No. 17-1184

In The Supreme Court of the United States

MICHAEL J. BIESTEK,

Petitioner,

v.

NANCY A. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES; AARP & AARP FOUNDATION IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE[1]

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a national membership organization comprising approximately 2,900 individuals, mostly attorneys, who represent individuals applying and appealing claims for Social Security and Supplemental Security Income (SSI) benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other nonprofits; employees of for-profit law firms and other businesses; and individuals in private practice.

NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts. Approximately 70% of claimants who appeared in disability hearings before administrative law judges in the fiscal year ending September 30, 2017, were represented by attorneys or non-attorney representatives.

NOSSCR has a great interest in ensuring that its members' clients are awarded benefits when they meet the criteria under the Social Security Act and the Commissioner's regulations, and that their clients continue to have due process hearings where the claimants and

[1] Under Supreme Court Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than Amici or their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Petitioner filed a blanket consent to the filing of amicus briefs. Respondent has consented to Amici filing an amicus brief.

their representatives have the opportunity to engage in relevant cross-examination of vocational experts.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. AARP and AARP Foundation support ensuring access to disability benefits under the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs because older workers with disabilities rely heavily on those benefits to stay out of poverty. Mikki Waid, *Social Security Disability Benefits: A Lifeline for Workers with Disabilities*, Pub. Policy Inst. (Apr. 2015) https://bit.ly/2BZCgIM (last visited Aug. 29, 2018).

SUMMARY OF THE ARGUMENT

This case concerns step five of the five-step sequential evaluation of the adjudication of disability claims under the Social Security Act. At step five, the Commissioner has the burden to provide evidence of jobs that a claimant can perform which exist in

significant numbers in the economy. 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. §§ 404.1566(d); 1560(c)(2) (2018).[2] The vocational expert in this case testified to the existence of work as a sorter and final assembler, relying not only upon the Dictionary of Occupational Titles, but also on her own experience. Biestek asked for the job analysis supporting the vocational expert's testimony. The ALJ stated that she would "not require that." Pet. App. at 119a. Biestek could not examine the foundation of that testimony once the ALJ stated that she would not require production of foundational material. Biestek had no opportunity to identify potential flaws in the analysis and argue to the ALJ that a preponderance of the evidence did not support the expert's opinion. Without access to the basis of the testimony, Biestek also lacked an adequate record upon which to argue on judicial review that the vocational expert's analysis did not support her testimony. Thus the vocational expert's testimony lacked a foundation which a reasonable mind might accept as adequate to support the ALJ's conclusion that there was a significant number of jobs in the economy which Biestek could perform. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Moreover, the Commissioner has made clear that vocational experts should be prepared to cite, explain, and furnish any sources relied upon to support the testimony. Soc. Sec. Admin., *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf, at 3, 19, 20, 28, 31, 38 (last visited Aug. 29, 2018) (hereafter

[2] All citations are to the April 1, 2018 20 C.F.R.

"*Handbook*"). The evidentiary standard in *Perales* should apply to vocational expert testimony, and vocational experts should be prepared to explain why the sources which provide the basis for their testimony are reliable. *Id.* at 38.

ARGUMENT

I. Vocational Expert Testimony About the Number of Jobs is Not Consistent or Inherently Reliable, and an Inability to Verify the Basis of Vocational Expert Testimony Would Result in Denial of Meritorious Claims.

The regulations require a five-step sequential evaluation process to resolve disability claims. 20 C.F.R. § 404.1520. Step five consists of two distinct parts: (1) whether a claimant's vocational profile (age, education, work experience, and limitations resulting from physical and mental impairments) allows for the performance of specific jobs in the economy, and (2) whether the jobs identified exist in "significant numbers either in the region where you live or in several regions of the country."[3] 20 C.F.R. § 404.1566(d). The Commissioner has the responsibility "for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do." 20 C.F.R. § 404.1560(c)(2). ALJs frequently use

[3] The Commissioner does not define "significant numbers" in the regulation and offers no guidance in any sub-regulatory rulings or manuals.

vocational experts to answer questions about the existence of work and the numbers of jobs. 20 C.F.R. § 404.1566(e).

The Commissioner provides some protection to claimants regarding the first part of step five in Social Security Ruling 00-4p, which places an "affirmative responsibility" on the ALJ "to ask about any possible conflict" between the vocational expert's testimony and the *Dictionary of Occupational Titles* (DOT), U.S. Dep't of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991), https://www.oalj.dol.gov/LIBDOT.HTM.[4] If an apparent conflict exists between the expert testimony and the DOT, the ALJ must resolve the conflict and explain in the decision how the conflict was resolved. *Id*. The DOT describes job titles, industry, duties, exertion, education, and training requirements of jobs, but does not provide numbers of jobs in the economy.

The Commissioner's institutional effort to obtain reliable evidence from vocational experts does not extend to vocational expert testimony regarding the numbers of jobs in the economy. *Shaibi v. Berryhill*, 883 F.3d 1102, 1108-09 (9th Cir. 2018) (no *sua sponte* duty

[4] Social Security Ruling 00-4p recognizes that vocational expert testimony will sometimes conflict with information in the DOT. "Neither the DOT nor the VE [vocational expert] or VS [vocational specialist] evidence automatically 'trumps' when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony rather than on the DOT information." SSR 00-4p, 65 Fed. Reg. 75,759 (Dec. 4, 2000). Neither the regulations nor the rulings define the qualifications of a vocational expert.

to resolve conflicts regarding the numbers of jobs in the economy). Vocational expert opinions about numbers of jobs vary widely. In this case, for example, the vocational expert testified that there were 120,000 sorter jobs in the nation.[5] Recent district court cases show that there is no consensus on the number of nut sorter jobs in the national economy. As shown in the table below, vocational experts in other cases have opined that there are as few as 274 nut sorter jobs nationally, and as many as 471,000, with a range of opinions in between.

Number of nut sorter jobs in the national economy	Month and year of vocational expert opinion
274[6]	October/November 2016
5,000[7]	September 2008
16,000[8]	September 2014
26,000[9]	June 2015
40,000[10]	October 2014

[5] The vocational expert referred to this job as "sorter." Pet. App. at 116a. The DOT code provided corresponds to the title of nut sorter. DOT 521.687-086. The DOT states that a nut sorter "[r]emoves defective nuts and foreign matter from bulk nut meats." *Id*.

[6] *Wood v. Berryhill*, No. 3:17-cv-5430-RJB-BAT, 2017 WL 6419313, at *3 (W.D. Wash. Nov. 17, 2017).

[7] *Binger v. Astrue,* No. EDCV 08-0852-RC, 2009 WL 2848999, at *6 (C.D. Cal. Aug. 31, 2009).

[8] *Wolfanger v. Colvin,* No. 6:16-CV-06688 (MAT), 2018 WL 2425811, at *2 (W.D.N.Y. May 30, 2018).

[9] *Kruppenbacker v. Berryhill*, No. 6:17-CV-06068-MAT, 2017 WL 6275727, at *2 (W.D.N.Y. Dec. 11, 2017).

[10] *Alexander v. Berryhill,* No. 5:16-CV-747-BO, 2017 WL 3624238, at *3 (E.D.N.C. Aug. 23, 2017).

50,000[11]	November 2013
75,000[12]	October 2011
135,000[13]	September 2012
471,000[14]	December 2014

The vocational expert in this case also testified that there were 240,000 final assembler jobs in the nation.[15] Pet. App. at 116a. Recent cases show variable responses for the number of final assembler jobs in the national economy.

Number of final assembler jobs in the national economy	Month and year of vocational expert opinion
4,800[16]	September 2008
6,500[17]	December 2014

[11] *Flores v. Berryhill,* No. CV H-17-30, 2017 WL 3412163, at *10 (S.D. Tex. Aug. 7, 2017).

[12] *Stone v. Colvin*, No. 1:13CV52/MCR/CAS, 2014 WL 1017929, at *9 (N.D. Fla. Mar. 17, 2014).

[13] *Woodby v. Colvin,* No. CV.A. 1:14-952-RMG, 2015 WL 628482, at *9 (D.S.C. Feb. 12, 2015).

[14] *Mora v. Berryhill,* No. 1:16-CV-01279-SKO, 2018 WL 636923, at *3 (E.D. Cal. Jan. 31, 2018).

[15] The vocational expert referred to the job as "bench assembler," but the DOT code given refers to final assembler, DICOT 713.687-018. According to the DOT, a final assembler "[a]ttaches nose pads and temple pieces to optical frames, using handtools." *Id*.

[16] *Binger,* 2009 WL 2848999, at *6.

[17] *Kotok v. Berryhill*, No. C17-191-BAT, 2017 WL 2859507, at *3 (W.D. Wash. Jul. 5, 2017).

7,000[18]	June 2013
14,000[19]	October 2012
20,000[20]	June 2015
75,000[21]	September 2014
175,000[22]	November 2013
239,500[23]	May 2013
280,160[24]	March 2011

These experts were all asked questions meant to elicit whether there were jobs for a hypothetical claimant, and they all: (a) stated that either nut sorter or final assembler could be performed; and (b) then gave widely disparate answers as to the numbers of jobs available nationally. The answers are not reconcilable through any published data. ALJs have accepted and relied on this evidence to deny claims for benefits. The courts review a small percentage of ALJ decisions and only those where the claimant files a complaint for judicial review of the Commissioner's final decision. The

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[18] *Wilson v. Berryhill,* No. 1:16-CV-01861-SKO, 2018 WL 1425963, at *35 (E.D. Cal. Mar. 22, 2018).

[19] *Razo v. Colvin,* No. 1:14-CV-00945-NYW, 2015 WL 6689400, at *13 (D. Colo. Nov. 3, 2015).

[20] *Kruppenbacker v. Berryhill,* No. 6:17-CV-06068-MAT, 2017 WL 6275727, at *2 (W.D.N.Y. Dec. 11, 2017).

[21] *Davis v. Comm'r of Soc. Sec.,* No. 15-CV-10176, 2015 WL 12683814, at *3 (E.D. Mich. Nov. 19, 2015).

[22] *Flores v. Berryhill*, No. CV H-15-3462, 2017 WL 698528, at *11 (S.D. Tex. Feb. 21, 2017).

[23] *Paul v. Colvin,* No. 3:15CV123/EMT, 2016 WL 1169475, at *6 (N.D. Fla. Mar. 22, 2016).

[24] *Steigerwald v. Comm'r of Soc. Sec.,* No. 1:12 CV 02739, 2013 WL 5330837, at *2 (N.D. Ohio Sept. 23, 2013).

courts do not review favorable decisions where ALJs rely on vocational expert testimony to find that a claimant's impairments preclude the performance of jobs which exist in significant numbers. There may well be many cases where the vocational expert testified to the existence of even fewer numbers of the same jobs and approved the claims.

Claimants should have right to review, comment on, and rebut evidence in administrative hearings, and vocational expert opinions should not be treated differently. The right of claimants to comment on and rebut vocational expert opinions prevents the denial of meritorious claims. An ALJ who relies on vocational expert testimony that there are hundreds of thousands of nut sorter and final assembler jobs may find that there are a significant number of jobs the claimant can perform and deny the claim. However, if the lower estimates of 274 jobs, 5,000 jobs, or even 16,000 jobs in the nation are more accurate, an ALJ may find that the claimant cannot perform a significant number of jobs and award benefits. If a claimant challenges the basis of a vocational expert's opinion, the claimant must be permitted to review the basis of the opinion to ensure that it is reasonably accurate. *See* 5 U.S.C. § 556(d) ("A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.")[25] Without the

[25] This Court has not decided whether the Administrative Procedure Act generally applies to Social Security hearings. However, in *Perales*, this Court stated that the provisions of 5 U.S.C.

ability to review the basis of the testimony, a claimant cannot present an effective challenge to the vocational expert's opinions. A claimant must be able to meaningfully comment on and rebut a vocational expert's opinion. A "claimant will rarely, if ever, be in a position to anticipate the particular occupations a [vocational expert] might list and the corresponding job numbers to which a [vocational expert] might testify at a hearing." *Shaibi*, 883 F.3d at 1110. The courts must remain cognizant "that the lack of pretrial discovery in Social Security hearings can make the task of cross-examining a [vocational expert] quite difficult." *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008).

Requiring vocational experts to produce data on demand serves the interests of both claimants and the Commissioner. Amici recognize that the Social Security Administration has both an interest in ensuring that benefits are paid promptly to those who are entitled to them, and also an interest in protecting the disability trust fund against non-meritorious claims. If data must be available on demand, both claimants and the Commissioner can expect greater reliability from vocational expert testimony, more uniformity in the adjudicative system, and more efficient resolution of conflicts in or questions about the testimony. As the Fourth Circuit explained in *U.S. Steel Min. Co., Inc. v.*

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§ 556(d) were consistent with the Social Security Act. *Perales*, 402 U.S. at 409-10. The APA either applies or informs the principles of administrative notice and rebuttal evidence in Social Security disability claims.

Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, 187 F.3d 384 (4th Cir. 1999):

> The ALJ's duty to screen evidence for reliability, probativeness, and substantiality similarly ensures that final agency decisions will be based on evidence of requisite quality and quantity. As the Supreme Court has observed, in enacting § 556(d) of the Administrative Procedure Act, "Congress was primarily concerned with the elimination of agency decision-making premised on evidence which was of poor quality-irrelevant, immaterial, unreliable, and nonprobative-and of insufficient quantity." *Steadman v. SEC,* 450 U.S. 91, 102, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981).

Id. at 389.

The requirement to produce the data upon which the vocational expert relied on demand ensures fairness in evaluation of a claimant's questions about vocational expert testimony. While the substantial evidence standard applies to judicial review of Social Security cases, claims at the administrative level before the ALJ are decided based on a preponderance of the evidence. 20 C.F.R. § 404.953(a). If a claimant questions vocational expert testimony, and on production of the vocational expert's data the claimant identifies a flaw in the analysis, the claimant then can point out the flaw to the ALJ and argue that a preponderance of the evidence supports a conclusion that there are not jobs in significant numbers that the claimant can perform. If the ALJ agrees with the claimant, then further

litigation has been prevented, and a deserving claimant has been awarded benefits. If the ALJ does not agree with the claimant, then the ALJ should provide an explanation in the decision. If this explanation satisfies the claimant, or is at least not legally or factually incorrect, litigation may be prevented. If the ALJ does not agree with the claimant's challenge, and the claimant believes the ALJ's decision is not supported by substantial evidence, the record will include the detail necessary for a reviewing court to evaluate the ALJ's decision to rely on the vocational expert's opinion. Requiring vocational experts to produce the foundation and reasoning underlying their opinions on demand and allowing claimants to comment on and rebut those opinions is consistent with principles of reliability, consistency, and fairness which serve the interests of both claimants and the Commissioner.

II. Requiring Vocational Experts to Provide Data Underlying Their Opinions Will Not Unduly Burden the Agency.

The Seventh Circuit's requirement that vocational experts provide the reasoning underlying their opinions on demand does not impose a significant burden on the agency. *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004). Social Security published the top ten reasons for remands from District Courts for each year from 2010 through 2017, and no vocational expert

issue appears on any list.[26] Even if the "other" category includes vocational issues, the incidence of vocational expert testimony forming the basis for remand from federal courts is uncommon. The rule that vocational experts be able to produce the basis for their testimony on demand has been the law in the Seventh Circuit for over fifteen years. *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). Despite the right of claimants to challenge vocational expert testimony at hearings, processing times at hearing offices within the Seventh Circuit generally fall within the average range.[27] There is no evidence that vocational expert challenges have caused any significant delays or increase in litigation.

The Court in *Perales*, 402 U.S. at 406, was concerned with the burden on the Social Security Administration in different circumstances, but those concerns do not apply here. The petitioner in *Perales* objected to four medical opinions and asked the court to require all doctors who provided a written opinion to submit to

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[26] Office of Hearings Operations, Soc. Sec. Admin., *Top 10 Remand Reasons Cited by the Court on Remands to SSA*, https://www.ssa.gov/appeals/DataSets/AC08_Top_10_CR.html (last visited Aug. 29, 2018).

[27] Social Security operates 164 hearing offices. The fastest processing time for offices within the Seventh Circuit is Fort Wayne, IN which ranks 34th, and the slowest is Madison, WI which ranks 133rd. Of the hearing offices within the Seventh Circuit, seven of them are in the top half in processing time (Fort Wayne, IN, Chicago, IL, Evanston, IL, Orland Park, IL, Oak Brook, IL, Peoria, IL, and Evansville, IN). Office of Hearings Operations, Soc. Sec. Admin., https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html (last visited Aug. 29, 2018).

cross-examination. To require the administration to arrange for cross-examination of all doctors whose written opinions are already contained in the record would be a significant administrative burden, and also a financial burden, as the Commissioner would have to pay the doctors to review the files and appear at a hearing.

Requiring vocational experts to cite, explain, and furnish the sources relied upon for their testimony imposes little or no burden on the Commissioner. The vocational expert is either physically present at the hearing, appears by telephone or video teleconferencing, or answers interrogatories.[28] The vocational expert should have the basis of the opinion at the time it is given, so it should not be difficult or time-consuming for the expert to cite, explain, and furnish the sources relied upon for their testimony to a claimant's representative if it is requested. This process would likely prevent rather than cause delays by ensuring that vocational experts are well-prepared and give supportable testimony, and would give greater confidence to ALJs in relying on that testimony at step five. If the basis for vocational expert testimony is available on demand, nearly all questions of reliability could be resolved during or shortly after the hearing.

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[28] In cases where interrogatories are posed after the hearing the responses are proffered to the claimant, the claimant then has "the opportunity to review responses, submit comments or rebuttal evidence, object to questions, or to propose additional questions." *HALLEX*, § I-2-5-30.

The vocational expert in this case stated that some of the information relied upon was from individual labor market surveys and was confidential. The ALJ did not require the vocational expert to provide documentation from the surveys which provided the basis for the opinion. It is not clear from the record that this evidence was confidential, but even if it was confidentiality could readily be preserved by redacting any private information in the documents. Redaction would take little time for vocational experts and would not cause additional cost or delay to the agency.

III. Due Process Concerns in *Perales* Support Petitioner's Position.

The Court held the following in *Perales*:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.

Perales, 402 U.S. at 402. The circumstances in *Perales* differ from the circumstances in this case in several respects, and those differences support Biestek's position.

The claimant in *Perales* was afforded far greater due process regarding medical opinions than Biestek was afforded in his challenge to vocational expert testimony. In *Perales*, the claimant had access to the medical reports in question well before the hearing; the reports were completed by physicians who had examined the claimant, several of whom were treating physicians retained by the claimant; the reports contained the details of the examinations which provided the bases for the doctors' conclusions; the regulations specifically provided the claimant with the right to request a subpoena, though the claimant did not take advantage of that right; the reports were available to the claimant prior to the hearing, so he had the opportunity to review the evidence in advance and submit rebuttal evidence. *Id*. at 402-06.

Claimants do not have the same protections regarding vocational expert testimony. Claimants cannot anticipate the testimony, review the foundation of the testimony, or submit rebuttal evidence prior to the hearing. *Britton*, 521 F.3d at 804. Under the regulations, claimants do not ordinarily have a right to submit rebuttal evidence following the hearing. 20 C.F.R. § 404.935(a); 20 C.F.R. § 404.949. A claimant must submit written statements to the ALJ "no later than 5 business days before the date set for the hearing,

unless you show that your circumstances meet the conditions described in § 404.935(b)." 20 C.F.R. § 404.949.

Claimants must ask the ALJ for a continuance or supplemental hearing when surprised by evidence adduced at the hearing. *See HALLEX*, § I-2-6-80. Even if a claimant could submit rebuttal evidence, the best the claimant can do is submit competing evidence post-hearing. *Shaibi*, 883 F.3d at 1110. Without knowing the basis for the vocational expert's conclusions, it may be difficult or even impossible to determine whether there are errors underlying those conclusions.

Opinions regarding medical conditions and resulting limitations are very different from opinions regarding work requirements and numbers of jobs in the economy. *Perales* involved conflicting medical opinions concerning the limiting effects of a back injury. The basis of a claimant's impairments is apparent from the results of examinations and the treatment record in the file, but a medical opinion of limitations resulting from those impairments requires professional judgment. While vocational expert testimony can require professional judgment in some cases, the requirements of jobs are factual and should be verifiable to some degree. The number of jobs in the national or regional economy is a statistical fact. It is reasonable to expect vocational experts to produce the data supporting their opinions on request, since the vocational expert should know the basis at the time of the hearing. The Commissioner recognizes this in the *Handbook* by stating that vocational experts "must be prepared to cite, explain, and furnish any sources relied upon in your

testimony." *Handbook*, at 3, 19, 20, 28, 31, 38. This is consistent with the requirement of the APA that a party be entitled to "conduct such cross-examination as may be required for a full and true disclosure of the facts." *See, e.g.*, 5 U.S.C. § 556(d).

The Commissioner makes it clear in the *Handbook* that the information sought by Biestek should be available at the time of the hearing. The Commissioner should not be heard to argue that a requirement for production of the basis for the vocational expert's testimony is unreasonable or burdensome in the context of non-adversarial administrative disability hearings. A vocational expert should be prepared not only to cite, explain, and furnish any sources relied upon but to also explain why those sources are reliable. *Handbook*, at 38. Biestek and other claimants should have the opportunity "to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Perales*, 402 U.S. at 409 (citing 5 U.S.C. § 556(d)).

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit Court of Appeals and rule that substantial evidence standard is offended using undisclosed methods or sources for estimating job numbers.

Respectfully submitted,

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