No. 17-1184

# In the Supreme Court of the United States

MICHAEL J. BIESTEK, PETITIONER

*v.*

NANCY A. BERRYHILL, ACTING COMMISSIONER, SOCIAL SECURITY ADMINISTRATION

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the administrative law judge in this Social Security disability benefits case erred in crediting the vocational expert's opinion, which was based upon the expert's professional experience, without requiring disclosure of the expert's confidential files.

## TABLE OF CONTENTS

Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 2
Argument ..... 7
Conclusion ..... 19

## TABLE OF AUTHORITIES

Cases:

*Barnhart* v. *Thomas*, 540 U.S. 20 (2003) ..... 3
*Bayliss* v. *Barnhart*, 427 F.3d 1211 (9th Cir. 2005) ..... 13, 16
*Brault* v. *Social Sec. Admin.*, 683 F.3d 443 (2d Cir. 2012) ..... 4, 11, 13, 16, 17
*Britton* v. *Astrue*, 521 F.3d 799 (7th Cir. 2008) ..... 17
*Buck* v. *Berryhill*, 869 F.3d 1040 (9th Cir. 2017) ..... 9, 16
*Donahue* v. *Barnhart*, 279 F.3d 441 (7th Cir. 2002) ..... 7, 10, 14, 15, 16
*Heckler* v. *Campbell*, 461 U.S. 458 (1983) ..... 4
*Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999) ..... 12
*McKinnie* v. *Barnhart*, 368 F.3d 907 (7th Cir. 2004) ..... 10, 14, 15
*Purdy* v. *Berryhill*, 887 F.3d 7 (1st Cir. 2018) ..... 14, 16, 17
*Richardson* v. *Perales*, 402 U.S. 389 (1971) ..... 3, 8
*Welsh* v. *Commissioner Soc. Sec.*, 662 Fed. Appx. 105 (3d Cir. 2016) ..... 17

Statutes, regulations, and rules:

Social Security Act, 42 U.S.C. 301 *et seq.* ..... 2
42 U.S.C. 405(b)(1) ..... 3, 8, 10, 11
42 U.S.C. 405(g) ..... 3
42 U.S.C. 423(a)(1)(E) ..... 2

Statutes, regulations, and rules—Continued: Page

42 U.S.C. 423(d)(1)(A) ..... 2
42 U.S.C. 423(d)(2)(A) ..... 2
42 U.S.C. 1381a ..... 2
42 U.S.C. 1382c(a)(3)(A) ..... 2
42 U.S.C. 1382c(a)(3)(B) ..... 2
20 C.F.R.:
Pt. 404:
Subpt. J:
Section 404.900 ..... 2
Section 404.900(a)(1) ..... 2
Section 404.900(a)(2) ..... 2
Section 404.900(a)(3) ..... 2
Section 404.900(a)(4) ..... 2
Section 404.929 ..... 9
Section 404.935 ..... 9
Section 404.949-404.950 ..... 9
Section 404.950 ..... 9
Subpt. P:
Section 404.1520(a)(4) ..... 3
Section 404.1520(a)(4)(i)-(v) ..... 3
Section 404.1560(c)(1) ..... 4
Section 404.1560(c)(2) ..... 4
Section 404.1566(e) ..... 4
Section 404.1569 ..... 4
App. 2 ..... 4
Pt. 416:
Subpt. I:
Section 416.920(a)(4) ..... 3
Section 416.920(a)(4)(i)-(v) ..... 3
Section 416.960(c)(1) ..... 4
Section 416.960(c)(2) ..... 4

Regulations and rules—Continued: Page

Section 416.966(e) ..... 4
Section 416.969 ..... 4
Subpt. N:
Section 416.1400 ..... 2
Section 416.1400(a)(1) ..... 2
Section 416.1400(a)(2) ..... 2
Section 416.1400(a)(3) ..... 2
Section 416.1400(a)(4) ..... 2
Section 416.1429 ..... 9
Section 416.1435 ..... 9
Section 416.1449-416.1450 ..... 9
Section 416.1450 ..... 9
Fed. R. Evid.:
Rule 702 ..... 8, 14
Rule 702 advisory committee's note (2000 Amendments) ..... 11, 12
Rule 703 ..... 12
Sup. Ct. R. 10 ..... 10, 12

Miscellaneous:

Soc. Sec. Admin., *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf. ..... 17, 18
SSR 00-4p, 65 Fed. Reg. 75,759 (Dec. 4, 2000) ..... 9
U.S. Dep't of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991), https://www.oalj.dol.gov/LIBDOT.HTM ..... 4

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 880 F.3d 778. The opinion of the district court adopting the magistrate judge's report and recommendation (Pet. App. 25a-34a) is not published in the Federal Supplement but is available at 2017 WL 1173775. The magistrate judge's report and recommendation (Pet. App. 35a-74a) is not published in the Federal Supplement but is available at 2017 WL 1214456.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 24a) was entered on December 27, 2017. The petition for a writ of certiorari was filed on February 21, 2018. The

[1] Respondent's title is corrected to reflect her current position in accordance with Supreme Court Rule 35.3.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. a. The Social Security Act (Act), 42 U.S.C. 301 *et seq.*, authorizes the payment of Social Security Disability Insurance (SSDI) and supplemental security income (SSI) benefits to certain individuals with disabilities. 42 U.S.C. 423(a)(1)(E) (SSDI); 42 U.S.C. 1381a (SSI). As relevant here, the Act defines "disability" to include the inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that is expected to result in death or to last at least 12 months. 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). To qualify as "disab[led]," an individual's physical or mental impairment must be of "such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

The Social Security Administration (SSA) adjudicates disability claims through a multi-step administrative review process. See 20 C.F.R. 404.900 (SSDI); 20 C.F.R. 416.1400 (SSI). A claimant for benefits first receives an initial determination, and if dissatisfied, the claimant may request reconsideration. 20 C.F.R. 404.900(a)(1) and (2), 416.1400(a)(1) and (2). If dissatisfied with the reconsideration determination, the claimant may then request a hearing before an administrative law judge (ALJ). 20 C.F.R. 404.900(a)(3), 416.1400(a)(3). And if dissatisfied with the ALJ's decision, the claimant may request review by the Appeals Council in SSA. 20 C.F.R. 404.900(a)(4), 416.1400(a)(4). At each of those levels, "the agency operates essentially, and is intended so to do, as

an adjudicator and not as an advocate or adversary." *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971).

Recognizing the non-adversarial nature of this scheme, the Act provides that "[e]vidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. 405(b)(1). Thus, "strict rules of evidence * * * are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent." *Richardson*, 402 U.S. at 400. "[T]he conduct of the hearing rests generally in the examiner's discretion," subject to "hearing procedures" established by agency regulation. *Ibid.* And the agency's findings of fact, "if supported by substantial evidence," are "conclusive" for purposes of judicial review. 42 U.S.C. 405(g).

b. To determine whether a claimant is entitled to disability benefits, the SSA employs a five-step sequential evaluation process. 20 C.F.R. 404.1520(a)(4) (SSDI); 20 C.F.R. 416.920(a)(4) (SSI); see *Barnhart* v. *Thomas*, 540 U.S. 20, 24-25 (2003) (describing this process). The agency must determine, first, whether the claimant is performing substantial gainful activity (in which case he is not disabled); second, whether the claimant's impairment is "severe"; third, whether that impairment meets or medically equals an impairment listed in SSA regulations; fourth, if the impairment does not meet or medically equal the listings, whether the claimant's residual functional capacity allows him to perform his past work; and fifth, whether the claimant is unable to perform other work. 20 C.F.R. 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). The claimant bears the burden of providing evidence at each of the first four steps, while the agency bears that burden at step five.

At step five, the agency must determine whether other work exists "in significant numbers in the national economy" that the claimant can perform, given his residual functional capacity, age, education, and work experience. 20 C.F.R. 404.1560(c)(1), 416.960(c)(1). SSA has adopted medical-vocational guidelines under which, if a claimant's characteristics correspond to the criteria of a rule, the guidelines direct a conclusion regarding whether work exists that a claimant can perform. 20 C.F.R. Pt. 404, Subpt. P, App. 2; see *Heckler* v. *Campbell*, 461 U.S. 458 (1983); 20 C.F.R. 404.1569, 416.969. In other circumstances, the ALJ may rely upon the testimony of a vocational expert. See 20 C.F.R. 404.1560(c)(2), 404.1566(e), 416.960(c)(2), 416.966(e). The ALJ typically poses hypothetical questions asking the vocational expert to identify the types and numbers of jobs that could be performed by a person of the claimant's age, education, and work experience, with specified limitations reflecting the particular claimant's functional capacity. Cf. Pet. App. 41a.

In answering those questions, vocational experts may rely on various sources of information. To identify the types of jobs a claimant could perform, vocational experts often rely on a U.S. Department of Labor publication, the *Dictionary of Occupational Titles* (4th ed. rev. 1991) (*Dictionary*). The *Dictionary* "gives a job type a specific code—for example, '295.467-026 Automobile Rental Clerk'—and establishes, among other things, the minimum skill level and physical exertion capacity required to perform that job." *Brault* v. *Social Sec. Admin.*, 683 F.3d 443, 446 (2d Cir. 2012) (per curiam). Although the *Dictionary* "defines jobs," it "does not report how many such jobs are available in the economy." *Ibid.* (emphasis omitted). To determine the number of posi-

tions that are available for a particular job type, the vocational expert may rely on her professional knowledge and experience and various other sources of information, including federal or state government publications.

2. Petitioner worked as a carpenter and construction laborer until 2005. Pet. App. 3a. In 2010, petitioner applied for SSDI and SSI benefits with an alleged disability onset date in October 2009. *Ibid.* Petitioner alleged that his disabilities included degenerative disc disease, Hepatitis C, asthma, and/or depression. *Id.* at 3a, 37a.

After extensive administrative proceedings (see Pet. App. 3a-4a, 75a-78a), the ALJ concluded that petitioner was "not disabled" prior to May 2013. *Id.* at 113a; see *id.* at 78a-79a, 109a-112a. The ALJ determined that petitioner's impairments were severe, but that they did not meet or medically equal any of the listings. *Id.* at 83a-89a. And upon considering petitioner's age, education, work experience, and residual functional capacity, the ALJ determined that, prior to May 2013 (when petitioner turned 50 years old), petitioner was capable of performing work that existed in significant numbers in the national economy. *Id.* at 109a-112a.[2]

As relevant here, in performing the step-five inquiry, the ALJ relied upon "the testimony of [a] vocational expert." Pet. App. 112a; see *id.* at 111a-112a. The vocational expert testified that a hypothetical person with petitioner's characteristics could perform sedentary work such as bench assembler, for which the expert estimated there were 240,000 jobs nationally, and sorter, for which there were 120,000 jobs nationally. *Id.* at

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[2] Once petitioner reached age 50, the agency's medical-vocational guidelines directed a finding that he became "disabled." Pet. App. 113a; see *id.* at 109a, 112a-113a.

111a, 116a.[3] The vocational expert based her testimony upon the *Dictionary*; data from the Bureau of Labor Statistics; and her 11 years of professional experience as a vocational rehabilitation consultant, which included interviewing employers, performing on-the-job analyses, and conducting labor market surveys. *Id.* at 20a, 28a, 70a, 117a-119a.

During cross-examination, petitioner's counsel asked the vocational expert to produce data supporting her professional opinions. Pet. App. 28a, 118a-119a. The vocational expert explained that her opinions were based in part upon "job analys[e]s" and "labor market surveys" that were performed for individual clients and which were "part of [their] private confidential files." *Id.* at 118a-119a. The ALJ then indicated that the vocational expert would be permitted to testify based upon her professional experience without producing "her confidential file[s]" pertaining to "individual people." *Id.* at 118a.

The Appeals Council denied review. Pet. App. 3a.

3. Petitioner brought suit challenging the ALJ's decision on various grounds, and a magistrate judge recommended upholding the ALJ's decision. Pet. App. 35a-74a. As relevant here (see *id.* at 69a-73a), the magistrate judge explained that an ALJ is entitled to rely upon the testimony of a vocational expert "even where that testimony is not based on the [*Dictionary*], but on the [vocational expert's] professional experience." *Id.* at 71a; see *ibid.* (noting that the "credibility of the [vocational expert's] testimony was fully probed at the hearing"). The

[3] The vocational expert opined that if certain additional functional limitations were imposed, the hypothetical person could still perform those jobs, but the number of positions would be reduced "by about 20 to 30 percent." Pet. App. 117a.

district court adopted the magistrate judge's recommendation in full. *Id.* at 25a-34a.

4. The court of appeals affirmed. Pet. App. 1a-23a. As relevant here, the court concluded that the ALJ did not err in permitting the vocational expert to base her testimony upon both the *Dictionary* and her "'professional experience[]' gained from talking with employers and conducting job analyses." *Id.* at 20a. Noting petitioner's reliance on several Seventh Circuit decisions, see *id.* at 20a-21a, the court of appeals agreed that vocational expert testimony cannot be considered substantial evidence if it is "conjured out of whole cloth," *id.* at 22a (quoting *Donahue* v. *Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002)). But the court reasoned that the task of "guarding against baseless testimony" does not require "incorporating the stringent evidentiary requirements embodied in the Federal Rules of Evidence." *Ibid.* The court therefore declined to endorse an approach that would "incorporat[e] the essence * * * of Federal Rule of Evidence 702" into the evaluation of vocational expert testimony. *Id.* at 20a. The court also noted that there was "little clarity" as to how the Seventh Circuit would apply its seemingly more "rigorous" approach. *Id.* at 20a, 22a.

**ARGUMENT**

Petitioner contends (Pet. 11-24) that the court of appeals erred in declining to require the ALJ, before relying upon vocational expert testimony, to require disclosure of the expert's confidential files. The court of appeals' decision is correct and does not implicate any conflict warranting this Court's review. Although the court below understood the Seventh Circuit to have adopted a more demanding approach for evaluating vocational expert testimony, the extent to which any genuine conflict

exists among the circuits remains unclear, and petitioner has not shown that the Seventh Circuit would reach a different result on the facts of this case. Moreover, in light of recent updates to SSA guidance, any disagreement may be of little prospective importance. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals correctly concluded that the ALJ was permitted to credit the vocational expert's testimony, which was based upon her 11 years of professional experience as a vocational rehabilitation consultant, without requiring the expert to disclose her "private confidential files" relating to that experience. Pet. App. 118a; see *id.* at 20a-22a.

a. The Social Security Act provides that "[e]vidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. 405(b)(1). "[T]he conduct of the hearing rests generally in the examiner's discretion," in accordance with "hearing procedures" established by agency regulation. *Richardson* v. *Perales*, 402 U.S. 389, 400 (1971). An ALJ therefore need not determine that a vocational expert has satisfied the requirements for expert testimony under Federal Rule of Evidence 702, or any other evidentiary rules applicable in court, before her testimony may be admitted and relied upon at a disability benefits hearing. See *Richardson*, 402 U.S. at 400 ("[S]trict rules of evidence * * * are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent.").

At the same time, SSA has recognized that ALJs should rely upon expert testimony only if that testimony is considered to be reliable. To that end, the agency's regulations allow a claimant to question a vocational ex-

pert (and other witnesses) regarding the basis for the expert's testimony and to present arguments concerning the reliability of that testimony. See 20 C.F.R. 404.929, 404.949-404.950, 416.1429, 416.1449-416.1450. Its regulations also allow a claimant to tender conflicting evidence, see 20 C.F.R. 404.935, 404.950, 416.1435, 416.1450, and courts have concluded that significant inconsistencies in such evidence should be addressed by the ALJ, see, *e.g.*, *Buck* v. *Berryhill*, 869 F.3d 1040, 1052 (9th Cir. 2017) (remanding to the agency where "the vast discrepancy between the [vocational expert's] job numbers and those tendered by [the claimant], presumably from the same source, is simply too striking to be ignored").

In addition, SSA has provided guidance specifically on the topic of vocational expert testimony. In a December 2000 Social Security ruling, SSA instructed that where there is an apparent conflict between a vocational expert's testimony and the *Dictionary*, the ALJ should elicit a reasonable explanation for the conflict before relying on the expert's testimony. SSR 00-4p, 65 Fed. Reg. 75,759, 75,760 (Dec. 4, 2000). And as explained below, see pp. 17-18, *infra*, SSA has recently provided updated guidance concerning the identification of sources that vocational experts rely upon in presenting job numbers. SSA has not, however, required or suggested that an ALJ should not permit a vocational expert to rely upon her professional experience or that an expert must disclose confidential client files before she may do so.

b. The court of appeals correctly applied these principles in rejecting petitioner's argument that the ALJ should have "require[d] the vocational expert to produce data or other documentation to support her opinions." Pet. App. 20a. As authority for that purported requirement, petitioner cited a pair of decisions that appeared

to "incorporat[e] the essence, if not the explicit requirements, of Federal Rule of Evidence 702." *Ibid.* (citing *Donahue* v. *Barnhart*, 279 F.3d 441 (7th Cir. 2002) and *McKinnie* v. *Barnhart*, 368 F.3d 907 (7th Cir. 2004) (per curiam)). As the court explained, however, "Congress specifically exempted Social Security disability proceedings from the strictures of the Federal Rules of Evidence," thereby "allowing ALJs to consider a broader range of potentially relevant information than would be admissible in an ordinary court of law." *Id.* at 21a (citing 42 U.S.C. 405(b)(1)). The court thus properly declined to adopt a judicial "rule" that would categorically preclude an ALJ's consideration of vocational expert testimony based upon professional experience unless the testimony is independently corroborated by data. *Id.* at 22a.

At the same time, the court of appeals recognized that an ALJ generally should "guard[] against baseless testimony." Pet. App. 22a. Indeed, the court agreed with the Seventh Circuit that "vocational expert testimony that is 'conjured out of whole cloth' cannot be considered substantial evidence." *Ibid.* (quoting *Donahue*, 279 F.3d at 446). The court of appeals here observed, however, that petitioner had had the opportunity to raise objections to the reliability of the vocational expert's testimony, and the court correctly explained that "[u]ltimately, responsibility for weighing the credibility of witnesses belongs to the ALJ," *ibid.* Reviewing the record here, the court concluded that the ALJ "in this case" had "acceptably fulfilled that obligation." *Ibid.* That factbound determination does not warrant this Court's review. See Sup. Ct. R. 10.

c. Petitioner does not identify the basis for his assertion of error in the court of appeals' decision or in the ALJ's conduct of the hearing in this case. Petitioner principally asserts that "an ALJ's decision must be supported

by 'substantial evidence,'" Pet. 21 (citation omitted), and contends that a vocational expert's professional knowledge categorically cannot constitute such evidence unless detailed "supporting data" are provided upon request, Pet. 22. But petitioner identifies no statute, regulation, or decision of this Court that compels adoption of such a rigid rule. On the contrary, the "'substantial evidence' standard" is "extremely flexible" and "gives federal courts the freedom to take a case-specific, comprehensive view of the administrative proceedings, weighing all the evidence to determine whether it was 'substantial.'" *Brault* v. *Social Sec. Admin.*, 683 F.3d 443, 449 (2d Cir. 2012) (per curiam).

Lacking statutory or regulatory support for his proposed mandatory rule, petitioner seeks (Pet. 22) to analogize to "other area[s] of the law" in which, petitioner maintains, an expert must tender "underlying data" for her conclusions. As already explained (see pp. 2-3, 8-9, *supra*), however, the determination of Social Security disability benefits differs from other adjudicative schemes; the Social Security Act and its implementing regulations provide for non-adversarial, streamlined hearing procedures in which "rules of evidence applicable to court procedure" do not apply. 42 U.S.C. 405(b)(1). Social Security disability cases thus permissibly stand "separate and apart" from other kinds of adjudication as a matter of express statutory and regulatory design. Pet. 22.

In any event, petitioner's argument also fails on its own terms. Even in adjudications that (unlike Social Security disability proceedings) are governed by the Federal Rules of Evidence, an expert's professional experience may afford a valid standalone basis for his testimony. The advisory committee's note to Rule 702 states that "[n]othing in this amendment is intended to suggest

that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide sufficient foundation for expert testimony." Fed. R. Evid. 702 advisory committee's note (2000 Amendment); cf. *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 156 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."). The Federal Rules also specify that an expert may base an opinion upon facts or data on which experts in the field would reasonably rely even if the facts and data themselves are not admissible in the proceeding. Fed. R. Evid. 703. It follows *a fortiori* that professional experience may constitute a valid basis for a vocational expert's testimony in a Social Security disability benefits hearing, where formal evidentiary rules do not apply at all.

d. Although the application of law to the facts of this case would not independently warrant review, cf. Sup. Ct. R. 10, petitioner also fails to offer any case-specific argument as to why the ALJ's step-five determination was not supported by substantial evidence on the administrative record in this case. The ALJ confirmed that the vocational expert's testimony about the types of jobs available to petitioner was consistent with the *Dictionary*, see Pet. App. 117a, and petitioner does not argue otherwise. And although it is true that the *Dictionary* does not address all of petitioner's limitations (Pet. 9-10), petitioner apparently does not dispute that the vocational expert could supplement the *Dictionary* by testifying about the types of jobs petitioner could perform based upon her professional experience. Pet. App. 117a-119a; see *id.* at 28a (noting that this aspect of the vocational expert's testimony was based "on her

eleven-year experience as a vocational rehabilitation consultant") (citation omitted).

Petitioner instead challenges (Pet. 22) the ALJ's reliance on the vocational expert's testimony about the "number of jobs available" for the types of work that the expert identified. Even though petitioner was afforded the opportunity to question the expert and to tender his own evidence, however, petitioner did not submit any evidence that contradicted her estimates. Cf. Pet. App. 116a-119a.[4] Indeed, although petitioner sought a more detailed explanation of the basis for the expert's opinion, petitioner did not actually dispute that she had accurately estimated the number of bench-assembler or sorter jobs available in the national economy. Cf. *ibid.* And the ALJ, who was responsible for evaluating the reliability of the vocational expert's testimony, found that testimony to be credible and entitled to "great weight." *Id.* at 111a. In these circumstances, petitioner has failed to show that the ALJ's step-five determination was unsupported by substantial evidence.

2. The court of appeals' decision does not implicate any conflict warranting this Court's review. Petitioner acknowledges (Pet. 12-19) that the court of appeals' decision below accords with decisions of the Second and Ninth Circuits, see *Brault*, 683 F.3d at 449-450; *Bayliss* v. *Barn-*

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[4] Petitioner did submit a "vocational opinion" from a different individual, but the "ALJ appropriately found that [that] opinion was irrelevant" because it addressed jobs that were "completely different from those which the ALJ found that [petitioner] can perform." Pet. App. 72a-73a; see *id.* at 112a (affording "little weight" to that individual's opinion because "the cited jobs are not relevant" and because the opinion assumed characteristics that were not "part of [petitioner's] residual functional capacity").

*hart*, 427 F.3d 1211, 1217-1218 (9th Cir. 2005), but contends that it conflicts with those of the Seventh Circuit.[5] The two Seventh Circuit cases on which petitioner relies, however—*Donahue* v. *Barnhart*, *supra*, and *McKinnie* v. *Barnhart*, *supra*—involved meaningfully different circumstances.

In *Donahue*, as here, the Seventh Circuit upheld the ALJ's reliance on vocational expert testimony. There, the vocational expert provided testimony that arguably conflicted with the *Dictionary*, but the claimant failed to identify that discrepancy at the hearing. 279 F.3d at 446. The court ultimately concluded that the ALJ did not err in accepting the expert's testimony, reasoning that "[w]hen no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion, even if that conclusion differs from the *Dictionary*'s." *Ibid.* The court then proceeded to discuss, in dicta, what should happen if the vocational expert's conclusions are the subject of timely objection, and suggested that in those circumstances, "the ALJ should make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable." *Ibid.*[6] The

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[5] While this petition was pending, the First Circuit issued an opinion expressing agreement with the decisions of the Second and Ninth Circuits. See *Purdy* v. *Berryhill*, 887 F.3d 7, 14-17 (2018) (Souter, J.).

[6] Rule 702 provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

court observed that "[e]ven in court, however, an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand." *Ibid.* And the court suggested that the vocational expert there had satisfied that standard by "produc[ing] * * * job titles and numbers" and appearing for cross-examination, which petitioner in that case had failed to undertake on relevant topics. *Ibid.*

Here, as in *Donahue*, petitioner's counsel was afforded the opportunity to cross-examine the vocational expert about her testimony. And as in *Donahue*, petitioner's questioning did not "reveal any shortcomings in the vocational expert's data or reasoning." 279 F.3d at 447. Petitioner thus fails to identify any conflict between *Donahue* and the court's decision below.

Petitioner also fails to identify any square conflict with the Seventh Circuit's decision in *McKinnie*. There, unlike in *Donahue*, the court did sustain a claimant's challenge to an ALJ's reliance on testimony about the "number of jobs [that] were available to [the claimant]" after the claimant had requested, but not received, certain underlying data supporting the vocational expert's opinions. *McKinnie*, 368 F.3d at 911. There, however, the ALJ and vocational expert had apparently agreed to produce that data so long as the claimant "pa[id] for the preparation of the[] materials" that the claimant had requested. *Ibid.* The court rejected that condition, reasoning that the "[t]he data and reasoning underlying a vocational expert's opinions are not 'available on demand' if the claimant must pay for them." *Ibid.* (quoting *Donahue*, 279 F.3d at 446). *McKinnie* thus did not present the question whether a vocational expert's assumed duty of disclosure extends to the expert's confidential client

files. And petitioner has not identified any Seventh Circuit decision applying *McKinnie* in order to require the disclosure of confidential materials. Petitioner thus has failed to demonstrate that, had it been presented with this case, the Seventh Circuit would have reached a different result than the court of appeals below.

Moreover, even in cases not involving confidential information, it is not clear to what extent the Seventh Circuit's approach genuinely differs from that of other circuits. Both the Second Circuit and the court below indicated their "agree[ment] with the Seventh Circuit that evidence cannot be substantial if it is 'conjured out of whole cloth.'" *Brault*, 683 F.3d at 450 (quoting *Donahue*, 279 F.3d at 446); see Pet. App. 22a (same). Similarly, the Ninth Circuit has emphasized that, although "'[a] [vocational expert's] recognized expertise provides the necessary foundation for his or her testimony'" and "'no additional foundation is required,'" a vocational expert's testimony is "not incontestable." *Buck*, 869 F.3d at 1051 (quoting *Bayliss*, 427 F.3d at 1218). That court accordingly vacated and remanded an agency decision in circumstances where the "vast discrepancy between the [vocational expert's] job numbers and those tendered by [the claimant]" were "simply too striking to be ignored" and thus required further inquiry into reliability. *Id.* at 1052. Similarly, the Second Circuit emphasized in *Brault* that it was "*not* hold[ing] that an ALJ *never* need question reliability." 683 F.3d at 450; see also *Purdy* v. *Berryhill*, 887 F.3d 7, 16 & n.12 (1st Cir. 2018) (Souter, J.) (upholding ALJ's reliance on vocational expert testimony without supporting data, but recognizing that in some cases an expert's methodology might be "so unreliable that it cannot constitute substantial evidence"). Meanwhile, the Seventh Circuit itself has recognized

that the Act does not permit "pretrial discovery in Social Security hearings," and it accordingly "refuse[d]" to adopt rules of disclosure that would "drag[] out every Social Security hearing to an interminable length." *Britton* v. *Astrue*, 521 F.3d 799, 804 (2008) (per curiam).

To be sure, as petitioner notes (Pet. 10), several courts of appeals have understood the Seventh Circuit to have adopted a diverging approach and have suggested that its approach "has not been a popular export." Pet. App. 21a (quoting *Brault*, 683 F.3d at 449); see also *Purdy*, 887 F.3d at 16 (stating that "[t]he Seventh Circuit stands alone * * * in imposing a *Daubert*-like requirement on ALJs in Social Security cases"); *Welsh* v. *Commissioner Soc. Sec.*, 662 Fed. Appx. 105, 109-110 (3d Cir. 2016) (similar). But petitioner has not shown that these abstract expressions of disagreement have yielded meaningfully different results. Moreover, the Seventh Circuit cases relied upon by petitioner predate all of the allegedly conflicting decisions, and the Seventh Circuit may well refine or reevaluate its approach in light of the continuing criticisms advanced by other circuits.

3. Review is also unwarranted for the additional reason that SSA has recently issued updated policy guidance expressing the agency's expectation that vocational experts testifying at ALJ hearings should be prepared to identify and describe the factual bases for their testimony. In 2017, SSA updated its *Vocational Expert Handbook*, which sets forth the agency's expectations as to how vocational experts should prepare for ALJ-conducted disability hearings. SSA, *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (*Handbook*). The *Handbook* instructs vocational

experts that they "should be prepared to provide a complete explanation for [their] answers to hypothetical questions"; that they "should have available, at the hearing, any vocational resource materials [on which they] are likely to rely"; and that they "should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." *Id.* at 37. The *Handbook* further advises vocational experts that "[i]n some cases, the ALJ may ask [them] to provide relevant portions of materials [they] rely upon." *Ibid.*

The revised *Handbook*, which had not yet been issued at the time of petitioner's ALJ hearing, will help guide the agency's handling of vocational expert testimony in future cases, so that any disagreement among the courts of appeals may be of limited prospective importance. At a minimum, the *Handbook* and the regulations cited above (see pp. 8-9, *supra*) underscore that Social Security disability claimants are already able under current law to challenge the reliability of vocational expert testimony. Petitioner cannot show that imposing the novel mandatory rule he urges, which is not grounded in the statutory or regulatory text, is necessary to provide such an opportunity.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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