No. 17-1184

# In the Supreme Court of the United States

MICHAEL J. BIESTEK, PETITIONER

*v.*

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

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

**BRIEF FOR THE RESPONDENT**


NOEL J. FRANCISCO
*Solicitor General*
*Counsel of Record*
JOSEPH H. HUNT
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
ANTHONY A. YANG
*Assistant to the Solicitor General*
ALISA B. KLEIN
RACHEL F. HOMER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the hearing testimony of a vocational expert can constitute "substantial evidence" in the administrative record, 42 U.S.C. 405(g), supporting a factual finding by the Social Security Administration (SSA) that jobs that petitioner could perform existed in significant numbers in the national economy, if SSA rejected petitioner's request in that hearing to require the expert to produce documents to support her testimony.

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### 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 (Pet. App. 25a-34a) and the report and recommendation of the magistrate judge (Pet. App. 35a-74a) are not published in the Federal Supplement but are available at 2017 WL 1173775 and 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, and was granted on June 25, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-8a.

## STATEMENT

### A. Statutory And Regulatory Framework

The Social Security Act (Act), 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to pay Social Security Disability Insurance (SSDI) benefits, 42 U.S.C. 423(a)(1)(E), and supplemental security income (SSI) benefits, 42 U.S.C. 1381a, to certain individuals with disabilities. See *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). As relevant here, an individual is considered disabled under the Act if he is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" which can be expected to result in death or which has lasted or is expected to last at least 12 months. 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). The impairment must be of "such severity that [the individual] 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," regardless "whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

#### *1. Administrative Adjudication*

Congress has directed SSA "to make findings of fact, and decisions as to the rights of any individual" who has filed a claim for SSDI and/or SSI benefits, 42 U.S.C. 405(b)(1), 1383(c)(1)(A). The "administrative structure and procedures" that SSA utilizes to fulfill that mandate "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971); *id.* at 406 (noting in 1971 over 20,000 hearings annually). The

resulting "hearing system is 'probably the largest adjudicative agency in the western world,'" *Heckler* v. *Campbell*, 461 U.S. 458, 461 n.2 (1983) (citation omitted), and it has continued to grow over time. In recent years, SSA has annually received about 2.6 million initial disability claims; completed on average about 670,000 hearings before administrative law judges (ALJs) at its third layer of adjudication; and paid about $192 billion to approximately 10 million SSDI and 8 million SSI recipients. SSA, *Annual Performance Report, Fiscal Years 2017-2019*, at 4, 32, 35 (2018) (*2018 SSA Report*), https://www.ssa.gov/budget/FY19Files/2019APR.pdf.[1]

*a. General framework of adjudication*

The Act vests the Commissioner of Social Security with "full power and authority" to adopt rules and regulations "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in its administrative adjudication of disability claims. 42 U.S.C. 405(a); see 42 U.S.C. 1383(d)(1). Pursuant to regulations, the agency employs a multi-layer administrative review process, 20 C.F.R. 404.900(a), 416.1400(a), which SSA conducts in an "informal, non-adversarial manner," 20 C.F.R. 404.900(b), 416.1400(b), "operat[ing] essentially * * * as an adjudicator and not as an advocate or adversary." *Perales*, 402 U.S. at 403.

After receiving an initial application for benefits, SSA will issue an initial determination. 20 C.F.R. 404.900(a)(1), 416.1400(a)(1). If the claimant is dissatisfied with that determination, he may seek reconsidera-

[1] SSA has informed this Office that the vast majority of the 670,000 hearings before ALJs annually are for disability claims.

tion. 20 C.F.R. 404.900(a)(2), 416.1400(a)(2). If dissatisfied with the reconsideration determination, the claimant may request a hearing before an ALJ. 20 C.F.R. 404.900(a)(3), 416.1400(a)(3). The Act provides that, during the course of any hearing, the ALJ may "examine witnesses" and "receive evidence." 42 U.S.C. 405(b)(1), 1383(c)(1)(A). In addition, "[e]vidence may be received at any hearing * * * even though inadmissible" under the "rules of evidence applicable to court procedure." *Ibid.* The regulations accordingly provide than an ALJ may "receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court." 20 C.F.R. 404.950(c), 416.1450(c). The ALJ must then make factual findings based on "the preponderance of the evidence in the hearing record" and render a decision. 20 C.F.R. 404.929, 416.1429. If dissatisfied with the ALJ's decision, the claimant may request review by SSA's Appeals Council. 20 C.F.R. 404.900(a)(4), 416.1400(a)(4).

At each layer of agency adjudication, SSA employs a five-step sequential evaluation process to determine whether a claimant is entitled to disability benefits. 20 C.F.R. 404.1520(a)(4), 416.920(a)(4). The agency determines (1) whether the claimant is performing substantial gainful activity (if so, he is not disabled); (2) whether the claimant has a "severe" impairment (if not, he is not disabled); (3) whether that impairment meets or equals an impairment listed in SSA regulations (if so, the claimant is disabled); (4) if the impairment does not meet or equal the listings, whether the claimant's residual functional capacity allows him to perform his past work; and, (5) if not, whether the

claimant is able to perform other work that exists in significant numbers in the national economy, considering his residual functional capacity, age, education, and work experience. *Ibid.*; see *Barnhart* v. *Thomas*, 540 U.S. 20, 24-25 (2003) (describing this process). The claimant bears the burden of producing evidence at each of the first four steps, and SSA bears the burden of production at step five. 20 C.F.R. 404.1512(a) and (b)(3), 404.1560(c)(2), 416.912(a) and (b)(3), 416.960(c)(2); see Pet. App. 82a.

*b. Step 5 of the sequential evaluation process*

This case concerns evidence addressing the fifth step in the sequential evaluation process, in which the agency must determine whether the claimant can perform jobs that exist in significant numbers in the national economy. The existence of such jobs is established if they exist in significant numbers either in the region where the claimant lives or in several regions in the country. 20 C.F.R. 404.1560(c)(1), 416.960(c)(1); see 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

*Medical-vocational guidelines*. In certain cases, that question will be resolved under SSA's medical-vocational guidelines, rather than through case-specific evidence about jobs that the claimant could perform. 20 C.F.R. 404.1569, 416.969; see 20 C.F.R. Pt. 404, Subpt. P, App. 2 (guidelines). The guidelines consist of "a matrix of the four factors identified by Congress—physical ability, age, education, and work experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Campbell*, 461 U.S. at 461-462 (footnote omitted). Under the guidelines, for instance, "a significant number of jobs exist for a person

who can perform light work, is closely approaching advanced age, has a limited education but who is literate and can communicate in English, and whose previous work has been unskilled." *Id.* at 462 n.4. When the guidelines apply to a particular claimant's circumstances, they relieve SSA "of the need to rely on vocational experts" to obtain evidence about "the types and numbers of jobs that exist in the national economy." *Id.* at 461.

*Vocational Experts.* A claimant often has material limitations that are not specifically addressed by the medical-vocational guidelines. In such cases, an ALJ will typically obtain testimony from a "vocational expert." 20 C.F.R. 404.1566(e), 416.966(e); SSA, *Hearings, Appeals, and Litigation Law Manual* (HALLEX) I-2-5-50.A (Aug. 29, 2014).[2]

A vocational expert is an individual who has "expertise and a current knowledge" of "[w]orking conditions and physical demands of various occupations" and "[t]ransferability of skills"; "[k]nowledge of the existence and numbers of jobs at all exertional levels in the national economy"; and "[i]nvolvement in or knowledge of placing adult workers, including those with disabilities, into jobs." HALLEX I-2-1-31.B.1 (June 16, 2016). After SSA determines that an individual's overall education and experience qualifies the individual as a voca-

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[2] The HALLEX is available at https://www.ssa.gov/OP_Home/hallex/hallex.html. Although some of the current HALLEX provisions were revised after the relevant July 2015 vocational-expert testimony in this case, SSA has informed this Office that the 2015 HALLEX provisions corresponding to those cited in this brief were materially similar, except for HALLEX I-2-1-31, which was issued in June 2016 but which SSA has informed this Office reflects SSA's prior practice.

tional expert, SSA will enter into a contract with the expert, *ibid.*, to provide "impartial expert testimony" in agency proceedings, HALLEX I-2-5-48 (June 16, 2016). The vocational expert is then added to a regional SSA roster, which SSA uses to select vocational experts for disability cases by rotation, subject to the expert's availability. HALLEX I-2-5-52.A (June 16, 2016). SSA compensates vocational experts on the basis of the service they provide, regardless of the content of their testimony or the outcome of the proceedings. Under SSA's current fee schedule, a vocational expert is paid $85.47 for the first appearance of the day and $43.29 for each additional appearance that same day.[3]

In advance of the hearing, the ALJ will provide the vocational expert with copies of the evidence relating to the claimant's vocational history. HALLEX I-2-5-48. A vocational expert will then appear at the hearing in person or by telephone or videoconference. 20 C.F.R. 404.936(c)(2), 416.1436(c)(2). At the hearing, the ALJ will ask the claimant (or his representative) whether the claimant has any objection to the vocational expert testifying. HALLEX I-2-6-74.B (June 16, 2016). The claimant may object "based on [the expert's] perceived bias or lack of expertise"; and, if the claimant objects, the ALJ must resolve that objection in writing or on the record at the hearing. HALLEX I-2-5-30.B (Apr. 1, 2016).

The ALJ will not ordinarily have determined the claimant's residual functional capacity—the claimant's

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[3] SSA has informed this Office that its regional offices now sometimes contract with entities to provide vocational experts for hearings, and that those contracts specify the same qualifying requirements for vocational experts. SSA, however, has confirmed to this Office that it contracted directly with the vocational expert in this case after it had determined her expert qualifications.

functional capacity in a work setting in light of his medical impairments, see 20 C.F.R. 404.1545(a), 416.945(a) —before the vocational expert testifies in a hearing. The ALJ therefore will typically ask the expert a series of hypothetical questions to identify the types and availability of work in the national economy that could be performed by a person similarly situated to the claimant with particular limitations reflecting potentially relevant (but yet-to-be-determined) functional capacities. See HALLEX I-2-6-74.D. After the ALJ determines the claimant's residual functional capacity, the ALJ can then utilize the expert's testimony corresponding to the most relevant hypotheticals.

Several publicly available sources frequently serve as a baseline for the testimony of vocational experts. The Department of Labor's *Dictionary of Occupational Titles* (4th ed., rev. 1991), and its companion publication, the *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (1993) (collectively, *Dictionary*), define jobs that exist in the national economy by "giv[ing] a job type a specific code—for example, '295.467-026 Automobile Rental Clerk'—and establish[ing], 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). But the *Dictionary* "does not report *how many* such jobs are available in the economy." *Ibid.* (emphasis added). Data compiled by the U.S. Bureau of Labor Statistics (BLS), state governments, and commercially available compilations can provide estimates of such numbers. Cf. 20 C.F.R. 404.1566(d), 416.966(d) (listing examples of data sources of which SSA will take administrative notice).

Such publicly available sources, however, have limitations that may require a vocational expert to draw on her professional expertise to answer an ALJ's hypothetical questions. For example, the *Dictionary* has not been updated in more than 20 years, and "the types of jobs in the workforce and job requirements change over time." See *2018 SSA Report* 14.[4] The BLS, in turn, aggregates job numbers for categories broader than those used in the *Dictionary*. And public sources like the *Dictionary* do not address whether the jobs they identify can be performed by individuals with specific limitations that may be relevant in a particular case, such as the use of a cane, the need for a sit/stand option, and the need to spend a percentage of time off task. Administrative Record (A.R.) 859 (D. Ct. Doc. 17 (Apr. 19, 2016)). As a result, a vocational expert will frequently need to rely on her vocational expertise to supplement such sources. A vocational expert's opinion may therefore be informed, for instance, by "information obtained directly from employers" or her "experience in job placement or career counseling." Social Security Ruling (SSR) 00-4p, *Titles II and XVI: Use of Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions*, 65 Fed. Reg. 75,759, 75,760 (Dec. 4, 2000).

***2. Judicial Review***

A claimant may obtain judicial review of a final agency decision by civil action filed in district court. 42 U.S.C. 405(g), 1383(c)(3). On judicial review, "[t]he findings of [the agency] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. 405(g).

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[4] SSA has entered into an interagency agreement with BLS to develop new occupational data. See *2018 SSA Report* 14.

The question presented in this case is whether the evidence in the administrative record is sufficient—under the "substantial evidence" standard of review—to support the agency's "finding[] of * * * fact," 42 U.S.C. 405(g), made at step five of the sequential evaluation process based on a vocational expert's hearing testimony, that petitioner could perform work that existed in significant numbers the national economy.

**B. Proceedings In This Case**

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.

***1. Administrative Proceedings***

a. After extensive administrative proceedings and a remand from district court, an ALJ held two more hearings before rendering a decision. Pet. App. 3a-4a, 75a-78a. In that decision (*id.* at 75a-113a), the ALJ concluded that petitioner had become "disabled" based on SSA's medical-vocational guidelines upon reaching age 50 in May 2013. *Id.* at 113a; see *id.* at 3a, 109a, 112a-113a. The ALJ, however, rejected petitioner's disability claim for the period before May 2013, concluding that petitioner was "not disabled" at that time. *Id.* at 113a; see *id.* at 78a-79a, 109a-112a.[5]

In finding that petitioner was not disabled before age 50, the ALJ determined that petitioner's impairments were severe, but that they did not meet or medically

[5] This case accordingly concerns only petitioner's claim of entitlement to past disability benefits from October 2009 to May 2013.

equal any of the listings. Pet. App. 83a-89a. The ALJ then found petitioner's testimony about the intensity, persistence, and limiting effect of his symptoms not entirely credible. *Id.* at 92a, 102a, 107a-108a; see *id.* at 89a-108a. Based on other evidence, the ALJ found that, during the relevant period, petitioner had a "residual functional capacity" to perform "sedentary work," except that petitioner required work satisfying several additional criteria. *Id.* at 89a-90a.

More specifically, the ALJ concluded that petitioner required "a sit/stand option at will, but not to exceed 30 minutes at a time in either position"; needed "use of a cane for prolonged ambulation" and was unable to perform work requiring "crawling" or "climbing" ramps, stairs, ladders, ropes, or scaffolds; could do occasional flexion, extension, or rotation of the neck; could not work at hazardous heights, around dangerous machinery, or in temperature extremes; and needed to work in relatively clean air. Pet. App. 89a-90a. The ALJ further concluded that petitioner was limited to "simple, routine tasks such as those jobs [having a Specific Vocational Preparation time of] 1 or 2" due to pain, fatigue, and depression causing "occasional limitations in [his] ability to maintain concentration for extended periods," including "occasional limitations in [his] ability to carry out detailed instructions"; that petitioner could work without being "off task for more than 10% of the workday"; and that he was "limited to brief and superficial interaction" with others. *Ibid.*

In light of petitioner's residual functional capacity, age, education, and work experience, the ALJ determined that, before May 2013 (when petitioner turned 50 years old), petitioner was capable of performing work that existed in significant numbers in the national

economy. Pet. App. 109a-112a. The ALJ explained that, in finding the existence of such work, she had relied upon the July 2015 hearing testimony of "Erin O'Callaghan, an impartial vocational expert," *id.* at 77a. See *id.* at 111a-112a; see also A.R. 853-874 (transcript of O'Callaghan's testimony).

b. In the July 2015 hearing, before the vocational expert testified, the ALJ asked petitioner's counsel if he would stipulate to O'Callaghan's "qualifications to serve as a vocational expert." A.R. 853. Counsel stated that he'd "prefer not to stipulate" because he believed that government counsel would later argue that the stipulation would mean that petitioner should have to "take [O'Callaghan's] testimony as true." A.R. 853-854. Counsel made clear, however, that he had "no objections" to the expert "giving testimony." A.R. 854-855. O'Callaghan's resume (an exhibit in the agency record) shows that she received a master's degree in counseling before accumulating seven years of experience as a rehabilitation consultant and four additional years in her own company addressing the employment and vocational rehabilitation of disabled individuals. A.R. 1274 (resume).

The ALJ asked the vocational expert a series of questions involving a "hypothetical Claimant," after identifying most of the specific work criteria noted above as "additional limitations." A.R. 855-856; see A.R. 855-859. The ALJ first asked the expert whether she could identify a "sample of jobs" at the "light exertional level with those limitations." Pet. App. 116a (A.R. 856). The expert identified a series of representative jobs and estimated numbers of such jobs in Southeast Michigan and the national economy. *Ibid.*

The ALJ next asked if the expert could identify a sampling of jobs at the "sedentary level" that could be performed with those additional limitations. Pet. App. 116a (A.R. 857). The vocational expert testified that jobs "such as" a "bench assembler," "sorter," and "surveillance system monitor" could be performed. *Ibid.* The expert stated that about 3000 and 240,000 bench-assembler jobs; 1500 and 120,000 sorter jobs; and 1000 and 80,000 surveillance-system-monitor jobs existed in Southeast Michigan and nationally, respectively. *Ibid.* The expert also identified "representative" *Dictionary* codes for such work. *Ibid.*

In response to the ALJ's questions about whether such jobs would still be suitable if the claimant required "a cane for prolonged ambulation," the vocational expert testified that both the light-exertion and sedentary jobs would. A.R. 857. The ALJ then asked whether the jobs would continue to be suitable if, in addition, the claimant could not perform "overhead lifting" or lift more than five pounds (hypothetical limitations the ALJ later found did not apply to petitioner's residual functional capacity). A.R. 858; cf. Pet. App. 89a-90a. The expert identified certain light-exertion jobs that she had previously identified as accommodating those restrictions, and she testified that the hypothetical lifting restrictions would reduce the number of sedentary "sorter and bench assembler jobs by about 20 to 30 percent." Pet. App. 117a (A.R. 858). She further testified that the requirements and classification of the jobs to which she testified was consistent with that of the *Dictionary*, but that the *Dictionary* did not address "issues relating to a sit/stand option," "time off task," or "use of a cane," and that her testimony on such matters was "based on [her] professional experience." *Ibid.* (A.R. 859).

Petitioner, through counsel, cross-examined the vocational expert on several issues. A.R. 859-874. Counsel asked, for instance, if the jobs the vocational expert had identified would be available to a person who took medications that reduced his pace of work, and the expert testified that they would. A.R. 862-866. The expert explained that, "[g]enerally, people need to be working at a competitive rate for 80 percent of the workday," that the minimum amount of time "on task in order to maintain competitive work" "depends on the job," and that for "sorter/bench assembler jobs it's 80 percent of the workday." A.R. 863-864. In response to counsel's question about the basis for that testimony, the vocational expert stated that she had relied on her "professional experience," which included "[t]alking to employers, [and] doing job analysis on the job for these types of jobs." Pet. App. 117a-118a (A.R. 865).

Counsel asked whether the expert could provide "those job analys[e]s." Pet. App. 118a (A.R. 865). After the expert noted that they were "part of people's private confidential files," the ALJ stated that she was "not requiring" the expert to furnish such files, because the expert had testified based on "her overall training over the years, as well as her confidential file[s] of individual people." *Ibid.* In response to a follow-up question from the ALJ, the expert explained that "nothing" in various published employment sources "specifically addresses th[e] time off task issue," and that her testimony had been based on her "experience of talking with employers," her "experience doing job analysis, [and her] experience as a vocational rehabilitation consultant for the past 11 years." A.R. 866. Petitioner's counsel did not further explore the types of job analyses the expert had done; clarify whether the expert's testimony was based

on information actually contained within written job analyses or was based more generally on her "experience" obtained in the course of "doing job analysis"; or otherwise explore the possible probative value (or lack thereof) of any written materials. See *ibid.*

Counsel separately asked the vocational expert about the basis for her job numbers. Pet. App. 118a-119a (A.R. 869). The expert explained that her numbers were based on both BLS data and her "own individual market surveys." *Id.* at 119a (A.R. 869). Counsel did not request copies of, or ask questions about, the BLS data. Counsel instead asked whether the expert could "provide [her] own" surveys, which the expert explained were "part of [her] client files." *Ibid.* (A.R. 869-870). Counsel suggested that the expert could "take the client's names out," but the ALJ stated that her "ruling is that [she] would not require that [the vocational expert] provide" such client files. *Ibid.* Counsel again did not further explore the nature of any written information in the expert's client files. See *ibid.*

Toward the end of the July 2015 hearing, the ALJ stated that "an hour [had been] set aside" for the hearing, which the ALJ was "going to have to continue" because the next claimant was "out there waiting." A.R. 872-873. The ALJ informed counsel that he could "have as much time as [he] need[ed], but not on this day." A.R. 874. Petitioner's counsel represented that he did not "need to continue the hearing" and asked if he could submit a "closing memo." *Ibid.* The ALJ accordingly concluded the hearing but "h[e]ld the record open" for additional information. A.R. 877.

c. By letter dated September 28, 2015, petitioner's counsel submitted a vocational opinion dated September 23, 2015 (A.R. 1297-1298) from "vocational expert

Lee Knutson," whose proffered "opinion testimony" reflected his "extensive experience in vocational rehabilitation and placement, including almost 20 years as a vocational expert for [SSA]," A.R. 1290. See A.R. 1290-1292 (letter); see also A.R. 1293-1295 (Kutson's resume). After noting that vocational expert O'Callaghan had testified about three categories of suitable "sedentary" positions—"Bench assembler," "Sorter," and "Security Systems Monitor"—counsel's letter argued that Knutson's proffered opinion indicated that "the occupation of Security Systems Monitor * * * is no longer considered unskilled in the post 2001 world" and was, for that reason, not a correct response to the ALJ's hypothetical about suitable sedentary work. A.R. 1291. Although Knutson's expert opinion responded directly to that one aspect of O'Callaghan's testimony, Knutson did not respond to O'Callaghan's description of, or her estimated job numbers for, the bench assembler and sorter positions. See A.R. 1297-1298. Nor did he respond to O'Callaghan's testimony that such positions require that workers be on task at least 80% of the workday. See *ibid.*

d. In her subsequent decision, the ALJ found that "jobs exist in the national economy" suitable for someone in petitioner's position "[b]ased on the testimony of the vocational expert," who had identified "representative sedentary unskilled occupations such as a bench assembler * * * and sorter," with 240,000 and 120,000 jobs nationally. Pet. App. 111a-112a (emphasis omitted). The ALJ did not rely on the availability of security-system-monitor positions, over which Knutson's vocational opinion gave rise to a factual dispute. See *ibid.* The ALJ instead explained that she "g[ave] little weight"

to Knutson's opinion, because it addressed "jobs [that] are not relevant to [the ALJ's] decision." *Id.* at 112a.

***2. Judicial Review***

a. On judicial review, a magistrate judge recommended granting summary judgment to the government. Pet. App. 35a-74a. As relevant here, the magistrate judge concluded that the ALJ's step-five determination that suitable jobs existed in significant numbers in the national economy was supported by "substantial evidence" in the agency record. *Id.* at 69a-73a. The vocational opinion by Knutson, the magistrate judge explained, addressed "occupations that are completely different from those which the ALJ found that [petitioner] can perform." *Id.* at 72a-73a.

The district court adopted that recommendation and granted the government summary judgment. Pet. App. 25a-34a. The court held that a vocational expert's testimony, even though it is based on the expert's professional experience, can constitute "substantial evidence" to support an ALJ's decision concerning the availability of jobs in the national economy. *Id.* at 28a. The court declined petitioner's invitation to hold that "the [vocational expert] was required to provide [documentary] support for her testimony," *ibid.* See *id.* at 28a-30a.

b. The court of appeals affirmed. Pet. App. 1a-23a. As relevant here, the court rejected petitioner's argument, based on the Act's "substantial evidence" standard of review, that "the ALJ erred by refusing to require the vocational expert to produce data or other documentation to support her opinions regarding the work available to [petitioner]," *id.* at 20a. See *id.* at 20a-22a. The vocational expert, the court noted, based her testimony on the *Dictionary* and her "'professional ex-

perience,' gained from talking with employers and conducting job analyses." *Id.* at 20a. Under the governing standard, the court explained, the ALJ retains "responsibility for weighing the credibility of witnesses," and the ALJ here "acceptably fulfilled that obligation." *Id.* at 22a.

The court of appeals rejected petitioner's contention that the vocational expert's "testimony falls short of 'substantial evidence'" because, in petitioner's view, "little substantiates the reliability of the vocational expert's testimony." Pet. App. 20a. The court declined to follow Seventh Circuit decisions that have stated that such experts must "provide the data and reasoning used in support of their conclusions upon request," noting that "there is little clarity on how to apply" the Seventh Circuit's decisions, which have not been a "'popular export'" in other courts. *Id.* at 21a-22a (citation omitted).

## SUMMARY OF ARGUMENT

I. The court of appeals correctly concluded that the administrative record contains "substantial evidence" to support the ALJ's challenged factual finding, based on the testimony of an impartial vocational expert, that jobs suitable for petitioner existed in significant numbers in the national economy. See Pet. App. 20a-22a.

A. The "substantial evidence" standard is a "term of art" in administrative law governing judicial review of agency factfinding. *T-Mobile S., LLC* v. *City of Roswell*, 135 S. Ct. 808, 815 (2015) (quoting *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)). The standard asks only whether the evidence actually contained in the agency record would be sufficient that a "reasonable mind" might accept it "as adequate to support" the factual finding at issue. *Consolidated Edison*

*Co.* v. *NLRB*, 305 U.S. 197, 229 (1938) (*Consolidated Edison*).

The genesis of the substantial-evidence standard for judicial review of agency action was the sufficiency-of-the-evidence test used in judicial proceedings. Like that test for judicial proceedings, the substantial-evidence test does not encompass an inquiry into procedural issues, such as whether the agency erroneously admitted particular evidence into, or excluded it from, the evidentiary record, or whether the agency should have facilitated the discovery of additional facts that a party might then have sought to have admitted into the record. The test simply takes the state of the agency record as it stands, leaving such other matters to be raised in a proper—and distinct—procedural challenge to the particular agency ruling denying the party's evidentiary objection or discovery request. In short, the test evaluates the reasonableness of the agency's factfinding "*on the basis of the evidence before it*," even if that evidence could potentially "be refuted by other evidence that was not presented to the decision-making body." *Carlo Bianchi & Co.*, 373 U.S. at 715.

Petitioner concedes that if "no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion." Br. 29 (citation omitted); see Pet. 23-24. That concession itself demonstrates that the vocational expert's testimony here constitutes substantial evidence supporting the ALJ's finding concerning the availability of suitable jobs. Regardless whether a party to the proceeding stays silent, or instead "questions" the basis for the expert's evidence and unsuccessfully attempts to obtain additional documentary evidence that might corrobo-

rate or undermine the testimony, the state of the evidentiary record is the same. If the evidentiary record contains "substantial evidence" in the absence of an objection, so too does the same evidentiary record that results when the agency adjudicator rejects a party's procedural request to develop the record further.

B. It follows that petitioner's "substantial evidence" challenge (Pet. i) lacks merit. The agency record includes the testimony of an impartial vocational expert directly supporting the ALJ's factual finding that a significant number of jobs petitioner could perform existed in the national economy. Nothing in that testimony, which the ALJ credited, is irrational or implausible. And petitioner's post-hearing submission of another expert's vocational opinion conspicuously failed to challenge the first expert's testimony on which the ALJ based her factfinding. Especially given the long established practice of relying on the testimony of qualified vocational experts in SSA disability hearings, in these circumstances the record contains "sufficien[t]" evidence that "a reasonable mind might accept as adequate to support" the ALJ's finding. See *Consolidated Edison*, 305 U.S. at 229 (emphasis omitted).

II. Although petitioner has framed his legal arguments in "substantial evidence" terms, Pet. i, he also states that a "procedural mechanism[]" for "[r]equiring the production of underlying data upon request" by a claimant would be "'fundamentally fair'" and should be made available to facilitate the "probing [of vocational experts'] conclusions" and the testing of their reliability. Br. 29, 41 (citation omitted). As explained below, petitioner cites no provision of the Act or SSA's implementing regulations, or of the Constitution, requiring such a procedural mechanism. And SSA's existing

administrative process involving presumptively reliable testimony by impartial experts provides a fundamentally fair process for claimants to test the expert's testimony through cross-examination and the presentation of additional evidence. The manner in which this case comes to this Court, however, appears to make the case an unsuitable one to fully address those issues: the court of appeals ruled only on substantial-evidence grounds and did not resolve any procedural contentions; petitioner's question presented is similarly limited; and petitioner has briefed only the question of substantial evidence, and does not contend that the ALJ's distinct procedural rulings violated any relevant source of procedural law.

In any event, the administrative proceedings in this case were fair and did not violate any applicable procedural requirements. The expertise and impartiality of vocational experts makes their testimony presumptively reliable. And once such an expert testifies about relevant jobs in the national economy, the claimant both has the opportunity to probe the reliability of that testimony through cross-examination and may submit other evidence in response, including evidence from another vocational expert. As this Court has recognized, the reliability of testimonial evidence is properly tested in the crucible of cross-examination, which is the age-old process for ferreting out the truth.

Petitioner, who like most claimants was represented by counsel at his disability hearing, never took the opportunity to probe the reliability of the vocational expert's testimony through cross-examination. Counsel never asked about the nature and type of any analyses informing the expert's testimony or inquired about the expert's methodology and original sources of data on

which she based any analysis. Nor did counsel even ask about the nature or relevance of any documents the vocational expert might have retained in the course of her professional work or the type of information and analysis they might actually have contained. Such questions could have developed the evidentiary record by eliciting further testimony about the basis for the expert's conclusion. If the expert could not persuasively answer probing questions about the foundation for her testimony or the reliability of her conclusions to an ALJ's satisfaction, or if the expert's responses included conflicting testimony, the cross-examination might have developed testimonial evidence in the administrative record that could have rendered the expert testimony to be insubstantial on the record as a whole. Petitioner's counsel, however, simply opted not to explore such lines of inquiry.

## ARGUMENT

### I. THE ADMINISTRATIVE RECORD CONTAINS "SUBSTANTIAL EVIDENCE" SUPPORTING THE ALJ'S FACTUAL FINDING THAT SUITABLE JOBS EXISTED IN SIGNIFICANT NUMBERS IN THE NATIONAL ECONOMY

The Social Security Act directs SSA to "make findings of fact and decisions as to the rights of any individual" who has filed a claim for SSDI and/or SSI benefits. 42 U.S.C. 405(b)(1), 1383(c)(1)(A). The Act then provides for judicial review of the resulting agency decision in which, as relevant here, "[t]he findings of the [agency] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. 405(g); see 42 U.S.C. 1383(c)(3). The deferential "substantial evidence" standard for reviewing the sufficiency of the evidence in the administrative record to support an agency finding of fact applies throughout administrative law,

and it merely requires that the evidence actually contained in the administrative record be sufficient that a "reasonable mind" might accept the evidence "as adequate to support" the factual finding in question. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938).

The substantial-evidence standard takes the evidentiary record as it stands and calls for the reviewing court to determine if the agency could rationally make the findings it did based on that record. That standard of review leaves questions concerning a party's requests to obtain additional evidence that might have been, but was not, obtained or admitted into the agency record for resolution in distinct procedural challenges to the agency rulings denying such requests. In this case, under the substantial-evidence standard of review of the sufficiency of the evidence, the vocational expert's hearing testimony in the administrative record is sufficient to support the ALJ's finding that jobs suitable for petitioner existed in significant numbers in the national economy.

The structural provisions of the SSA adjudicatory system concerning the qualifications and selection of impartial vocational experts, and the ability of claimants to contest those qualifications, cross-examine the expert, and offer evidence of their own, provide assurances of reliability for the ALJ's fact-finding. See pp. 44-51, *infra*. There is no basis in the substantial-evidence test for judicial review of evidentiary sufficiency to impose the rigid document-on-demand rule that petitioner urges.

### A. The Substantial-Evidence Test Measures Only The Sufficiency Of The Evidence Actually Contained In The Agency Record

1. The "statutory phrase 'substantial evidence' is a 'term of art' in administrative law that describes how 'an administrative record is to be judged by a reviewing court.'" *T-Mobile S., LLC* v. *City of Roswell*, 135 S. Ct. 808, 815 (2015) (quoting *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)). As the text of Section 405(g) makes clear, that standard of review applies to agency "findings of * * * fact" in SSA hearings, 42 U.S.C. 405(g), and measures the "sufficiency of the evidence" to support such findings, *Consolidated Edison*, 305 U.S. at 229 (emphasis omitted). Under the substantial-evidence standard, a reviewing court determines whether, in light of "the whole record" actually assembled or designated in agency proceedings, there exists "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477, 488 (1951) (quoting *Consolidated Edison*, 305 U.S. at 229); see, *e.g.*, *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999); *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (*Columbian Enameling*). That standard of review for agency factfinding is even more deferential than the "clearly erroneous" standard that applies to review a trial court's "findings of fact." *Zurko*, 527 U.S. at 152-153.

2. This Court's development of the substantial-evidence standard, which had its "genesis in appellate court review of jury verdicts," 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.2, at 976 (5th ed. 2010); see *id.* at 878, confirms its scope.

Well before Congress' 1939 enactment of Section 405(g)[6] and 1946 enactment of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, this Court had described the legal standard for determining whether a case should be submitted to a jury—a standard that determines when the trial court had authority to direct a verdict—as whether the evidentiary record contained "substantial evidence to go to the jury." *Chicago Junction Ry. Co.* v. *King*, 222 U.S. 222, 224 (1911); see also, *e.g.*, *Abrams* v. *United States*, 250 U.S. 616, 619 (1919); *Stilson* v. *United States*, 250 U.S. 583, 588 (1919); *Union Pac. R.R.* v. *Huxoll*, 245 U.S. 535, 537 (1918). Under the jury standard, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient" to avoid a directed verdict (or summary judgment), because "there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); see *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993); *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930).

By 1938, the Fourth Circuit in *Appalachian Electric Power Co.* v. *NLRB*, 93 F.2d 985 (*Appalachian Electric*), like other courts of appeals, had concluded that "[t]he rule as to substantiality [in judicial review of agency action] is not different * * * from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict." *Id.* at 989; see, *e.g.*, *Ballston-Stillwater Knitting Co.* v. *NLRB*, 98 F.2d 758, 760 (2d Cir. 1938); *NLRB* v. *Thompson Prods., Inc.*, 97 F.2d 13, 15 (6th Cir. 1938).

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[6] Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1368-1371 (enacting, *inter alia*, Section 405(a), (b), and (g)).

Soon thereafter, this Court decided the two path-marking decisions—*Consolidated Edison* (1938), and *Columbian Enameling* (1939)—that are now "considered authoritative in defining the words 'substantial evidence'" in the administrative-law context. *Consolo* v. *Federal Mar. Comm'n*, 383 U.S. 607, 620 & n.18 (1966) (citation omitted). Both decisions cited and followed the Fourth Circuit's *Appalachian Electric* decision in holding that "substantial evidence" requires "more than a mere scintilla" and means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison*, 305 U.S. at 229 (citing *Appalachian Electric*, 93 F.2d at 989, and similar decisions); accord *Columbian Enameling*, 306 U.S. at 300. Echoing the jury-trial origins of that test, the Court emphasized that "[s]ubstantial evidence" in the context of judicial review of agency action must be "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Columbian Enameling*, 306 U.S. at 300 (citing *Appalachian Electric*, 93 F.2d at 989, and this Court's sufficiency-of-the-trial-evidence decision in *Gunning*, 281 U.S. at 94); accord, *e.g.*, *Illinois Cent. R.R.* v. *Norfolk & W. Ry. Co.*, 385 U.S. 57, 66 (1966); *Consolo*, 383 U.S. at 620; *Universal Camera Corp.*, 340 U.S. at 477.

### B. The Sufficiency Of The Evidence In The Administrative Record, As Measured By The Substantial-Evidence Test, Is Distinct From Procedural Questions Concerning The Creation Of That Record

Significantly for present purposes, the substantial-evidence inquiry is "limited to the administrative record" and simply measures the propriety of "what the agency did *on the basis of the evidence before it*." *Carlo*

*Bianchi & Co.*, 373 U.S. at 715. For that reason, "a decision may be supported by substantial evidence" "even though [that evidence] could be refuted by other evidence that was not presented to the decision-making body." *Ibid.* This Court's decisions applying the substantial-evidence test, and petitioner's own contentions, show that the record evidence here satisfies that standard.

1. The Court has long understood challenges to the sufficiency of the evidence in the agency record under the "substantial evidence" framework to be legally distinct from procedural challenges to the agency's denial of a party's request to obtain additional evidence or admit it into the record.

This Court's decision in *Consolidated Edison*—one of the decisions "considered authoritative in defining the words 'substantial evidence,'" *Consolo*, 383 U.S. at 620 & n.18 (citation omitted)—addressed a company's procedural challenge to the NLRB's "refusal to receive the testimony of certain witnesses," *Consolidated Edison*, 305 U.S. at 225, *id.* at 224-229, before separately resolving the company's challenge to "[t]he sufficiency of the evidence" in the agency record under the "substantial evidence" standard, *id.* at 229-231 (emphasis omitted). With respect to the procedural-due-process challenge, the Court determined that the agency had erred in refusing to develop the record with the testimony proffered by the company. *Id.* at 226. The Court nevertheless rejected the company's procedural challenge because the company had failed to utilize an agency process to submit additional evidence. *Id.* at 226-228. The Court then separately turned to the evidence actually in the agency record—which, of course, did not include the company's wrongfully excluded testimony—

and concluded that it was sufficient to uphold the Board's findings under the "substantial evidence" standard because "a reasonable mind might accept [that evidence] as adequate to support [the Board's] conclusion." *Id.* at 229-230.

The Court's decision in *Heckler* v. *Campbell*, 461 U.S. 458 (1983), is similar. In *Campbell*, SSA had relied on its medical-vocational guidelines to determine that "a significant number of jobs existed" that the claimant could perform. *Id.* at 463. The court of appeals overturned the agency's denial of benefits as "not supported by substantial evidence" because, the court reasoned, the hearing record contained no evidence about particular jobs suitable for the claimant to perform. *Id.* at 465 (citation omitted). This Court reversed, holding that the agency could resolve the "factual issue" concerning the types and number of jobs that existed in the national economy by rulemaking, rather than on a case-by-case basis using "vocational experts at each disability hearing." *Id.* at 468; see *id.* at 465-468.

Having rejected the claimant's substantial-evidence challenge, the Court in *Campbell* declined to address the claimant-respondent's related—but legally distinct—argument that an agency regulation and the Due Process Clause independently required the agency "to specify alternative available jobs" in a disability hearing. 461 U.S. at 468-469 & n.12. Those issues, the Court concluded, were not fairly presented by the court of appeals' substantial-evidence decision on review. *Id.* at 468.

Both *Consolidated Edison* and *Campbell* reflect that judicial review to determine whether substantial evidence supports an agency's factual finding is not the means by which a party may challenge agency decisions

affecting what evidence may or must be obtained by a party or admitted into the administrative record.

2. This Court has applied similar principles in the criminal context. In *McDaniel* v. *Brown*, 558 U.S. 120 (2010) (per curiam), the State relied at trial on a DNA expert who, the State later conceded, made significant errors in her testimony, including testimony that erroneously indicated that DNA testing had shown only "a 0.000033% chance that [the defendant] was innocent." *Id.* at 127-128. Both the district court and court of appeals on federal habeas review concluded (in light of a post-trial expert report identifying the errors) that the expert DNA testimony was "unreliable" and thus could not be considered when reviewing the sufficiency of the evidence. *Id.* at 126-127 (citations omitted). This Court reversed, concluding that it is "clearly correct" that review for evidentiary sufficiency determines "'whether the jury acted in a rational manner * * * based on the evidence before it, not whether improper evidence violated due process.'" *Id.* at 130-131 (citation omitted). For that reason, the Court explained, a "'reviewing court must consider all of the evidence admitted'" at trial, even expert evidence "admitted erroneously." *Id.* at 131 (citation omitted); see *id.* at 137-138 (Thomas, J., concurring). Moreover, the Court declined to consider the respondent's argument for affirmance on the alternative ground that admitting into evidence the "'unreliable and misleading'" expert testimony violated his procedural due-process rights. *Id.* at 134-136. That argument asserting procedural error, the Court concluded, had not been preserved by making a sufficiency-of-the-evidence argument. *Id.* at 135-136; see also *Lockhart* v. *Nelson*, 488 U.S. 33, 40-41 (1988) (similar evidentiary sufficiency decision).

The same logic applies with equal force to judicial review of evidentiary sufficiency under the substantial-evidence standard. So long as the agency could have rationally made its factual finding on the evidence in the administrative record before it, *i.e.*, so long as that evidence is "sufficien[t]" for a "reasonable mind" to accept it "as adequate to support" the agency's factfinding, *Consolidated Edison*, 305 U.S. at 229 (emphasis omitted), substantial evidence supports the agency finding.

3. Petitioner emphasizes (Br. 29) that, under his version of the substantial-evidence inquiry, a social security disability claimant "cannot attack the substantiality of an expert's conclusions" if the claimant failed to employ the "procedural mechanisms available for probing those conclusions." As a result, petitioner continues (*ibid.*), "[w]hen no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion" as "substantial evidence." *Donahue* v. *Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). But, petitioner contends, "if [the expert's testimony is] challenged" by the claimant at the hearing, the "vocational expert [must] make available the data underlying the expert's opinion" in order qualify the expert's testimony as "substantial evidence." Pet. 23-24. Petitioner's theory fundamentally misunderstands the nature of the substantial-evidence inquiry.

The substantial-evidence test, as discussed above, evaluates the sufficiency of the evidence to support the agency's factfinding "on the basis of the evidence before [the agency]." *Carlo Bianchi & Co.*, 373 U.S. at 715 (emphasis omitted). If a claimant in SSA proceedings stays silent and thereby fails to utilize "procedural mechanisms available for probing" a vocational expert's

testimony (Pet. Br. 29), the state of the evidentiary record will be exactly the same as when the claimant unsuccessfully requests documentary evidence from the expert that could potentially undermine her testimony. In both cases, the expert's testimony is what remains in the administrative record. As a result, if, as petitioner acknowledges, the evidentiary record is deemed sufficient and sufficiently reliable to constitute "substantial evidence" in the absence of an objection, so too does the same evidentiary record that results when the agency adjudicator rejects a party's procedural request to obtain further evidence and include it in the record.

Moreover, petitioner's contention that a vocational expert's testimony is not "substantial evidence" if the expert does not provide upon request a "written report or other documentation" to support her testimony, Br. 28 (citations omitted), erroneously disregards the focus of the substantial-evidence inquiry: the actual evidence in the record. A vocational expert, for instance, might persuasively answer a claimant's questions on cross-examination about the methodology she employed and might identify the specific publicly available data that she used to create any particular written analysis that may actually have formed the basis for her testimony. The fact that the expert did not produce an actual copy of any such written analysis would provide no sound basis for concluding that the hearing record lacks substantial evidence to support the ALJ's factual finding on the basis of the expert testimony. Yet petitioner's document-on-demand theory of the substantial-evidence test would do precisely that. It would elevate what petitioner desires as a procedural requirement—the production of certain documents upon request—into a touchstone of

substantial evidence, regardless of the state of the evidence in the agency record.

### C. Petitioner Misreads *Richardson* v. *Perales* And Identifies No Decision Of This Court Supporting His View Of The Substantial-Evidence Test

Petitioner's misunderstanding of the substantial-evidence test flows from his misreading of the decisions of this Court. Petitioner principally relies (Br. 18, 22-30) on *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971), which he views as "mandat[ing] that vocational experts provide the data underlying their conclusions upon an applicant's request," Br. 22 (capitalization omitted). That is incorrect. The portion of *Perales* that petitioner cites for his understanding of "substantial evidence" resolves different questions involving procedural due process. Petitioner identifies (Br. 30-34) no other decision of this Court supporting his position.

#### *1. Petitioner's reliance on* Perales *is misplaced*

Petitioner contends (Br. 18) that *Perales* "held" that "an expert's conclusions must have evidentiary support and be subject to meaningful cross-examination to constitute 'substantial evidence.'" That is incorrect. Petitioner relies (Br. 22-25) on Part V of the *Perales* decision, 402 U.S. at 401-406, but that portion of *Perales* rests on procedural due-process grounds, not the sufficiency of the evidence.

a. The Court in *Perales* granted the government's certiorari petition to review the Fifth Circuit's holding that medical reports prepared by physicians who did not provide live testimony in SSA disability proceedings were not "substantial evidence" because such reports rested on purportedly "uncorroborated hearsay" when

the claimant objected to their admission and live testimony contradicted them. 402 U.S. at 398; see also *id.* at 390. The court of appeals' holding had been based on a "single sentence from *Consolidated Edison*," which stated that "'[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence.'" *Id.* at 407 (quoting *Consolidated Edison*, 305 U.S. at 230). The Court clarified in *Perales* (in one portion of Part VI of its opinion) that *Consolidated Edison* did not impose a "blanket rejection" of "administrative reliance on hearsay," but rather concluded that evidence lacking "'*rational* probative force'" will not constitute substantial evidence. *Id.* at 407-408 (quoting *Consolidated Edison*, 305 U.S. at 230) (emphasis added). *Perales*, however, did not simply clarify that single sentence from *Consolidated Edison*. The Court also made clear that it granted certiorari to resolve what it characterized an "important procedural due process issue." *Id.* at 398; see also *id.* at 402 ("The question, then, is as to what procedural due process requires with respect to examining physicians' reports in a social security disability claim hearing.").

The government in *Perales* had argued that that Fifth Circuit's decision was incorrect under the Social Security Act's express authorization to consider evidence that would be inadmissible under rules of evidence governing court procedure, 42 U.S.C. 405(b)(1), and the Act's "substantial evidence" standard of review, 42 U.S.C. 405(g). See Gov't Br. at 15-16, *Perales*, *supra* (No. 70-108). "The only basis" on which those statutory provisions could be attacked, the government argued, would be that "they operate, in some way, to deny 'due process of law,' contrary to the Fifth Amendment." *Id.* at 16.

Perales, in turn, conceded that "the substantial evidence rule" required a reviewing court to uphold agency factfinding "if there is *any* evidence which will support the decision." Resp. Br. at 8, *Perales*, *supra*. Perales therefore argued that, although judicial review must proceed under the "substantial evidence rule," "the *procedural safeguards of due process*" nevertheless secured a "right" to "confrontation and cross-examination" of the non-testifying authors of the medical reports. *Id.* at 6-7 (emphasis added). His submission was that the "admission of written [hearsay] statements or reports concerning the crucial issue [of medical impairment,] which are disputed by other live witnesses, cannot be substantial evidence," because "calling [those materials] substantial evidence is a basic denial of due process." *Id.* at 9; see *id.* at 8-18 (making "procedural due process" argument).

The Court in *Perales* thus briefly noted the statutory "substantial evidence" standard in Section IV of its opinion (which comprises only one paragraph), 402 U.S. at 401, before turning in Section V (*id.* at 401-406) to resolve Perales's arguments concerning the application of "procedural due process" in SSA proceedings, *id.* at 401-402. The Court stated that "[t]he question" that it was called upon to answer was "what procedural due process requires with respect to examining physicians' reports in a social security disability claim hearing." *Id.* at 402; see *id.* at 414 (Douglas, J., dissenting) ("Review of the evidence is of no value to us. The vice is in the *procedure* which allows it in without testing it by cross-examination.") (emphasis added).

*Perales* was decided about five years before the Court's seminal procedural due-process decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). But the Court's

evaluation of factors "assur[ing] [the] underlying reliability and probative value" of the reports even without the authors' cross-examination, *Perales*, 402 U.S. 402; see *id.* at 402-406, as well as the "pragmatic" interest in avoiding the massive burden of requiring live testimony by medical experts in all disability cases, *id.* at 406, reflected what *Eldridge* would later synthesize doctrinally for due-process purposes as a balancing of the risk of error under the challenged procedures and the value of imposing additional procedural safeguards against the "administrative burden and other societal costs" of imposing additional process. See *Eldridge*, 424 U.S. at 343, 347.

b. Unlike the claimant in *Perales*, however, petitioner has not made a procedural due-process argument in this Court. Nor has petitioner pointed to any procedural rights specified by Congress or established by SSA regulation to govern the agency's conduct of its hearings. Rather, he seeks to insert such rights into the doctrinally distinct substantial-evidence standard for *judicial review* of the ALJ's factfinding based on those hearings. Pet. Br. 22-28. Petitioner's submission, if accepted, would substantially disrupt administrative-law jurisprudence.

In *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519 (1978), this Court noted that it had "continually repeated" the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure," *id.* at 544, and it cautioned that a reviewing court "stray[s] beyond the judicial province" by "impos[ing] upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good," *id.* at 549. The Court has thus emphasized that the APA "sets forth the

full extent of judicial authority to review executive agency action for procedural correctness." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The substantial-evidence standard in Section 405(g) governing judicial review of the sufficiency of the evidence in the administrative record applies throughout administrative law, as codified in the APA, 5 U.S.C. 706(2)(E), and numerous other statutes governing judicial review of agency action.[7] Distorting that standard in the manner petitioner proposes would improperly circumvent the very limited judicial authority to prescribe procedures for administrative agencies. Cf. 5 U.S.C. 706(2)(D) and (E) (providing APA standards of judicial review that identify as separate agency errors the failure to observe "procedure required by law" and the making of findings "unsupported by substantial evidence").

Such a doctrinal innovation would be particularly unwarranted here. Congress has vested SSA with 'full power and authority" to make "rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. 42 U.S.C. 405(a). That provision confers "exceptionally broad authority" to establish regulations appropriate to administer the vast hearing system required to implement the Act. *Campbell*, 461 U.S. 466. Yet petitioner points to no regulatory provision governing his hearing that he contends was violated.

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[7] See, *e.g.*, 2 U.S.C. 1407(d)(3); 5 U.S.C. 7703(c)(3); 12 U.S.C. 1848; 15 U.S.C. 717r(b); 21 U.S.C. 877; 29 U.S.C. 160(e), 660(a); 30 U.S.C. 816(a)(1); 49 U.S.C. 44703(d)(3).

### *2. No other decision of this Court supports petitioner's understanding of substantial-evidence review*

Aside from his misplaced reliance on *Perales*, petitioner identifies no basis for his understanding of the substantial-evidence standard of judicial review. Petitioner relies (Br. 30-34) on three decisions in purportedly "analogous administrative contexts." Br. 30-31. But those decisions have no relevance to the question presented here, beyond the fact that each involved "substantial evidence" challenges to agency decisions (in materially different circumstances).

a. *Baltimore & Ohio Railroad* v. *Aberdeen & Rockfish Railroad*, 393 U.S. 87 (1968), involved review of an Interstate Commerce Commission decision in which the Commission had rejected a proffered rate division for North-South freight rail service on the ground that it provided Northern rail lines a smaller share of the revenues from joint rates than was warranted by the Northern lines' "share of the expenditures made in providing the joint service." *Id.* at 88-89; see *id.* at 90. The administrative record, however, did not include any evidence about "[t]he costs of North-South traffic" at issue. *Id.* at 90. Rather than "gather" such evidence, the Commission had based its decision on "average costs * * * relat[ing] to all Northern traffic and all Southern traffic." *Id.* at 90-91.

This Court concluded that the Commission's decision was not supported by "substantial evidence" because no evidence in the administrative record indicated that the "territorial average costs [in the record] are necessarily the same" as the "costs incurred in handling North-South freight traffic." 393 U.S. at 91. *Baltimore & Ohio Railroad* thus simply reflects that an expert agency *adjudicator* cannot assert factual conclusions about the

specific circumstances of a particular case without any evidentiary support in the administrative record. The decision does not speak to the distinct question here, which concerns actual evidence in the agency record—testimony by an impartial vocational expert—that affirmatively supports the ALJ's factual finding.

b. Petitioner's reliance (Br. 32-33) on *Columbian Enameling* is similarly misplaced. In *Columbian Enameling*, the Court held that the NLRB's finding that an employer had "refused to bargain collectively with the Union on July 23, 1935" was not supported by substantial evidence. 306 U.S. at 293, 300. That was so because, under the National Labor Relations Act, the employer had no bargaining obligation "without some indication given to him by [his employees] or their representatives of their desire or willingness to bargain," *id.* at 297, and because the administrative record contained "no evidence that the Union gave to the employer * * * any [such] indication" before the key July 23 date, *id.* at 298. See *id.* at 298-300. That straightforward application of the substantial-evidence standard has no relevance here, where, again, the record contains evidence—vocational expert testimony—directly supporting SSA's determination.

Petitioner asserts (Br. 33) that SSA in this case made "almost precisely the error this Court identified in *Columbian Enameling*." That is so, petitioner continues, because the employer in *Columbian Enameling* "'pointedly brought to the attention of the Board'" the lack of any evidence reflecting a refusal to bargain, after which the agency made "'no attempt * * * to supply the omission,'" Br. 32 (quoting *Columbian Enameling*, 306 U.S. at 298), whereas, in this case, petitioner "pointed out to [SSA] an 'omission' in the record," *i.e.*,

"the data underlying the [vocational] expert's opinion," Br. 33. It may well be that petitioner, like the employer in *Columbian Enameling*, preserved his claim of error by raising it before the agency, but the actual error in *Columbian Enameling* was the lack of any relevant evidence in the agency record. This case, as explained, does contain relevant evidence in the form of an impartial vocational expert's direct testimony about the availability of jobs that petitioner could perform.

c. Finally, petitioner notes (Br. 33) that the Court in *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972), concluded that "expert testimony alone" can constitute "substantial evidence." In that case, the Commission's jurisdiction over an electric utility rested on an agency finding that the utility had transmitted electrical energy (through another utility) across state lines. *Id.* at 454, 456-457. The agency based that finding on an analysis of power flow at a particular location on the power grid, *id.* at 461, that "rested on the testimony of expert witnesses," *id.* at 463. This Court rejected the view that an "expert opinion" is "not fact" and is "mere speculation rather than evidence." *Id.* at 464. "The substantial-evidence rule," the Court explained, "is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts." *Id.* at 466 (brackets and citation omitted).

Nothing in *Florida Power & Light* suggests that the vocational testimony here does not constitute substantial evidence of the existence of significant numbers of jobs in the national economy that petitioner could perform. *Florida Power & Light* made clear that the sufficiency of the type of scientific expert opinion before the Court had been "so long accepted" that it was not

"fairly in dispute" that such evidence would qualify as substantial evidence. 404 U.S. at 465-466. That decision *upholding* an agency's finding under "the substantial-evidence test" based on a "long accepted" practice of relying on expert opinion, *id.* at 465, 467, affirmatively supports the result in this case.

### D. The Vocational Expert's Hearing Testimony In This Case Constitutes Substantial Evidence Supporting The ALJ's Factfinding

Under the proper formulation of the substantial-evidence standard of judicial review, the administrative record in this case contains sufficient evidence to support the ALJ's finding that jobs suitable for petitioner existed in significant numbers in the national economy.

The agency record contains the hearing testimony of an impartial vocational expert (O'Callaghan) that directly supports the ALJ's factual finding. Petitioner neither objected to O'Callaghan providing expert testimony nor questioned her expert qualifications. See p. 12, *supra*. The vocational expert testified, and the ALJ found, that sedentary unskilled occupations suitable for petitioner's functional limitations included work as a "bench assembler" and "sorter," which respectively reflected approximately 240,000 and 120,000 jobs nationwide. Pet. App. 111a-112a; *id.* at 116a (A.R. 857); see pp. 12-13, *supra*. The vocational expert further testified that bench-assembler and sorter positions required a worker to stay on task no less than 80% of the workday. A.R. 863-865; see p. 14, *supra*. At a minimum, that expert testimony, which O'Callaghan based in part on her vocational-rehabilitation experience and was subject to cross-examination, has the "rational probative force" necessary to constitute substantial evidence of a significant number of jobs in the national economy

that petitioner could perform. *Perales*, 402 U.S. at 407-408 (quoting *Consolidated Edison*, 305 U.S. at 230).

Moreover, the significance of the expert testimony supplied by O'Callaghan was enhanced by the opinion of petitioner's own vocational expert (Knutson), which petitioner offered in response. Knutson, who had himself served as a SSA vocational expert for nearly 20 years, directly responded to one of the three illustrative sedentary jobs that O'Callaghan had identified. See pp. 15-16, *supra*. But Knutson's opinion conspicuously failed to discuss—let alone challenge—O'Callaghan's description of, and her job numbers for, the bench assembler and sorter positions. See p. 16, *supra*. Nor did Knutson discuss or dispute the minimum time on-task required for those jobs. See *ibid*. Those omissions by petitioner's own experienced expert itself indirectly supports the reliability of O'Callaghan's expert testimony on which ALJ relied.

Especially given the long-established practice of relying on the testimony of vocational experts like O'Callaghan (and Knutson) in social security disability hearings, the evidence in the administrative record in this case is "sufficien[t]" evidence that "a reasonable mind might accept as adequate to support" the ALJ's factual finding of the availability of relevant work in the national economy. See *Consolidated Edison*, 305 U.S. at 229 (emphasis omitted). It is much more than a "mere scintilla," *ibid*., and it is far removed from the kind of evidentiary material lacking any "rational probative force" that would be insufficient to constitute "substantial evidence," *Perales*, 402 U.S. at 407 (quoting *Consolidated Edison*, 305 U.S. at 230). There is no contrary evidence in the record, much less anything "so compel-

ling" that "a reasonable factfinder would have to conclude" that O'Callaghan's expert testimony was incorrect. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481, 483-484 (1992) (citing *Columbian Enameling*, 306 U.S. at 300). A reasonable factfinder confronted with such an evidentiary record could rationally find that bench assembler and sorter positions exist in roughly the numbers that O'Callaghan described, and in any event could determine that jobs suitable for petitioner existed in significant numbers in the national economy. In short, the ALJ's factfinding is "supported by substantial evidence" and therefore "conclusive" on judicial review. 42 U.S.C. 405(g).

## II. THE ADMINISTRATIVE PROCEEDINGS IN THIS CASE WERE FAIR AND DID NOT VIOLATE ANY PROCEDURAL REQUIREMENTS IMPOSED BY LAW

Although petitioner frames his legal arguments as addressing whether "substantial evidence" supports the ALJ's factfinding, the premise for his position is ultimately a procedural one: The vocational expert "fail[ed] upon [petitioner's] request to provide the underlying data on which [the expert's] testimony is premised." Pet. i. Any such failure, however, stemmed not from the expert's own refusal to supply requested documents from her files, but from the ALJ's two procedural rulings during petitioner's disability hearing not to require the production of such documents. Pet. App. 118a-119a (A.R. 865, 870). Petitioner states (Br. 29) that a "procedural mechanism[]" for "[r]equiring the production of underlying data upon request" by a claimant should be made available to facilitate the "probing [of vocational experts'] conclusions." Those "procedures," in peti-

tioner's view (Br. 29, 41), are required to make the proceedings "fundamentally fair" and increase the reliability of the disability evaluation process.

Those contentions lack merit. The administrative proceedings in this case were fair and did not violate any procedural requirement imposed by law. As explained below, the testimony of impartial vocational experts under long-established practice is inherently reliable; SSA's existing administrative process, which gives claimants the right to cross-examine such experts and submit other relevant evidence, is a fair procedure for testing a vocational expert's testimony; and petitioner's discovery-on-demand rule would be an impractical and unduly burdensome procedure in this context.

The Court's consideration of those issues, however, may be frustrated by the manner in which this case has come to the Court. First, the court of appeals rejected petitioner's "substantial evidence" argument without addressing procedural due process or any other asserted source of procedural law. Pet. App. 20a-22a; see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Second, petitioner sought certiorari to resolve an asserted disagreement over the meaning of the substantial-evidence test, Pet. 12-19, and accordingly presented only a "substantial evidence" question for the Court's review, Pet. i. Yet the substantial-evidence test for the sufficiency of an agency's evidentiary record is legally independent and distinct from the procedures for assembling and designating that record. See pp. 24-32, *supra*. Finally, petitioner has not once mentioned "due process" in his briefs in this Court nor identified any statutory or regulatory provision requiring his suggested procedure. Those factors appear to render this case an unsuitable

one in which to fully explore in the first instance such procedural matters, even if they are regarded as "related" or "complementary" to the substantial-evidence question presented to the Court. See *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (A subsidiary question must be "fairly included" in the question presented.) (citations and emphases omitted). In any event, petitioners' contentions are without merit.

### A. Vocational Experts' Expertise And Impartiality Make Their Testimony Presumptively Reliable

As with the opinions of the physicians at issue in *Perales*, the expertise and impartiality of vocational experts make their opinions presumptively reliable. Vocational experts are practitioners with expertise in "placing adult workers, including those with disabilities, into jobs" and the "[w]orking conditions and physical demands of various occupations," as well as "[k]nowledge of the existence and numbers of jobs at all exertional levels." HALLEX I-2-1-31.B.1. The purpose of obtaining the testimony of these unbiased professionals is to secure an impartial and realistic assessment of whether someone with the claimant's vocational background and residual functional capacity would be able to do work that exists in significant numbers in the national economy. As the resumes of the two experts in this case reflect, A.R. 1274, 1293, such experts frequently work in the community in the field of vocational rehabilitation and therefore have private clients for whom they provide services. It is such practical experience helping disabled workers in vocational contexts that can make vocational experts particularly valuable in evaluating whether a claimant has satisfied the statutory definition of disability.

SSA has established criteria specifying the overall education and experience for an individual in order to qualify as a vocational expert. See p. 6, *supra*. SSA's subsequent selection of vocational experts for particular ALJ hearings off a rotating roster (subject to their availability), and its payment of fees based only on the services they furnish, see pp. 6-7, *supra*, provide structural protections that safeguard impartiality. See *Perales*, 402 U.S. at 403 (fee paid to medical expert as "recompense for [the expert's] time and talent" provides no basis for "ascrib[ing] bias" to their opinions). The agency's own role as "an adjudicator and not as an advocate or adversary" further contributes to the "reliability and impartiality" in their expert opinions. *Ibid.* And each claimant is given the opportunity at the hearing both to probe and to object to the qualifications and impartiality of the particular expert selected to provide testimony in his case. See p. 7, *supra*. Petitioner did not object to or dispute the expertise or impartiality of the vocational expert here.

Although petitioner contends (Br. 36, 49-52) that a vocational expert's impartiality, credibility, and professional experience have "little bearing" on the reliability of the expert's testimony about the availability of jobs, this Court concluded in *Perales* that such factors enhance the reliability of expert evidence in SSA disability hearings, even when the expert is *not* cross-examined in the hearing. See 402 U.S. at 402-404 (including the "impartiality," "independen[ce]," and "professional" opinion of medical experts as factors that "assure underlying reliability"). Likewise, under the Federal Rules of Evidence, "experience alone—or experience in conjunction with other knowledge, skill, training or education"

—can "provide sufficient foundation for expert testimony." Fed. R. Evid. 702 advisory committee's note (2000 amendments); 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.").

### B. Claimants Can Effectively Probe The Testimony Of Vocational Experts Through Cross-Examination

Once an impartial vocational expert has testified about jobs that can be performed by a person described in the hypotheticals posed by the ALJ based on the claimant's alleged impairments, the claimant has the opportunity to probe the reliability of that testimony through cross-examination. The "reliability" of testimonial evidence is properly tested "in the crucible of cross-examination." *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004). Indeed, petitioner acknowledges that cross-examination is "[t]he age old tool for ferreting out truth." Br. 45 (citation omitted). Cf. *Dowling* v. *United States*, 493 U.S. 342, 353 (1990) (rejecting contention that it is "fundamentally unfair" to admit evidence alleged to be "inherently unreliable," because the defendant "had the opportunity to refute it" and the factfinder could then "assess the truthfulness and the significance" of the testimony).

The cross-examination procedure does not, as petitioner suggests (Br. 48), shift to the claimant an evidentiary burden that should be borne by the agency. At step five of SSA's sequential evaluation process, the agency bears the burden of producing evidence of jobs that the claimant could perform and that exist in substantial numbers in the national economy. As petitioner acknowledges (*ibid.*), the agency accepts that burden so that a claimant does not have to prove "a broad negative

proposition about the absence of suitable alternative work in the labor market." 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003) (explaining that the claimant does not have to "produce vocational evidence showing that there are no jobs in the national economy that [the claimant] can perform"). The agency meets that burden when, through a vocational expert, it identifies jobs that a person with the claimant's limitations could perform. At that point, the claimant is not being asked to "prove a broad negative proposition about the absence of suitable alternative work in the labor market." Pet. Br. 48 (citation omitted). Instead, the vocational expert has provided estimates with respect to the availability of the specified jobs, which the claimant may probe through cross-examination.

Like petitioner, most claimants are represented by counsel at ALJ hearings.[8] The ALJ can reasonably rely on the claimant's attorney to adequately probe the bases for any potentially questionable vocational-expert testimony through cross-examination. The public jobs data that vocational experts utilize are available and "familiar to * * * claimants' representatives," who successfully use them "to rebut contrary [expert] testimony." National Ass'n of Disability Representatives

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[8] See *Social Security's Processing of Attorney Fees: Hearing Before the Subcom. on Social Security of the House Comm. on Ways and Means*, 107th Cong., 1st Sess. 50 (May 17, 2001) (testimony by Executive Director, National Organization of Social Security Claimants' Representatives (NOSSCR), that 74.9% of SSDI claimants were represented by an attorney in FY 2000); NOSSCR Amicus Br. 1 (similar). Because petitioner was represented by counsel, this case does not present any question whether an ALJ has an independent duty to probe the testimony of a vocational expert when a claimant is unrepresented.

Amicus Br. 12-13. Here, however, nothing in petitioner's cross-examination of the vocational expert gave the ALJ reason to question the reliability of her testimony. See pp. 13-15, *supra*.

Petitioner asserts (Br. 46-47) that, without obtaining documents that may have informed the vocational expert's opinion, a claimant "cannot probe the basic question * * * of whether the expert's conclusions flow from a coherent analysis of reliable data sources" or determine if the opinion has been conjured "out of whole cloth." That is wrong. Such matters may be explored by asking questions to ascertain the expert's logic, mode of analysis, and information sources underlying her conclusions. Yet after making only a very preliminary inquiry, petitioner's counsel never even asked the expert about her methodology or the sources of information informing her testimony, or challenged the vocational expert with different evidence. See pp. 13-16, *supra*.

When the vocational expert, for instance, stated that she based her testimony that sorters and bench assemblers must stay on task at least 80% of the workday on her professional experience, including talking to employers and doing job analyses, petitioner's counsel never explored the issue beyond asking for copies of her job analyses. See pp. 14-15, *supra*. Counsel never asked about the types of analyses that the expert performed; what specific categories of information any written analyses might contain; or what methodology and sources of data the expert used in doing those analyses. If the vocational expert could not have persuasively answered probing questions about the foundation for her testimony to the ALJ's satisfaction, or if her responses included conflicting testimony, the cross-examination could have developed testimonial evidence

in the administrative hearing record that itself might have undermined the reliability of the expert's conclusions. In those circumstances, the record evidence might have been such that no "reasonable mind" could have found it "adequate to support"—*i.e.*, substantial evidence for—the expert opinion on which the ALJ relied. *Consolidated Edison*, 305 U.S. at 229. See, *e.g.*, *Chavez* v. *Berryhill*, 895 F.3d 962, 966-967, 969-970 (7th Cir. 2018) (discussing ALJ's probing examination that sufficiently undermined the vocational expert's conclusions). Petitioner opted never to explore such lines of inquiry.

In fact, petitioner's counsel failed even to ascertain whether any set of actual written analyses would likely shed meaningful light on the vocational expert's on-task testimony. The expert testified that her testimony was based in part on the "experience" she obtained in "*doing* job analysis." Pet. App. 117a-118a (A.R. 865) (emphasis added); accord A.R. 866 ("experience doing job analysis"); see p. 14, *supra*. She did not specifically testify that she relied for her testimony in this case on information in any particular written analyses, as petitioner's counsel appears to have assumed in asking her to "provide those job analys[e]s," Pet. App. 118a (A.R. 865).

Petitioner's counsel similarly failed to use cross-examination to probe the expert's testimony that 240,000 and 3000 bench-assembler jobs and 120,000 and 1500 sorter jobs existed in the national economy and Southeastern Michigan, respectively. Pet. App. 116a (A.R. 857). After the expert explained that she based those numbers on BLS data as well as her "own individual labor market surveys," counsel merely asked the expert to "provide [her] own" surveys. *Id.* at 119a (A.R. 869). Counsel never requested the relevant BLS data,

inquired further about such data or the vocational expert's evaluation of it, or asked about the nature of the individual labor market surveys she performed. Nor did counsel ask whether the Michigan-based expert's nationwide numbers were based on BLS's nationwide data rather than the expert's own possibly local surveys.[9]

When a claimant introduces evidence into the hearing record—either from the vocational expert herself on cross-examination or from some other evidentiary source—that calls the expert's initial testimony into

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[9] Petitioner's amici attempt to do in briefing in this Court what petitioner did not do at the hearing: contest the reliability of the vocational expert's testimony through competing data. NOSSCR Amicus Br. 6-8. NOSSCR suggests (Br. 6 & n.5) that when vocational expert O'Callaghan testified about the number of "sorter" jobs, she was referring only to the subset of jobs identified in the *Dictionary* under the specific numerical code for an agricultural "nut sorter." NOSSCR similarly suggests (Br. 7 & n.15) that when the expert testified about the number of "bench assembler" jobs, she was referring only to the subset of jobs identified under the *Dictionary* code for a "final assembler" of optical frames. NOSSCR then argues (Br. 6-8) that the experts' projections in this case differ from those offered by vocational experts in other cases. Petitioner's counsel did not raise such issues in his cross-examination of the expert, perhaps because counsel understood that the *Dictionary* codes that the expert cited in this case were merely "representative"—that is, illustrative—of the broader categories of "sorter" and "bench assembler" to which her job projections applied. See Pet. App. 116a (expert's explanation that she provided "representative" codes from the *Dictionary*). Had counsel asked the expert to explain how she developed her estimates, the expert would have then provided an answer. NOSSCR's argument thus underscores the point that claimants are free to use publicly available data when probing the basis for a vocational expert's testimony. Here, petitioner's counsel did not do so, and thus gave the ALJ no reason to conclude that the estimates given by the vocational expert were unreliable.

question, the claimant can produce a conflict that the ALJ must resolve. In *Buck* v. *Berryhill*, 869 F.3d 1040 (2017), for example, the Ninth Circuit concluded that "the vast discrepancy between the [vocational expert's] job numbers and those tendered by [the claimant], presumably from the same source, [wa]s simply too striking to be ignored." *Id.* at 1052. But where, as here, the claimant fails to utilize cross-examination to probe the basis for the expert's testimony and otherwise fails to submit evidence undermining that testimony, "a [vocational expert's] testimony is one type of job information that is regarded as inherently reliable" in "the absence of [such] contrary evidence," and accordingly can constitute substantial evidence for the agency's decision. *Id.* at 1051.

### C. Claimants Can Submit Rebuttal Evidence, Including From A Vocational Expert

Another procedural tool available to claimants is the option to submit rebuttal evidence, including an opinion from a different vocational expert. In this case, for example, petitioner obtained a rebuttal opinion from vocational expert Knutson (A.R. 1297-1298) and submitted it with an accompanying letter brief (A.R. 1290-1292) to argue his case to the ALJ.

Knutson's opinion, however, did not address two of the three sedentary-level jobs (bench assembler and sorter) that vocational expert O'Callaghan had identified as available in significant numbers in the national economy and the region in which petitioner lived. The only sedentary-level job that Knutson's opinion addressed was that of surveillance system monitor. A.R. 1297; see p. 16, *supra*. The ALJ accordingly credited the aspects of O'Callaghan's testimony that were left unrebutted and did not rely on the particular aspect of

her testimony that Knutson had called into question. Pet. App. 111a-112a. As explained above, this course of the proceedings reinforces the conclusion that O'Callaghan's unrebutted testimony supplied substantial evidence for the ALJ's finding that petitioner was able to perform substantial gainful work that existed in the national economy. See pp. 40-42, *supra*.

**D. Petitioner's Proposed Rule Would Be Impractical And Unduly Burdensome**

Petitioner's desire to require upon request automatic production of any documentary materials that may inform a vocational expert's opinion would be impractical and burdensome for multiple reasons.

First, as petitioner acknowledges (Br. 12), a vocational expert does not know in advance what hypothetical questions an ALJ will pose. Such questions are intended to address the potential range of the claimant's residual functional capacity, which an ALJ ordinarily will not have specifically determined in advance of a hearing. A vocational expert who appears in person at a hearing therefore would be unlikely to be able to have available for the hearing all potentially relevant documents developed in the course of her professional work.

Nor is it realistic to suppose (Pet. Br. 40) that an expert could gather her privately generated files during a brief hearing recess. As this case illustrates, SSA hearings are frequently tightly scheduled. See p. 15, *supra*. Recesses would likely result in continuances, significantly increasing the adjudicatory burdens on the agency. SSA already holds a vast number of hearings (approximately 670,000 annually from FY2014-FY2017) and "[o]ver 1 million people are waiting an average of 605 days [just] for an answer on their hearing request."

*2018 SSA Report* 6, 35. Given that ALJs found claimants to be disabled in 47% of the cases that they decided in FY2017,[10] such delays can have a significant adverse effect on the timing of the benefit payments needed by disabled claimants. Cf. *Califano* v. *Boles*, 443 U.S. 282, 285 (1979) (noting this Court's "sensitiv[ity] to the special difficulties presented by the mass administration of the social security system," which, given the "magnitude of that task," "is not amenable to the full trappings of the adversary process lest again benefit levels be threatened by the costs of administration").[11]

Finally, petitioner contends (Br. 5-6, 55) that SSA's experience within the Seventh Circuit after that court's 2002 decision in *Donahue* shows that requiring vocational experts to furnish documentary materials upon request is a "rule [that] works" and will not "delay or disrupt social security disability hearings." That is incorrect. This Office has been informed by SSA that the rule petitioner ascribes to *Donahue* has not been implemented by the agency within the Seventh Circuit, as SSA has not issued an acquiescence ruling for *Donahue* or its progeny. See 20 C.F.R. 404.985(b), 416.1485(b).

The Seventh Circuit in *Donahue* stated that "[i]f the basis of the vocational expert's conclusions *is* questioned at the hearing," the "ALJ should make an inquiry

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[10] SSA, *FY 2019 Congressional Justification* 206, https://www.ssa.gov/budget/FY19Files/2019CJ.pdf.

[11] Reducing the backlog of hearings is one of SSA's top priorities. *2018 SSA Report* 6. In FY2017, the agency began reducing the number of cases awaiting disability hearings, and SSA has since updated its plan to utilize "special funding that Congress provided to address the backlog." *Id.* at 6-7; see *id.* at 36; cf. *Heckler* v. *Day*, 467 U.S. 104, 112 (1984) (noting the longstanding "[c]ongressional concern over timely resolution of disputed disability claims").

(similar though not necessarily identical to that [concerning the admissibility of expert opinion testimony] in [Federal] Rule [of Evidence] 702) to find out whether the purported expert's conclusions are reliable." *Donahue*, 279 F.3d at 446. But that statement was dicta because the court held that "ALJ was entitled to reach the conclusion she did" because the claimant's counsel questioned the expert's testimony "only after the hearing." *Id.* at 447. After *Donahue*, the Seventh Circuit has rendered only one precedential decision finding error in an ALJ's failure to direct a vocational expert to produce supporting materials. See *McKinnie* v. *Barnhart*, 368 F.3d 907, 911 (2004) (per curiam). And *McKinnie*'s fact-bound reasoning based on the expert's "vague" responses that were "insufficient to establish a foundation for her testimony," *ibid.*, did not itself conflict with SSA policy. Since then, the Seventh Circuit has encouraged claimants' counsel to "cooperate" with ALJs to allow information underlying an expert's testimony to be considered but has "refuse[d] to endorse a system that drags out every Social Security hearing to an interminable length." *Britton* v. *Astrue*, 521 F.3d 799, 804 (2008) (per curiam); cf. *Liskowitz* v. *Astrue*, 559 F.3d 736, 745 (7th Cir. 2009) (declining a claimant's "invitation to impose impossible burdens on the [vocational expert]"). As a result, the significance of the *Donahue* line of cases even in the Seventh Circuit remains unclear.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
*Solicitor General*
JOSEPH H. HUNT
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
ANTHONY A. YANG
*Assistant to the Solicitor General*
ALISA B. KLEIN
RACHEL F. HOMER
*Attorneys*

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## APPENDIX

1. 5 U.S.C. 706 provides:

**Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 42 U.S.C. 405 provides in pertinent part:

**Evidence, procedure, and certification for payments**

**(a) Rules and regulations; procedures**

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

**(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations; subsequent applications**

(1) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the

evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

* * * * *

**(g) Judicial review**

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to

which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the

Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

**(h) Finality of Commissioner's decision**

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No ac-

tion against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

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3. 42 U.S.C. 1383 provides in pertinent part:

**Procedure for payment of benefits**

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**(c) Hearing to determine eligibility or amount of benefits; subsequent application; time within which to request hearing; time for determinations of Commissioner pursuant to hearing; judicial review**

(1)(A) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. The Commissioner of Social Security shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hear-

ing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse the Commissioner's findings of fact and such decision. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under the rules of evidence applicable to court procedure. The Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation of such individual (including any lack of facility with the English language) in determining, with respect to the eligibility of such individual for benefits under this subchapter, whether such individual acted in good faith or was at fault, and in determining fraud, deception, or intent.

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(3) The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title.

**(d) Procedures applicable; prohibition on assignment of payments; representation of claimants; maximum fees; penalties for violations**

(1) The provisions of section 407 of this title and subsections (a), (d), and (e) of section 405 of this title shall apply with respect to this part to the same extent as they apply in the case of subchapter II of this chapter.

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