate to find that no
2 rational jury could sustain a verdict in favor
3 of the party propounding that expert.

4 Why isn't the same true here?

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

7 JUSTICE GORSUCH: Okay. So you admit
8 the principle --

9 MR. YANG: But -- but I wouldn't -- I
10 wouldn't --

11 JUSTICE GORSUCH: -- so -- so can we
12 just be --

13 MR. YANG: -- I wouldn't concede that,
14 though, because --

15 JUSTICE GORSUCH: Well, we --

16 MR. YANG: -- it depends on the entire
17 record. And there --

18 JUSTICE GORSUCH: Yeah, sure it does.
19 But I -- I -- my hypothetical is that that's
20 the key point, and on that key point, the only
21 major piece of evidence is an expert who says I
22 have secret data. You'd agree that we would
23 reverse?

24 MR. YANG: Likely reverse. However --
25 however, I would like to point out some key

1 differences. There's factual differences,
2 which is, one, this expert's not refusing.
3 There's a ruling by the adjudicator.

4 JUSTICE GORSUCH: Fine.

5 MR. YANG: The adjudicator --

6 JUSTICE GORSUCH: Fine. You can
7 modify my hypothetical.

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

9 JUSTICE GORSUCH: That doesn't make
10 any difference, does it?

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

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

16 MR. YANG: Actually, I'm not sure
17 that's right. This Court has held that, for
18 instance, there's no -- no process problem with
19 admitting allegedly totally unreliable evidence
20 so long as you have the ability to --

21 JUSTICE GORSUCH: Not a process
22 problem.

23 MR. YANG: -- to contest it.

24 JUSTICE GORSUCH: Not a process
25 problem. Sufficient evidence for a rational

1 jury to reach a conclusion.

2 MR. YANG: But, if this -- if this is
3 a qualified expert, there's no contest on the
4 qualifications, the expert testifies to a fact,
5 now there may be additional things that
6 undermine that, but there's otherwise no other
7 evidence, no evidence that contradicts the
8 expert, I think that's a tough -- a tough call,
9 because --

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

23 Okay? And that's all there is. And
24 if that's all there is, does that expert -- or
25 the house painter says the same thing about a

1 -- about a rotten board. A rotten board in my
2 experience means termites if it's like this but
3 not if it leads that.

4 And -- and I've talked to many doctors
5 or many house painters, and I've seen a lot
6 myself, and that's my experience.

7 Now is that reversible error?

8 MR. YANG: No.

9 JUSTICE BREYER: Well, then why would
10 it be reversible error here if the vocational
11 expert says exactly the same thing?

12 MR. YANG: The --

13 JUSTICE BREYER: You're going to say
14 it isn't. Okay.

15 MR. YANG: The -- no, the one thing
16 that I'm holding out is -- is this standard
17 looks to the whole record, and there are things
18 that could -- evidence that can be admitted
19 into the record that can undermine the bottom
20 line conclusion.

21 So if, for instance -- and there are
22 cases like this -- the vocational expert gives
23 a bottom line number and then there's
24 cross-examination and this -- the vocational
25 expert cannot answer in any credible way how

1 the expert came about doing this.

2 Well, you know, I'm a vocational
3 expert. Well, that doesn't make any sense.
4 We're asking you how. And you probe and you
5 probe, and it ends up under -- so undermining
6 that testimony that the record evidence shows
7 that not a reasonable person -- a reasonable
8 person would not have relied upon that. That's
9 -- that's a different --

10 CHIEF JUSTICE ROBERTS: Well, but no
11 matter how --

12 JUSTICE SOTOMAYOR: Mr. Yang, it's
13 really -- I'm sorry.

14 CHIEF JUSTICE ROBERTS: -- no matter
15 how much of an expert a person is, what you've
16 basically said is -- is trust me. I've -- I've
17 done this for a while and I think -- and it's
18 not just trust me, I think, in general. Trust
19 me, I think, it's 20, you know, 20 percent.

20 It does have a sense of being pulled
21 out of -- pulled out of the air.

22 MR. YANG: There -- there are two
23 points that I think are important.

24 One, there are many issues in a Social
25 Security hearing, just like in other cases.

1 This is one of them. And oftentimes issues are
2 not contested, and when they're not contested,
3 you don't have to develop much of a record on
4 it.

5 The reason is you would -- if you had
6 to develop a record on uncontested things, it
7 would be an unmanageable process. It happens
8 in court litigation. It happens here.

9 Secondly, what we're talking about is
10 the question of --

11 JUSTICE GINSBURG: But there was --
12 here, there was -- you said it was -- the
13 expert didn't say no, but the expert -- the
14 question to the expert was: Can you provide
15 those surveys? No, they're confidential.

16 MR. YANG: The -- the --

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

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

22 "Answer: They would be part of
23 people's confidential files."

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

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

6 JUSTICE SOTOMAYOR: Does it matter
7 who --

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

9 JUSTICE SOTOMAYOR: Mr. Yang, you seem
10 to, in answering Justice Gorsuch, believe that
11 because the ALJ was the one who said, I'm not
12 going to order that, that that somehow elevates
13 the prior answer into being reliable?

14 I mean, no expert is the judge in a
15 case, correct? The judge has to accept the
16 testimony.

17 MR. YANG: Right, but just --

18 JUSTICE SOTOMAYOR: All right? So how
19 can an ALJ accept testimony for which it's
20 blocked an answer about how the expert came to
21 their conclusion?

22 MR. YANG: The -- the question --

23 JUSTICE SOTOMAYOR: That -- that's his
24 basic argument --

25 MR. YANG: The question --

1 JUSTICE SOTOMAYOR: -- which is this
2 testimony is unreliable --

3 MR. YANG: I --

4 JUSTICE SOTOMAYOR: -- because I was
5 blocked from being able to show a basis --

6 MR. YANG: I -- I understand that
7 process argument. My point is, and I think as
8 we've explored already, that that's a process
9 argument, not a substantial evidence argument,
10 because the substantial evidence depends on --

11 JUSTICE SOTOMAYOR: No.

12 MR. YANG: -- what actually comes into
13 evidence.

14 JUSTICE SOTOMAYOR: I could get on the
15 stand and say anything I want. And if the ALJ
16 stops the other side from giving the bases for
17 that, the record is devoid of a basis for that
18 answer, and it's unreliable for that reason.
19 That, I think, is the core of their argument.

20 MR. YANG: But, here, the ALJ, which
21 is an impartial ALJ -- or, excuse me, an
22 impartial expert, who's been -- whose
23 qualifications are determined and not objected
24 to, there's no reason to think that she's --

25 JUSTICE SOTOMAYOR: Well, that's --

1 that's fascinating because there was a whole
2 exchange at the beginning of this hearing where
3 the ALJ asked the attorney to stipulate to the
4 expertise of the expert, and the attorney
5 refused to do so.

6 MR. YANG: Because the attorney
7 thought --

8 JUSTICE SOTOMAYOR: And he said
9 because --

10 MR. YANG: They thought that that
11 meant they could not dispute anything the
12 expert said, which the judge says no, no, no,
13 and the attorney then clarifies, well, I don't
14 object to the testimony then. So -- so there's
15 a very different --

16 JUSTICE SOTOMAYOR: But not to the
17 expertise and certainly not to the fact that
18 the expertise matches the disabilities at issue
19 in this case.

20 MR. YANG: Well, let -- let me step
21 back a second, and I think this might help a
22 little.

23 There's a great -- good reason why
24 counsel doesn't probe numbers like this. There
25 -- the numbers, the testimony here, were based

1 on two categories of jobs that totaled about
2 360,000 jobs in the national economy. The
3 Sixth Circuit -- there's no magic number about
4 what constitutes the standard of a significant
5 number of jobs, but the Sixth Circuit, which is
6 the governing circuit here, has held,
7 consistent with other courts, that 6,000 is
8 enough.

9 So we're talking about numbers. The
10 testimony at 360,000, and you got to get it so
11 far -- it's got to be so off that it can't even
12 be ball-parked to 6,000. And so it doesn't
13 matter whether the job number is 100,000 or 250
14 or 360, since all of it is far beyond what
15 would matter. And, remember, this individual
16 --

17 JUSTICE KAGAN: Well, why is there,
18 Mr. Yang, such variance in the numbers that
19 these experts give? I mean, Mr. Bhabha says
20 that when talking about nut sorters -- and I
21 guess I want to know why everybody talks about
22 nut sorters too.

23 (Laughter.)

24 JUSTICE KAGAN: But it varies from 260
25 to 470,000.

1 MR. YANG: Right.

2 JUSTICE KAGAN: And that's a huge
3 variance, and it makes you think where is that
4 coming from and what are to -- what are we to
5 do --

6 MR. YANG: I totally understand.

7 JUSTICE KAGAN: -- when somebody --

8 MR. YANG: Yes.

9 JUSTICE KAGAN: -- says one of these
10 numbers?

11 MR. YANG: I totally understand your
12 point. I've got two basic responses.

13 Petitioner had their own expert that
14 made very specific objections to the expert
15 testimony presented. They did not contest the
16 job numbers, and I think for good reason.

17 Now the -- the -- what Petitioner
18 cites to is a amicus brief that provides for a
19 list of -- of various numbers, right? Now, if
20 you look at the cases that are cited, at the
21 stage 1 of the analysis for the -- the
22 vocational expert estimates, they have to do a
23 few things, one of which is you have to
24 determine the category of jobs.

25 Now, in this case, the category was

1 sorter. These are sedentary positions, but
2 that encompasses a whole number of jobs that
3 were defined in the Dictionary of Occupational
4 Titles.

5 Now different vocational experts are
6 going to focus on different sets. So some of
7 them may have a broader set of sorters; some of
8 them have a lesser set. And you don't list,
9 unless it's -- unless it's cross-examine, all
10 of them. You're asked initially to provide an
11 illustrative DOT number.

12 The DOT number provided in this case
13 is nut sorter. If you look it up, it's an
14 agricultural nut sorter. We are not suggesting
15 that there are 125 agricultural nut sorter --
16 125,000 agricultural nut sorters in the
17 country. It's illustrative of the type of
18 sorter positions, sedentary sorter positions.

19 So, when you look at these cases, what
20 you find are the courts simply saying there are
21 so many either -- in one case, it's
22 agricultural sorter; in one case, there was
23 sorter; another case was sorter. But you --

24 JUSTICE KAGAN: So you're saying
25 they're all ask -- answering different

1 questions?

2 MR. YANG: Different questions. You
3 cannot tell from this. And the right way to
4 examine that is to cross-examine it.
5 Cross-examination, as the Court has -- has
6 explained, is the time-tested way of discerning
7 truth and -- and -- and accuracy in testimony.

8 And there's no reason to -- to exclude
9 that here when --

10 CHIEF JUSTICE ROBERTS: Well, you
11 usually -- when you're having someone testify
12 to data and numbers, the way you cross-examine
13 is to ask what she relied on and then see if
14 that testimony lines up.

15 MR. YANG: Yes. And so, for
16 instance --

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

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

23 The -- with respect to the job
24 numbers, the -- the expert testified that she
25 relied on BLS numbers. Now, remember, BLS

1 provides both national and regional numbers for
2 various types of jobs. And she additionally
3 relied on her individual market surveys.

4 And -- but, remember, in this context,
5 she is an -- a expert who helps individuals
6 find jobs. So her labor market surveys, one
7 would assume, are for individuals finding jobs.

8 CHIEF JUSTICE ROBERTS: Well, they can
9 redact the names, right?

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

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

24 MR. YANG: Well, then you can probe
25 further. You can say, well, how did you --

1 like, what is the basis? How many people are
2 we talking about? How far did you -- you
3 survey out?

4 All of these are things that go to the
5 weight. But, again, to find no substantial
6 evidence, you'd have to find that no rational
7 decisionmaker could have relied upon that.

8 So there are all kinds of
9 cross-examination questions that would have
10 clarified this. And all we're saying -- and
11 we're not saying that when you cross-examine an
12 expert, if for some reason this impartial
13 expert who's already been certified as an
14 expert, can't -- can't respond --

15 JUSTICE SOTOMAYOR: Doesn't that shift
16 the burden? Isn't it your burden to prove that
17 those jobs exist? Why is it their burden to
18 show the basis for your expert's opinion?

19 MR. YANG: It's their --

20 JUSTICE SOTOMAYOR: It's me getting up
21 there and just saying this is the number,
22 believe me.

23 MR. YANG: This is a public right, and
24 claimants bear the burden of proving
25 disability. The way the Social Security

1 Administration has administered the process is
2 it has relieved them of the burden of
3 production with respect to the step 5 inquiry
4 by providing a vocational expert such that the
5 vocational expert provides something that the
6 claimant can respond to.

7 But that doesn't mean that the
8 claimant can simply say, well, I want a report,
9 and if you don't provide a report from your
10 private clients, there's not substantial
11 evidence. You're at least going to have to
12 require cross-examination to be able to discern
13 what was this -- how relevant is this report
14 and how does it affect the bottom line.

15 For instance, the job numbers that
16 ultimately became relevant did not include a 20
17 to 30 percent reduction because the ALJ did not
18 find that the -- the claimant couldn't lift
19 above her -- his head or lift more than five
20 pounds. It may be completely irrelevant, but
21 we don't know that because it's not in the
22 record. Although we suspect that it is
23 relevant, we can't show that.

24 So there are all kinds of reasons.
25 Now, going to Petitioner's position,

1 Petitioner, from the cert petition to their
2 opening brief -- now it shifted a little bit in
3 the reply brief -- have asked for a categorical
4 rule. It's substantial evidence and you can
5 rely upon it if there's no demand. But, if
6 there is a demand and you fail to respond to
7 it, for instance, because the ALJ says I'm not
8 going to require it and it's in your office,
9 which you'd have to travel to, then it's not
10 substantial evidence.

11 That ignores what's in the evidence,
12 as several questions pointed to. It's not a
13 substantial evidence question. It's a
14 procedural question. It's also not coherent
15 because, if it's true, as Petitioner has argued
16 --

17 JUSTICE GORSUCH: Well, but if it's
18 the key -- if it's the key fact in dispute --
19 and it really is in all these cases, right? I
20 mean, that's why you have a vocational expert,
21 is how many jobs are there going to be that
22 this person could -- could do.

23 If it's the key thing in dispute, and
24 the expert has said I -- I want to keep my
25 evidence on which I'm relying secret, it's not,

1 as in Justice Breyer's example, saying I'm
2 basing it on my experience over 30 years in the
3 industry, and then you could maybe ask about
4 that, and you could have your own expert with
5 30 years in the industry could opine on that.

6 And, in fact, the Federal Rules of
7 Evidence, of course, treat that kind of expert
8 very differently than an expert who relies on
9 data, as this one did.

10 This one says, I've got secret data.
11 All right? And it's the key question in the
12 case. Well, then why doesn't that create an
13 inference that -- that there -- an adverse
14 inference that that witness is hiding
15 something? And why doesn't that undermine
16 substantial evidence?

17 MR. YANG: There -- there -- there's
18 two questions. The adverse inference line of
19 doctrine concerns permissible inferences.
20 Right? Whether you can --

21 JUSTICE GORSUCH: Yeah.

22 MR. YANG: -- permissibly infer.
23 There's a second --

24 JUSTICE GORSUCH: Why wouldn't that be
25 a compelling inference? I understand it's an

1 analogy, but we're not -- we're not --

2 MR. YANG: Well, but it's meaningful
3 when you're talking about review of a jury
4 verdict or review here under substantial
5 evidence where you have to find no reasonable
6 adjudicator would have gone -- concluded that.
7 So it's a -- it's a very different inquiry.

8 Having bracketed that, I will admit
9 there are some answers that can undermine a
10 bottom line response.

11 Now we can quibble about where -- you
12 know, how far down that road you have to go to
13 --

14 JUSTICE GORSUCH: But you'd agree that
15 -- okay. So we -- we have some common ground,
16 that -- that an expert could say something or
17 withhold something in -- in a way that -- on a
18 -- on a key question that would be sufficient
19 to undermine substantial evidence, would raise
20 enough doubt about --

21 MR. YANG: Certainly.

22 JUSTICE GORSUCH: All right.

23 MR. YANG: I think that's right. But,
24 again, look at what we're talking about here.
25 This is on pages 118 and 119. There's nothing

1 like that in this case.

2 JUSTICE BREYER: Would you object --

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

4 JUSTICE BREYER: Would you -- you --
5 would you --

6 MR. YANG: There was questioning but
7 not on the relevant issues.

8 JUSTICE BREYER: Would you object,
9 because, obviously, there's some kind of a
10 problem. I mean, that -- that's apparent from
11 a lot of the briefs and so forth.

12 And suppose if I were writing a
13 concurrence or something I put in a paragraph
14 which said, if there really is a problem here,
15 it's not -- it may or may not be dealt with in
16 Gross. I -- I -- I'm not sure. But why
17 doesn't they -- why don't you find a test case
18 or suggest to the bar find a test case where
19 you do probe, and, indeed, it does turn out to
20 be resting on nothing, and you either win or
21 you would lose. And if you lose, you appeal
22 it. And if you win, you have a model of how to
23 proceed for others in the future.

24 MR. YANG: I -- I --

25 JUSTICE BREYER: I mean, is there

1 anything wrong with doing that? Could that
2 help solve the problem?

3 MR. YANG: I -- I think it would
4 depend on how that's written, but I would like
5 to just focus on, if it is contested,
6 significantly with cross-examination, which is
7 not in this case --

8 JUSTICE BREYER: Mm-hmm.

9 MR. YANG: -- then I would be very
10 hesitant, though, to require things like
11 personal confidential files that's going to
12 require significant delays in the process.

13 JUSTICE BREYER: No, you wouldn't have
14 to do that. I mean, the fed, you know, gets a
15 lot of information on the basis of surveys that
16 they certainly don't want to reveal. And that
17 -- that can happen in various agencies, though
18 sometimes you might have to reveal it. Since
19 --

20 MR. YANG: Well, there -- there are
21 cases -- there are cases, I think, that -- that
22 highlight exactly what you're talking about,
23 where there's cross-examination -- and we cite,
24 again, at least one or two of these in our
25 brief --

1 JUSTICE BREYER: Hmm.

2 MR. YANG: -- where the -- the -- the
3 -- on review, this -- like, you know, their --
4 this cross-examination so undermined the basic
5 predicate of -- or the basic testimony that it
6 can no longer be substantial evidence.

7 We're not quibbling with that. What
8 we're saying is that the categorical
9 document-on-demand rule, which they -- which,
10 frankly, is not a coherent view of substantial
11 evidence, would be imposed on the agency.

12 And they mentioned the Seventh
13 Circuit. The Seventh Circuit does not apply
14 this rule. The Seventh Circuit has never
15 required information from personal files.
16 There's two Seventh Circuit cases that are
17 central: Donahue, it's dicta; McKinnie, there
18 was cross-examination by counsel, and the
19 answer about -- from the -- the vocational
20 expert about how the vocational expert got the
21 numbers was basically, well, it was based on my
22 knowledge as a VE. And he followed up and
23 there was still nothing substantial after that.

24 And so, in that context, that's not a
25 big problem. The two district court cases that

1 Petitioners cite at page 40 of their brief and
2 then in reply on 24, both involve
3 cross-examination. Powell reversed on other
4 grounds, didn't reverse on the question that
5 we're talking here, and simply encouraged
6 revisiting the issue on remand. And in
7 Reynolds, there were multiple problems with the
8 VE testimony that was revealed on
9 cross-examination.

10 There's no tradition in the Seventh
11 Circuit or anywhere requiring this categorical
12 rule that this Court granted cert on. And it
13 would substantially impair the operations of
14 the social administration --

15 JUSTICE KAVANAUGH: How? How would it
16 substantially impair?

17 MR. YANG: Remember, these cases are
18 -- hearings are tightly packed. The volume of
19 the cases is immense. People wait all --

20 JUSTICE KAVANAUGH: I don't understand
21 that as how that's going to substantially
22 impair.

23 MR. YANG: Oh, the -- the -- the
24 reason is because you're not going to be able
25 to predict in advance what documents might be

1 relevant beyond the high-level documents that
2 we're talking about. And you would have to get
3 them from your files.

4 And that's going to require
5 continuances. And having a continuance in the
6 situation where claimants are already waiting
7 on average -- a million people, think about
8 this, a million people are waiting 605 days on
9 average just to get a response to their hearing
10 request --

11 JUSTICE GINSBURG: What -- what is --
12 what is the experience in the Seventh Circuit
13 that -- that has --

14 MR. YANG: We don't have much
15 meaningful experience in the Seventh Circuit
16 because the Seventh Circuit hasn't adopted the
17 rule that Petitioners purport to it. Now
18 there's some dicta that suggests it in -- in
19 the Donahue opinion, but the Court has since
20 stepped back for a minute.

21 JUSTICE ALITO: How -- how is the
22 government --

23 CHIEF JUSTICE ROBERTS: Is the
24 requirement --

25 JUSTICE ALITO: Oh, sorry.

1 CHIEF JUSTICE ROBERTS: Is the new --
2 are the new requirements in the handbook going
3 to slow things up?

4 MR. YANG: No, because we don't
5 understand that to mean bring all your personal
6 files. We understand that to mean bring things
7 that you're likely to be relying -- citing from
8 the BLS or other -- DOT, these publicly
9 available sources that you can provide those
10 upon request.

11 JUSTICE GORSUCH: Is the government's
12 argument that its failure to provide timely
13 hearings should be an excuse not to comply with
14 other requirements?

15 MR. YANG: Not -- not at all. But I
16 will say that there is a -- a significant
17 undertone of fairness and due process here.
18 And what the Court did in Perales, which I
19 think is undisputably a due process case, is it
20 applied, before Mathews versus Eldridge, but it
21 applied the same basic framework as what the
22 Court solidified in Mathews versus Eldridge.

23 And one of the things to consider is
24 the cost of the additional process. The cost
25 of the additional process here would be

1 significant.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MR. YANG: Thank you.

5 CHIEF JUSTICE ROBERTS: Five minutes,
6 Mr. Bhabha.

7 REBUTTAL ARGUMENT OF ISHAN BHABHA
8 ON BEHALF OF THE PETITIONERS

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

11 I'd just like to respond to three
12 things the government said.

13 First and foremost, the government's
14 lawyer represented that the Vocational Expert's
15 Handbook simply requires them to bring public
16 information they might perhaps rely on.

17 I'm sorry, but if you look at page 3
18 of the handbook, it explicitly says at all
19 hearings, you should be prepared to cite,
20 explain, and furnish any sources that you rely
21 on to support your testimony. And what I take
22 --

23 JUSTICE KAGAN: Well, what if, Mr.
24 Bhabha, you're right about that, but, instead,
25 it's just, well, that's the best practices

1 rule. But the best practices rule is not
2 necessarily a legal requirement.

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

6 Firstly, their administrability
7 arguments are inconsistent with the policy the
8 Social Security Administration itself is
9 telling vocational experts. And on the
10 specific question of workability in the Seventh
11 Circuit, I disagree with my friend from the
12 SG's office that this isn't the rule that's
13 being applied.

14 There is binding Seventh Circuit case
15 law. We cite cases where this has been the
16 basis for reversal. And my understanding from
17 practitioners in the Seventh Circuit is that
18 this is applied and that when data is not
19 handed over and the case gets appealed to the
20 Appeals Council, in some situations, the Social
21 Security Administration lawyers agree to a
22 remand so the data can then be provided.

23 And it's not always provided --

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

1 MR. BHABHA: Not voluntarily, Justice
2 Kavanaugh. That's totally right. They haven't
3 issued an acquiescence ruling. But the way it
4 works in practice is that, if this sort of a
5 request is made and the specific data is not
6 there, it is not uncommon for the record to be
7 held open for 14 days and the data is then sent
8 to the ALJ and to the claimant's
9 representative. Hopefully, they look at the
10 data and it substantiates the testimony and
11 that ends the matter.

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

14 And I will also say specifically on
15 the timing issue, nationally, there are 164
16 hearing officers. The average amount of time
17 to process a claim is 536 days. For the
18 hearing officers within the Seventh Circuit,
19 based on my calculation which I did last week,
20 and I don't imagine the number has changed
21 significantly, it's 529 days. So it's actually
22 quicker in the Seventh Circuit.

23 Now these are obviously large numbers,
24 but the basic point is this procedure, which
25 has existed since 2002, has not been shown to

1 slow down the process.

2 The other thing I'll say is that the
3 government lawyer says, well, you don't know
4 what particular questions are going to be asked
5 at a hearing, so how do you know what sources
6 to have?

7 But, if you don't know particular
8 questions and you don't have the specific
9 data-driven answers, you can't be answering the
10 question in the first place. So, by
11 definition, if they give an answer that there
12 are 3,000 nut sorter jobs or 6,000 bench
13 assembler jobs, there must be a data-driven
14 basis for that, which is exactly what the
15 expert again here identified as her source, not
16 her experience, but a labor market survey that
17 she then refused to -- to permit.

18 In sum, Your Honors, what Petitioner
19 is asking for here is a reaffirmation of a
20 basic rule of administrative procedure, which
21 is that an agency cannot make a determination
22 based upon testimony that is premised on secret
23 data without ever giving that data to a
24 requesting claimant.

25 That's all the more so in a case like

1 this, where this was the sole basis upon which
2 my client was denied benefits for the relevant
3 time period. This rule has worked without
4 disruption in the Seventh Circuit since 2002,
5 and it is entirely consistent with the very
6 policy the Social Security Administration
7 recognizes as good practice for vocational
8 experts.

9 JUSTICE GINSBURG: The government says
10 you're asking for more than the seven --
11 Seventh Circuit position. Is that so?

12 MR. BHABHA: That is not -- Justice
13 Ginsburg, we are asking for exactly the same
14 rule, which is, succinctly put, that when a
15 vocational expert testifies and the expert
16 identifies data sources that she has relied
17 upon, if you request those data sources and
18 they are not provided, the say-so of the
19 vocational expert alone cannot constitute
20 substantial evidence of the other work
21 available to an applicant.

22 For these reasons, Your Honors, we ask
23 that the decision of the Sixth Circuit be
24 reversed. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:04 a.m., the case
3 was submitted.)

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