No. 05-

IN THE

Supreme Court of the United States

DAVID SCOT PEKRUL,

Petitioner,

v.

JO ANNE B. BARNHART, Commissioner of Social Security

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

WILLIAM L. FOUCHÉ, JR.
Counsel of Record
LAW OFFICE OF
WILLIAM FOUCHÉ
2001 Ross Ave., Suite 4600
Dallas, TX 75201
(214) 660-4858

Counsel for Petitioner

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QUESTIONS PRESENTED

Step-five disability cases are those in which the claimant has been found to be incapable of performing his prior jobs. All such cases present as the ultimate question whether the claimant is capable of performing "other … work" which "exists in significant numbers … in the region where such individual lives or in several regions of the country." 42 U.S.C. § 423(d)(2)(A). This issue is often easily determined by reference to the Social Security Administration's medical-vocational guidelines. 20 C.F.R. Pt. 404, Subpt. P, App. 2. But the guidelines are inapplicable in more than half of the step-five cases pending in federal courts, including this one.

The questions presented by this petition are:

1. Whether, in determining whether other work "exists in significant numbers" in cases to which the medical-vocational guidelines do not apply, the agency fact-finder must consider the region's physical dimensions, its population, and the claimant's travel restrictions?

2. Whether the ALJ's duties to make full inquiry and to explain the basis of agency findings apply to determinations of "region" and numerical significance?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff/Appellant in the courts below was the current petitioner, David Scot Pekrul.

Defendant/Appellee in the courts below was respondent Jo Anne B. Barnhart, Commissioner of Social Security.

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David Scot Pekrul respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The ALJ's opinion denying Mr. Pekrul's Social Security disability benefits is unpublished and is reproduced herein as Appendix B (pages B1-B18). The Appeals Council's action letter denying petitioner's request for review is unpublished and is reproduced herein as Appendix C (pages C1-C3). The findings and conclusions of the magistrate judge recommending that the Commissioner's final decision be affirmed is unpublished and is reproduced herein as Appendix D (pages D1-D22). The district court's order adopting the magistrate judge's findings and conclusions and the district court's judg-

ment affirming the Commissioner's decision are unreported and are reproduced herein as Appendix E (pages E1-E2). The Fifth Circuit's opinion affirming the district court's denial of benefits is unpublished but available at 2005 WL 3032460, and is reproduced herein as Appendix A (pages A1-A5).

JURISDICTION

The Fifth Circuit issued its opinion on November 10, 2005. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Sections 205 and 223 of the Social Security Act (as amended), which is codified at 42 U.S.C. §§ 405 and 423, respectively.[1]

Section 405(b) provides, in relevant part:

> (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.
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> * * *

Section 423(d) provides, in relevant part:

(d) "Disability" defined

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[1] Disability is defined identically in both Title II and Title XVI of the Act. *Compare* 42 U.S.C. §§ 423(d)(2) (Title II), 1382c(a)(3) (Title XVI). The analysis of the issues presented is the same under both, so no further effort is made to call attention to both provisions. Petitioner filed both kinds of applications below and has urged both throughout. He also does so here.

(1) The term "disability" means--

(A) inability 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 can be expected to last for a continuous period of not less than 12 months;

* * *

(2) For purposes of paragraph (1)(A)--

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of 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. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

STATEMENT OF THE CASE[2]

The Social Security Act provides that, should misfortunes of health render an eligible claimant unable to perform the jobs he has done in the past, he is entitled to disability benefits unless the agency can show that he remains able to do other "work which exists in the national economy." The Act defines this to mean: "other … work … which exists in

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[2] Unless otherwise noted, the facts are taken from the ALJ's decision and excerpts from the transcript of the hearing before the Social Security Administration, attached as Appendices B, and F, respectively.

significant numbers either in the region in which such individual lives or in several regions of the country." 42 U.S.C. § 423(d)(2)(A). The Act also requires that this be determined "with respect to any individual." *Id.* This case turns on the legal effect of these words in cases to which the agency's elaborate medical-vocational guidelines do not apply and which, therefore, must be factually determined based on evidence included in the administrative record. 42 U.S.C. § 405(b)(1). Petitioner asks the Court to resolve circuit conflicts as to (1) whether the size and population of the region(s) chosen by the ALJ and the claimant's limited ability to transport himself to and from work are pertinent factors in evaluating numerical significance, and (2) whether they must be explained in the ALJ's written decision.

Scot Pekrul, a 41-year-old high-school graduate and father of two young boys, was once a computer-aided design drafter earning $37,200 per year.[3] In 1998, he injured both upper extremities in a workplace accident. This led to multiple nerve-entrapment maladies in both arms, including carpal-tunnel syndrome and cubital-tunnel syndrome that became increasingly severe over time. The resulting numbness, pain, and loss of strength impaired his abilities to use his hands and fingers, and to lift, carry, and reach. He lost his job in April, 2000, because he could no longer do it.

Mr. Pekrul applied to the Social Security Administration for disability benefits under both Titles II and XVI of the Social Security Act. His applications were twice denied based on an internal agency review of his medical records. They were denied again by an administrative law judge after a *de novo* hearing at which Mr. Pekrul appeared *pro se*.[4] The

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[3] Mr. Pekrul was 36 years old at the time of the administrative hearing.

[4] The presence of a *pro se* claimant impose upon the ALJ a "heightened factual exploration duty." *Bowling v. Shalala*, 36 F.3d 431, 437 (5th Cir. 1994). "The ALJ's basic obligation to develop a full and fair record rises to a special duty when an unrepresented claimant unfamiliar with hearing

agency's Appeals Council then declined to reverse the ALJ's decision. So Mr. Pekrul, continuing to represent himself, commenced this action for judicial review under 42 U.S.C. § 405(g).

The ALJ denied Mr. Pekrul's claim at "step five" of the agency's five-step evaluative algorithm.[5] The first three steps – whether he was then working, whether his medically determinable impairments were severe, and whether his condition was presumptively disabling according to the "listing" of impairments – are not material to the questions presented. At the fourth step, the ALJ found that Mr. Pekrul's medically determinable impairments left him able to perform only a limited range of sedentary tasks and only "occasionally to

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procedures appears before him." *Cowart v. Schweiker*, 662 F.2d 731, 735 (11th Cir.1981) (internal citations omitted).

[5] "The Secretary has established a five-step sequential evaluation process for determining whether a person is disabled. Step one determines whether the claimant is engaged in "substantial gainful activity." If he is, disability benefits are denied. If he is not, the decisionmaker proceeds to step two, which determines whether the claimant has a medically severe impairment or combination of impairments. … If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity. If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment is not one that is conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents the claimant from performing work he has performed in the past. If the claimant is able to perform his previous work, he is not disabled. If the claimant cannot perform this work, the fifth and final step of the process determines whether he is able to perform other work in the national economy in view of his age, education, and work experience. The claimant is entitled to disability benefits only if he is not able to perform other work." *Bowen v. Yuckert,* 482 U.S. 137, 140-42 (1987) (internal citations omitted). *See also*, 20 C.F.R. § 404.1520 (summarizing each of the five steps).

reach, handle, and finger."[6] He found that this made it impossible for Mr. Pekrul to return to his past work as a computer-aided design professional. The burden then shifted to the agency to show at step five that there is "other … work" that he can do that "exists in significant numbers either in the region where such individual lives or in several regions of the country," 42 U.S.C. § 423(d)(2)(A); *see also* 20 C.F.R. § 404.1560(c)(2)(2004) ("… we are responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do…"); 20 C.F.R. § 404.1512(g) (same); and *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987) (burden of proof is on the Commissioner at step-five).

ALJs are sometimes able to rely on a collection of detailed rules called the Medical-Vocational Guidelines (or the "grids") to discern whether the Commissioner has met its step-five burden. *See* 20 C.F.R., Pt. 404, Subpt. P, App. 2. *See Heckler v. Campbell*, 461 U.S. 458 (1983) (upholding the guidelines as a valid exercise of the agency's rule-making power). The guidelines reflect the agency's considered judgments about the numerical significance of jobs that are available to certain classes of claimants. In particular, they direct a conclusion of either "disabled" or "not disabled" depending upon the claimant's particular combination of four attributes: "residual functional capacity," age, education, and work experience.[7] But the guidelines are not helpful in cases

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[6] The ALJ found: "The claimant has the residual functional capacity to lift and/or carry 5 pounds frequently and 10 pounds occasionally, frequently to crouch, kneel and crawl, occasionally to climb, balance and stoop, and occasionally to reach, handle and finger. Therefore, the claimant has the residual functional capacity to perform a limited range of sedentary work." App. B16 (finding no. 8).

[7] The medical-vocational guidelines consist of three discrete collections of rules arranged in three matrices: Table No. 1 governs the step-five finding for claimants whose residual functional capacity is limited to "sedentary

where the claimant does not precisely match the assumptions of any particular rule. *Campbell*, 461 U.S. at 462 n.5. Mr. Pekrul, for example, is unable to do most sedentary work, and the capacity to do at least the full range of sedentary work is assumed by even the "worst case" subset of guidelines. *See* 20 C.F.R., Pt. 404, Subpt. P, App. 2 (Table No. 1).

The ALJ expressly determined that the guidelines were of no help,[8] leading him to seek the assistance of a vocational expert to explore what "other work" Mr. Pekrul is able to do.

The vocational expert testified that someone of Mr. Pekrul's age, education, work experience, and with his physical limitations can still do precisely three kinds of jobs: he can be (i) an election clerk, (ii) a call-out operator, or (iii) a surveillance-system monitor.[9] He further testified that there are 283 election clerks, 3,000 call-out operators, and 2,700 surveillance-system-monitor positions in Texas – for a total of 5,983 jobs. Texas was the only "region" for which numbers of jobs were given. This was done only in the aggregate. That is, no testimony was offered about where inside the state these jobs were located or how they were distributed.

At least one of these positions, election-clerk, is dispersed uniformly across the state at the rate of roughly one job per

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work;" Table No. 2 applies to "light work," and Table No. 3 to "medium work." *See also* 20 C.F.R. § 404.1567 (defining the quoted terms).

[8] App. B14 ("If the claimant had the residual functional capacity to perform the full range of sedentary work, Rule 201.28 of the Medical-Vocational Guidelines would direct the conclusion that he is not disabled. However, the Medical-Vocational Guidelines are not applicable in this case because the claimant only has the residual functional capacity to perform a limited range of sedentary work.").

[9] The vocational expert did *not* testify that these were examples of three occupations that someone with Mr. Pekrul's residual functional capacity and vocational characteristics could do. He testified, "And for sedentary there are three [occupations] …" App. F6-7.

county.[10] Moreover, in Texas, this is not only an appointed position, but it is temporary, arising only at election time, after which Texas law requires that a new election clerk be appointed.[11]

Texas is immense. It takes roughly 14 hours and 38 minutes to drive nonstop the 915 miles from Perryton in the north to Brownsville in the south.[12] It takes 11 hours and 45 minutes to travel the 789 miles from El Paso in the west to Marshall in the east. El Paso is approximately as close to Mr. Pekrul's home town of Ennis (658 miles) as it is to Needles, California (675 miles). These data are comparable to the driving distances between Washington D.C. and the following cities:

Washington DC to Portland, Maine	542 miles
Washington DC to Chicago, Illinois	699 miles
Washington DC to Jacksonville, Florida	711 miles
Washington DC to Detroit, Michigan	524 miles
Washington DC to Atlanta, Georgia	640 miles
Washington DC to St. Louis, Missouri	835 miles

[10] There are 254 counties in Texas. Election clerks are required by statute to reside in the county in which they serve. Ann McGeehan, Director of Elections, "Election Advisory No. 2004-13," online at http://www.sos.state.tx.us/elections/laws/advisory2004-13.shtml

[11] *See* Tex.Elect.Code § 32.031(a); Texas Election Code § 32.031(b) ("The appointment of an election clerk is for a single election only.").

[12] All mileage data are based on preferred travel routes, as selected by MapQuest, and have been rounded to the nearest mile. Travel times assume that one drives 65 mph without stopping. *See* MapQuest.com at http://www.mapquest.com/

Texas is also richly populated, although far from uniformly. It is the home of approximately 22,500,000 people.[13] Of these, fewer than half are distributed among the 24 Texas cities having populations of 100,000 or more, which are widely scattered.[14] More than half of Texans live in smaller communities or rural areas. And, because the geographical characteristics, climate, and labor markets vary greatly from one region to the next, some jobs exist only in isolated pockets of Texas. For example, longshoremen and harbor workers are needed only in seaports along the Gulf Coast. Commercial timber jobs lie almost exclusively in the "Piney Woods" region of East Texas, which also spills over into Arkansas and Louisiana.[15] In short, Texas is an amalgamation of disparate and widely scattered regional economies that, like most things economic, pay no particular heed to state lines or other political boundaries.

That Mr. Pekrul's ability to drive an automobile is greatly restricted was undisputed.[16] The entrapped nerves in his arms make it difficult for him to hold things and, in particular, he has difficulty holding the steering wheel. He is unable to change a flat tire. The *farthest* he has driven since his upper extremities became impaired is 80 miles. And the ALJ found that he can "reach, handle, and finger" only "occasionally," which the Social Security Administration defines as 2.0 hours

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[13] The U.S. Census Bureau estimates that the population of Texas in 2004 was 22,490,022. U.S. Census Bureau, "State and County QuickFacts," online at http://quickfacts.census.gov/qfd/states/48000.html

[14] These are Abilene, Amarillo, Arlington, Austin, Beaumont, Brownsville, Carrolton, Corpus Christi, Dallas, El Paso, Fort Worth, Garland, Grand Prairie, Houston, Irving, Laredo Lubbock, McAllen, Mesquite, Pasadena, Plano, San Antonio, Waco, and Wichita Falls. Source: U.S. Census Bureau, data arranged by InfoPlease Encyclopedia and available online: http://www.infoplease.com/ipa/A0108676.html

[15] Wikipedia Encyclopedia, "Piney Woods," http://en.wikipedia.org/wiki/Piney_Woods

[16] The ALJ found Mr. Pekrul's hearing testimony to be credible.

per day.[17] Therefore, for Mr. Pekrul to drive himself to work and to return home safely every evening would require him to use up an undetermined portion of this precious 2.0 hours handling the steering wheel, rather than the tools of his trade, and much of this before he ever signs in at the work site.[18]

Based only on the vocational testimony, the ALJ found "that 5,983 jobs in the State of Texas are a substantial number of jobs in the national economy." He therefore concluded at step five that Mr. Pekrul is not disabled. The ALJ did not avail himself of other sources of job data. *See* 20 C.F.R. § 404.1566(d) (authorizing administrative notice to be taken from certain publications). There was no evidence and no finding as to the number of jobs within Pekrul's driving radius or how many people were competing for those jobs. Nor does the agency's decision mention Mr. Pekrul's limited capacity for driving, explain why the ALJ believed 5,983 jobs in Texas to be a sufficient quantity, or explain why a region as large and populous as Texas is suitable for a meaningful analysis of numerical significance under the circumstances.

At the administrative hearing, Mr. Pekrul explained the difficulties in transporting himself that his impairments cause. He also complained that the number of jobs the vocational expert was offering were too few and too isolated. The ALJ acknowledged the argument on the record, but did not address the issue in his decision, beyond his ostensible adoption of the vocational testimony naming the three occupations (and quantifying the number of jobs in each) that Mr. Pekrul can still do.

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[17] "'Occasionally' means occurring from very little up to one-third of the time, and would generally total no more than about 2 hours of an 8-hour workday." Soc. Sec. Admin., SSR 96-9p (1996).

[18] The vocational expert was not asked to assume that Mr. Pekrul would arrive at work having already used up some of the 2.0 hours of handling and fingering time that the ALJ found him to have.

The district court affirmed the ALJ's finding that Pekrul was able to do significant numbers of jobs, reasoning that, because the vocational testimony was based on hypothetical questions that matched the ALJ's residual functional capacity finding, it constituted "substantial evidence" supporting the adverse step-five determination.

Petitioner then retained legal counsel, the undersigned counsel of record, and appealed. The Fifth Circuit affirmed. App. A1-A5. In so doing, its decision incorrectly characterizes Mr. Pekrul's far more comprehensive argument below as a complaint that the ALJ "fail[ed] to take into account the number of jobs existing in Pekrul's region–Ellis County, Texas." In fact, Mr. Pekrul asked the Fifth Circuit to reverse the administrative decision because his impairment restricted his ability to drive and because the State of Texas is too large and too populous to be properly considered the "region where [he] lives." Petitioner also invited the Court to adopt certain factors – those first articulated by the Sixth Circuit in *Hall v. Bowen* – in analyzing numerical significance. *Hall v. Bowen*, 837 F.2d 272, 275 (6th Cir. 1988). These include "the distance claimant is capable of traveling to engage in the assigned work." *Id.* And petitioner argued below that the ALJ's decision should be reversed because of its failure to consider these issues, resolve them in the decision, and include a valid explanation for the agency's numerical significance finding. This, he argued, required reversal under this Court's decision in *SEC v. Chenery*, 332 U.S. 194, 196 (1947).

Without referencing *Hall*, any of its factors, or the size or population of Texas, the Fifth Circuit affirmed the tribunals below. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SPLIT AS TO WHETHER THE NUMERICAL SIGNIFICANCE FINDING IS A FACTUAL ONE THAT VARIES WITH THE CASE AND, IF SO, WHAT FACTS ARE MATERIAL TO THE DETERMINATION.

The Sixth, Eighth and Tenth Circuits all reject the notion that there is a "magic number" of jobs that is numerically significant in every case. Instead, they favor a multifactor approach individualized to each claimant's circumstances. An early case articulating this approach is *Hall v. Bowen*, 837 F.2d 272, 275 (6th Cir. 1988), which is often cited for the following language:

> We are not blind, however, to the difficult task of enumerating exactly what constitutes a "significant number." We know that we cannot set forth one special number which is to be the boundary between a "significant number" and an insignificant number of jobs. The figure that the ALJ here found is not that magic number; the 1350 figure [applicable to a nine-county area including Dayton, Ohio] is to be viewed in the context of this case only. A judge should consider many criteria in determining whether work exists in significant numbers, some of which might include: the level of claimant's disability; the reliability of the vocational expert's testimony; the reliability of the claimant's testimony; the distance claimant is capable of travelling to engage in the assigned work; the isolated nature of the jobs; the types and availability of such work, and so on. The decision should ultimately be left to the trial judge's common sense in weighing the statutory language as applied to a particular claimant's factual situation.

Citing *Hall* in support, the Eighth and Tenth Circuits have also adopted these criteria. *Johnson v. Chater*, 108 F.3d 178, 180 (8th Cir. 1997); *Triamar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992). The *Hall* criteria are often cited in these circuits.

The Tenth Circuit has repeatedly reversed for the failure to apply them.[19] And a number of district courts in other parts of the country have either referred to them explicitly, cited cases that apply them, or have come up with similar analysis on their own.[20]

Rejecting Mr. Pekrul's explicit request to adopt some or all of the *Hall* factors, backed up by extensive briefing on the issue from both sides, the Fifth Circuit has declined to adopt any or all of these factors. This is consistent with other recent decisions from that court which read the last sentence of Section 423(d)(2)(A) right out of the Social Security Act. *See Lirley v. Barnhart,* 124 Fed.Appx. 283 (5th Cir. 2005) (unpublished) (upholding a numerical significance finding based on a single region embracing the entire nation). This holding, and others like it, are separately discussed at 16, *infra.*

In rejecting the *Hall* factors, the Fifth Circuit has cast its vote with the Ninth Circuit, the home of California, another state of monstrous size. If California were a country, its gross domestic product would rank fifth in the world, behind only the U.S., Japan, German, and the United Kingdom.[21] It is also the state with the largest population. Yet the Ninth Circuit has also concluded that the size and population of the region selected by the ALJ are immaterial to the question of numerical significance, because it is improper to consider the percentage of the jobs available in the region that the claimant is able to do. Only raw numbers matter, according to this view, and it is improper to gauge their "significan[ce]" by considering the number of individuals competing for them or how far away they are. *Barker v. Secretary of HHS*, 882 F.2d 1474, 1479 (9th Cir. 1989) ("Appellant's suggestion that the number of jobs must be considered in the context of the geographical

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[19] *See* cases cited *infra* at 20.

[20] *See* cases cited *infra* at 14-15.

[21] California Statistical Abstract (2001 data), available online at http://countingcalifornia.cdlib.org/pdfdata/csa01/P54

area at issue or in light of the population of the area, was considered and rejected by this court in *Martinez v. Heckler* [citation omitted]. We are compelled to follow the holding in *Martinez*.").

A legal regime that ignores population, geography, and capacity for travel can lead to absurd results. The approach in the Fifth and Ninth Circuits would require a court to affirm, for example, an ALJ's choice of all states west of the Mississippi River as the operative region. A few hundred jobs distributed in undetermined fashion west of the river – which might very well constitute "significant numbers" if concentrated in the metropolitan area of Pocatello, Idaho – has nothing useful to tell a claimant about his ability to make a living doing the "other work" which such numbers represent. To its credit, the *Barker* panel did not conceal its discomfort with the rule it felt compelled to follow, stating:

> Despite the logic of appellant's argument, that a number which is significant in a relatively small area such as Dayton, Ohio (the area in question in *Hall*), is not necessarily equally significant in the Los Angeles metropolitan area, this court is foreclosed under *Martinez* from revisiting it."

Barker, 882 F.2d at 1479-80.

The Fifth and Ninth Circuit view cannot be squared with many more sensible cases around the country. Among those that reverse based on the notion that the jobs are too small a percentage of the workforce in the region to be considered significant are *Leonard v. Heckler*, 582 F.Supp. 389 (M.D. Penn. 1983) (4,000 to 5,000 jobs across the nation not a significant number because "minuscule fraction" of jobs in the economy); *Ray v. Secretary of Health, Education & Welfare*, 465 F.Supp. 832, 837 (E.D.Mich.1978) (200 jobs in the Detroit area is not significant number where the number represents only one ten-thousandth of the jobs in the area); *Waters v. Sec. HHS*, 827 F.Supp. 446, 449 (W.D.Mich. 1992) ("1000

jobs within the entire state of Michigan" not significant); *Jimenez v. Shalala*, 879 F.Supp. 1069 (Colo. 1995) ("200-250 cashiering jobs … spread across Colorado is not a significant number"); *Mericle v. Sec. HHS* 892 F.Supp. 843, 847 (E.D. Tex. 1995) (870 jobs in the state of Texas is not a significant number); *Walker v. Shalala,* 1994 WL 171209, at *2 (S.D.Tex. 1994) (1800 surveillance systems monitors employed in Texas is not a significant number "as a percentage of the work force").[22]

And this does not include the Tenth Circuit cases that do not reach the ultimate question of significant numbers, but rather reverse because the ALJ failed to even evaluate the issue using the *Hall v. Bowen* factors.

II. THE CIRCUITS ARE SPLIT WITH RESPECT TO WHETHER A REGION CAN BE TOO LARGE, WITH FOUR CIRCUITS HOLDING THAT NATIONWIDE REGIONS ARE APPROPRIATE.

Typically, job numbers are analyzed in the context of the community or metropolitan area in which the claimant resides. *Hall v. Bowen*, 837 F.2d 272 (6th Cir. 1988) ("a nine-county area including Dayton, Ohio"); *Jenkins v. Bowen*, 861 F.2d 1083 (8th Cir. 1988) (St Louis area). *Graves v. Sec. HEW,* 473 F.2d 807 (6th Cir. 1973) (Detroit metropolitan area) *Lee v. Sullivan*, 988 F.2d 789 (7th Cir. 1993) (greater Milwaukee metropolitan area); *Martinez v. Heckler*, 807 F.2d 771 (9th Cir. 1987) (Greater Metropolitan Los Angeles and Orange County area); *Barker v. Sec. HHS*, 882 F.2d 1474 (9th Cir. 1989) (Los Angeles and Orange Counties). But ALJs have also used statewide numbers to support their findings in cer-

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[22] See *infra.* at 16, explaining why the latter two cases from Texas district courts cannot be squared either with the Fifth Circuit's decision in Mr. Pekrul's case or with other recent decisions from the Fifth Circuit on this issue. Both *Mericle* and *Walker* were cited in Pekrul's briefing before the Fifth Circuit. The former case, *Mericle*, expressly applies the *Hall* factors.

tain cases. *See*, *e.g., Barrett v. Barnhart*, 355 F.3d 1065 (7th Cir. 2004) (Wisconsin); *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir.) (Oklahoma); *Long v. Chater* 108 F.3d 185, (8th 1997) (Iowa); *Ostronski v. Chater* 94 F.3d 413 (8th Cir. 1996) (Minnesota); *Waters v. Sec. HHS*, 827 F.Supp. 446, 449-50 (W.D.Mich. 1992) (1000 jobs within entire state of Michigan held insignificant); *Jimenez v. Shalala*, 879 F.Supp. 1069, 1076 (D. Colo. 1995) ("200-250 jobs spread across Colorado is not a significant number").

ALJs sitting in Texas often select the entire state as the "region where such individual lives." Although two Texas district courts have reversed administrative determinations of disability based on small numbers of jobs in Texas – *see Mericle v. Sec. HHS* 892 F.Supp. 843, 847 (E.D. Tex. 1995) (870 jobs in the state of Texas is not a significant number); *Walker v. Shalala,* 1994 WL 171209, at *2 (S.D.Tex. 1994) (1800 surveillance systems monitors employed in Texas is not a significant number as a percentage of the work force) – these cases cannot be reconciled with more recent Fifth Circuit authority which essentially renders the numerosity issue meaningless. Mr. Pekrul's case is one example. And another affirms small numbers of jobs based on a region comprised of the entire nation. *See Lirley v. Barnhart*, 124 Fed.Appx. 283 (5th Cir. 2005) (unpublished). The occupation at issue in *Lirley*, surveillance-system monitor, which was affirmed as sufficiently plentiful for Mr. Lirley based on nationwide numbers, is the very same occupation that a Texas district court found too rare for a different Texan. *Walker*, *id.* And it is an occupation at issue in Mr. Pekrul's case as well.

At least four courts of appeals including the Fifth Circuit have affirmed findings that work exists in significant numbers based only on nationwide job data – a holding that regions can be of unlimited size. *See Kasarsky v. Barnhart*, 335 F.3d 539 (7th Cir. 2003) (150,000 jobs in the national economy); *Harmon v. Apfel*, 168 F.3d 289 (6th Cir. 1999) (700,000 jobs in the national economy); *Bishop v. Shalala*, 64 F.3d 662 (6th

Cir. 1995) (unpublished) (16,400 jobs in the national economy); *Donatelli v. Barnhart* 127 Fed.Appx. 626 (3rd Cir. 2005) (unpublished) (3,000,000 jobs in the national economy); *Lirley v. Barnhart*, 124 Fed.Appx. 283 (5th Cir. 2005) (unpublished) (50,000 surveillance monitor jobs in the national economy). These cases affirm administrative decisions that do not even pretend to conduct regional analysis, something the statute explicitly requires. And the Social Security Administration has successfully taken the position that nationwide analysis of job numbers is proper. *See Brun v. Barnhart*, 2004 WL 413305, at *5 (D. Me. 2004) (unpublished) (affirming ALJs numerical significance finding based on "40 [jobs] locally; 150,000 nationally" in a single occupation).

This approach is flatly inconsistent with the Social Security Act. The final sentence of § 423(d)(2)(A) gives factfinders the following choice: They may analyze the numbers of jobs available "in the region where [the claimant] lives" or they may do so "in several regions of the country." But they must do one or the other.[23] The power of the agency to find the facts does not carry with it the power to rewrite its own authorizing statute in order to strike out the provision's definition of available other work.

III. THE CIRCUITS ARE SPLIT AS TO WHETHER ALJS MUST DEVELOP AND EXPLAIN THE BASIS OF THEIR NUMERICAL SIGNIFICANCE FINDINGS.

The vocational expert's role in disability cases is to supply the types of jobs and the numbers. It falls to the ALJ to determine whether these are "significant" within the meaning

[23] This accomplishes at least two useful policy objectives: it excludes jobs that exist in only one region, unless the plaintiff already happens to live there. And it excludes jobs which are evenly, but too thinly, sprinkled across the nation – jobs such as election clerk, an occupation the Fifth Circuit upheld in this case.

of the Act.[24] Yet in cases to which the medical-vocational guidelines do not apply, the agency gives its factfinders free rein. There is no useful regulatory guidance as to what is meant by "region," how small or large it should be drawn, the extent to which it should shrink to accommodate a claimant whose impairments prevent him from commuting significant distances by car, or how to distinguish between numbers of jobs that are "significant" and numbers that are not. *See* 20 C.F.R. §§ 404.1566(a), 404.1566(b).

The Act – together with the decisions of this Court and applicable regulations – does provide more generally, however, that fact-laden inquiries prerequisite to deciding whether an individual is disabled must be individually determined after full inquiry into the matter, with a complete record of the evidence prepared, and a written decision issued explaining the necessary findings based on the evidence presented.[25] 42 U.S.C. § 405(b)(1). This is required so that the factual findings can be reviewed by the judiciary under the "substantial evidence" standard. 42 U.S.C. § 405(g). This is the funda-

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[24] *Barker v. Sec'y of Health & Human Servs.*, 882 F.2d 1474, 1480 (9th Cir.1989) (an expert's opinion about what constitutes a significant number of jobs is not relevant); *Brooks v. Barnhart* 133 Fed.Appx. 669 (11th Cir. 2005) ("The ALJ, relying on the VE's testimony, and not the VE, determines whether a specific number of jobs constitutes a significant number."); *Martinez v. Heckler*, 807 F.2d 771, 775 (9th Cir.1986) (whether there are a significant number of jobs is a question of fact to be determined by a judicial officer).

[25] *See Sims. v. Apfel*, 530 U.S. 103, 110-111 (2000) (disability hearing is "perhaps the best example" of a non-adversarial, investigatory model of decision-making. "It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits.") (internal citations omitted). *See also, e.g.,* 20 C.F.R. § 404.944 (ALJs to "look[] fully into the issues" and to develop relevant testimonial evidence by questioning witnesses at the hearing.); 20 C.F.R. § 404.951 (ALJ "shall make a complete record of the hearing proceedings."); 20 C.F.R. § 404.953(a) ("The administrative law judge shall issue a written decision that gives the findings of fact and the reasons for the decision. The decision must be based on evidence offered at the hearing or otherwise included in the record.").

mental nature of disability proceedings. Unfortunately, the Fifth Circuit refuses to apply this basic and essential methodology to the numerical significance issue, in conflict with the statute and with other circuits. Rather, the court below affirmed the denial of disability benefits on the basis of fewer than 6,000 jobs in a region 900 miles "tall" and almost 800 miles "wide" despite undisputed evidence of severe travel restrictions. The court concluded that the ALJ did not err in failing to offer any explanation for the numerical significance finding beyond a recitation of raw data furnished by the vocational expert. Other circuits have held that such testimony by the vocational expert is *irrelevant* to the issue of whether the raw numbers are "significant" within the meaning of the Act. *See infra* at 18 n.24.

But Mr. Pekrul need not rely only on general principles. Congress, in order to remove any doubt as to whether these concepts apply to the "significant numbers" issue, has said so explicitly, noting that the numerical significance determination is to be made "with respect to any individual." 42 U.S.C. § 423(d)(2)(A).

Individualized findings accompanied by written explanation of how the facts material to them were resolved is also required by the "simple but fundamental rule of administrative law" set forth in *SEC v. Chenery*, 332 U.S. 194, 196 (1947), which states that:

> "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."

Although this rule governs the review of administrative decisions denying disability benefits,[26]application of the *Chenery* principles to the numerical significance issue in disability cases, however, has been less than consistent across the circuits.

There is a circuit split concerning whether ALJs are required to explicitly explain the *Hall* factors in their written decision. The Tenth Circuit holds that they must and reverses when there is a failure to do so in a case where the numbers are not so large as to permit determination as a matter of law. *See Allen v. Barnhart*, 357 F.3d 1140, 1144 (10th Cir. 2004); *Rhodes v. Barnhart*, 117 Fed. Appx. 622, 631 (10th Cir. 2004) (unpublished) (same). Other circuits have held the opposite. *See Mitchell v. Sec. HHS*, 1990 WL 55669 (6th Cir.) (unpublished) (rejecting the argument that the decision should contain an explicit consideration of the *Hall* factors). And the Fifth Circuit's decision in this case is a rejection of Mr. Pekrul's argument in his briefing below that *Chenery* principles invalidate the ALJ's decision. The Fifth Circuit decision in issue here holds that merely reciting the raw numbers furnished by the vocational expert suffices as a meaningful explanation of numerical significance, even without an explanation of the ALJ's choice of region or why such a small num-

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[26] This rule applies to judicial review of administrative decisions denying disability benefits. *See, e.g., Grogan v. Barnhart*, 399 F.3d 1257 (10th Cir. 2005) (citing *Chenery* for proposition that "the district court may not create post-hoc rationalizations to explain the Commissioner's treatment of evidence when that treatment is not apparent from the Commissioner's decision itself."); *Butler v. Barnhart*, 353 F.3d 992, 1002 (D.C. 2004) (citing *Chenery* as basis for reversing decision of non-disability and noting that, although it seemed "intuitive[ly] appeal[ing]" to interpret a doctor opinion as supportive of non-disability, the Decision did not show that the ALJ adopted that interpretation); *Fargnoli v. Massanari*, 247 F.3d 34, 44 (3rd Cir. 2001) (reversing ALJ's denial of disability benefits because decision ignored significant evidence favorable to claimant and "independent analysis" of it by the district court "runs counter to the teaching of []*Chenery*.").

ber of jobs as 5,983 spread across Texas is "significant" for someone whose commuting time counts against his 2.0 hours of daily hand use.

The Fifth Circuit decision in Pekrul's case is disconcerting for another reason: it affirms a decision that neither makes a finding concerning the ability of the claimant to travel, mentions the issue, or otherwise explains why these facts do not require a region smaller than Texas. The ability to travel to and from work is one of the *Hall* factors. And analysis of this issue is also required by another line of cases that predates *Hall*. *See also Lopez-Diaz v. Sec. of HEW*, 585 F.2d 1137, 1140-41 (1st Cir. 1978) (When claimant raises "commuting problems" that are a direct consequence of the impairments complained of, the ALJ should receive testimony and make findings as to "claimant's physical capacity to travel to and from a job site.").

IV. THE ISSUES PRESENTED ARE OF NATIONAL IMPORTANCE.

Almost 3 in 10 of today's 20 year-olds will become disabled before reaching age 67.[27] Yet 72% of the nation's private-sector workforce has no long-term disability insurance of their own.[28] These Americans, if otherwise eligible, are entitled to Disability Insurance Benefits and Supplemental Security Income payments if they meet the common definition of "disability" set forth at 2-3, *supra*.

The number of people whose disability benefits will turn on a determination of whether "other … work… exists in significant numbers…" is staggering. Last year 980 administrative law judges made 521,887 "hearing dispositions" of appli-

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[27] Social Security Administration, PRESS OFFICE FACT SHEET: SOCIAL SECURITY BASIC FACTS, July 19, 2005, available online at: http://www.ssa.gov/pressoffice/basicfact.htm

[28] *Id.*

cations for Social Security disability benefits.[29] And almost 15,000 new disability review actions were commenced in U.S. district courts.[30] This is approximately equal to the number of all civil and criminal trials of every kind that occurred in district courts last year,[31] numbers that will continue to increase over time as the population ages. The overwhelming majority of the 15,000 new disability actions, more than three-quarters by Petitioner's estimate, arise from denials at step five.[32] And more than half of these step-five cases were

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[29] Social Security Administration, Annual Statistical Supplement, 2005 (Table 2.F9), available online at: http://www.ssa.gov/policy/docs/statcomps/supplement/2005/2f8-2f11.html. Table 2.F9 reveals that in 2005 there were 208,636 hearing dispositions of claims for disability insurance only, 137,113 hearing dispositions of applications for supplemental security income only, and 176,138 hearing dispositions of claims for both disability insurance benefits and supplemental security income. The sum of these figures is 521,887.

[30] Administrative Office of the United States Courts, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, Annual Report of the Director 2004, Table S-9, available online at: http://www.uscourts.gov/judbus2004/tables/s9.pdf

[31] *Id.*, Table T-1, available online at: http://www.uscourts.gov/judbus2004/appendices/t1.pdf

[32] Using Westlaw's online database of all federal cases, Petitioner searched for Social Security disability cases decided in 2005. Of the 933 cases this yielded by this search, Petitioner drew a sample of 37 cases by selecting every 25th case on the cite list. Out of these 37 cases, 6 were discarded either because they were irrelevant (e.g., involved childhood disability or a fee dispute) or contained insufficient information to categorize. Of the remaining 31 cases, 24 were denied by the agency at step-five, an additional 3 cases were denied simultaneously at both steps four and five (i.e., in the alternative). Thus step-five determinations were made by ALJs in 27 out of the 31 cases. Of these 27 step-five determinations, 9 were made using the medical-vocational guidelines alone, 13 were made based on vocational testimony alone, 2 were made using both the grids and vocational testimony. And the remainder could not be accurately classified. (Westlaw search done January 22, 2006: "SOCIAL SECURITY" & BARNHART & DISABLED & CI(2005)."

denied, not using the objective medical-vocational guidelines upheld by this Court in *Heckler v. Campbell*, 461 U.S. 458 (1983), but based primarily vocational testimony about raw numbers. In circuits that do not follow the *Hall* criteria, the ALJ may evaluate this issue based on good reasons, bad reasons, or no reasons and may keep all of them in his head, essentially making the issue beyond the pale of judicial review. And the numerical issue, when determined incorrectly, is one that is particularly likely to create harsh results, in that it by definition arises in those cases brought by claimants who have been *found* to be grievously impaired, are far off the "grids," and therefore able to do, at best, a handful of jobs.

It is ironic, to say the least, that the circuits containing California and Texas impose the greatest burdens on claimants who cannot travel. Congress surely did not intend for claimants in these states to have their fitness for "other work" assessed based on jobs that would not be within commuting distance no matter where inside the vast region the individual decides to live. Claimants evaluated based on a nearby metropolitan area or claimants from smaller states, of course, enjoy far more favorable treatment under the law, at present.

The approach that Petitioner recommends here would not unduly burden the Social Security Administration. Evidentiary hearings are already obligatory for claimants who request them. The agency must already call vocational experts to testify in cases to which the medical-vocational guidelines do not apply. And job data broken down by county or metropolitan area are not difficult to come by. Nor is there good reason to make numerical significance an exception to the usual rule that Social Security Administration factfinders may not make essential factual determinations in their heads, but must offer a plausible, evidence-based explanation for the finding in the written decision, and will be bound by their stated reasons on judicial review. To hold otherwise is to render Section 423(d)(2)'s plain language perfunctory and to

make judicial review on this potentially dispositive issue a kind of pointless rubber-stamping.

CONCLUSION

Petitioner asks the Court to resolve three circuit splits relating to the availability of other work and, by doing so, to effectuate the plain meaning of the final sentence of Section 423(d)(2)(A). No elaborate judicial formula need be crafted. The individualized analysis required by the final sentence necessarily entails consideration of the geography and population of the region in which the claimant lives and of the claimant's ability to travel within it. This Court should simply set out the clear legal principles that a chosen region's population and geographical dimensions matter to numerical significance and that medically determinable impairments restricting claimants' ability to reach the jobs in question must be considered. The individualized application of those factors will, of course, be left to the agency, subject to review. But the simple articulation of the legal factors themselves will bring much needed uniformity and coherence to the process.

Respectfully submitted,

WILLIAM L. FOUCHÉ, JR.
Counsel of Record
LAW OFFICE OF
WILLIAM FOUCHÉ
2001 Ross Ave., Suite 4600
Dallas, TX 75201
(214) 660-4858

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioner

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