No. 11-159

IN THE
Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,
Petitioner,
v.
KAREN K. CAPATO, ON BEHALF OF B. N. C., ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CANCER LEGAL RESOURCE CENTER OF THE DISABILITY RIGHTS LEGAL CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cancer Legal Resource Center is a program of the Disability Rights Legal Center ("DRLC"), a non-profit organization dedicated to championing the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services through education, advocacy, and litigation. DRLC accomplishes its mission through many programs, including the Cancer Legal Resource Center ("CLRC," a joint program with Loyola Law School Los Angeles), the Education Advocacy Program, the Education and Outreach Program, and the Civil Rights Litigation Program. Since 1975, DRLC has handled countless disability rights cases under state and federal civil rights laws challenging discriminatory practices by government, business, and educational institutions.

Through the CLRC, the DRLC addresses specific interests in cancer-related legal issues. The CLRC provides free information and resources to cancer patients, survivors, caregivers, health care professionals, employers, and others coping with cancer nationwide on cancer-related legal issues, such as access to government benefits and health care, employment and taking time off work, insurance coverage, and estate planning.

From the CLRC's direct work with cancer patients and their families, the CLRC understands that access to government benefits is an area of primary concern.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief. All of the parties have consented to this filing in letters that have been filed with the Clerk of the Court.

The onset of cancer is most often unexpected, especially among young adults. Accordingly, the CLRC works with cancer patients to ensure that they understand what government benefits are available in their individual situations, and how to access them. It is important to clarify and guarantee the equal rights of cancer patients, including with regard to child survivor benefits under the Social Security Act. Adults of child-rearing age with cancer enjoy the same rights as other wage earners, including the choice to have children and to receive Social Security Administration benefits. The CLRC therefore supports granting child survivor benefits under the Social Security Act to posthumously conceived children of deceased wage earners.

SUMMARY OF ARGUMENT

At the outset, it is crucial to understand the context in which posthumous conception occurs. Cancer affects significant numbers of Americans. There are nearly 12 million cancer survivors in the United States, and 1.6 million people are expected to be diagnosed with cancer in 2012. Although medical treatments are increasingly successful, those treatments are often accompanied by harmful effects on patients' fertility. Fertility preservation allows patients to choose to reproduce after their treatments conclude. Many of these patients elect to have children regardless of their prognosis.

The central issue in this case is the definition of "child" in the Social Security Act. The Act provides benefits for children of deceased insured individuals regardless whether their parents conceived them through natural or artificial means, or before or after one of the parents' deaths. The statute reads: "[t]he term 'child' means * * * the child * * * of an

individual * * * .” 42 U.S.C. § 416(e). The Commissioner’s alternative construction, that the meaning of “child” must be determined by reference to state intestacy law, raises serious Constitutional concerns. Under the Commissioner’s interpretation, a child’s ability to receive Social Security benefits would be determined by when and how that child’s parents chose to conceive the child. A child conceived naturally or artificially prior to a parent’s death would be entitled to benefits, whereas a child conceived following a parent’s death might not. This irrational distinction also presents the risk of impairing parents’ fundamental right to have children. The Court should apply the Constitutional avoidance doctrine and decline to adopt the Commissioner’s Constitutionally problematic interpretation.

Furthermore, the Commissioner’s policy concerns are misplaced. The Commissioner’s brief asserts that benefits are available only to children who relied on the decedent’s wages for support. But that argument is outside the scope of the question presented to the Court. The issue of whether an applicant is the “child” of the decedent is separate from the additional statutory test of whether the applicant was dependent upon the decedent. *See* 42 U.S.C. § 402(d)(1). The latter question was not decided below.

Likewise, the Commissioner inaccurately asserts that the Act was intended to provide benefits for children who unexpectedly lose a parent. To the contrary, nothing in the Act bars benefits where the parent’s death was anticipated, and there is no reason why the word “child” in the statute would imply such a rule.

The Commissioner also erroneously suggests that the Third Circuit’s holding raises federalism

concerns. To the contrary, the Act defines "child" only for purposes of providing Social Security survivors' benefits, and does not affect states' abilities to define "child" differently for different purposes. To the extent that state law is used to determine the meaning of the word "child" in the administration of a federal benefits program, the Court must reject state laws that "use the word 'child[]' in a way entirely strange to those familiar with its ordinary usage * * * ." *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956).

Finally, the Commissioner cites extrinsic authorities in a misguided attempt to avoid Congress's clear command that "[t]he term 'child' means * * * the child * * * of an individual * * * ." 42 U.S.C. § 416(e). A plain reading of Section 416(e) does not render Sections 416(h)(2)(B) and (3)(C) redundant, because those sections still affect whether an applicant is deemed dependent on the insured for purposes of Section 402(d)(3). In interpreting those statutes, the Court should not place significant weight on legislative history from the time period after the operative language was enacted, nor should the Court defer to administrative interpretations of an unambiguous statute such as this one.

ARGUMENT

I. CANCER AND OTHER COMMON CONDITIONS CAUSE PATIENTS TO SEEK FERTILITY PRESERVATION TO PRESERVE THEIR REPRODUCTIVE CHOICES

A. Cancer Treatments and Other Causes of Infertility are Widespread and Unpredictable

Over forty percent of Americans born today will be diagnosed with cancer at some point in their lives. Linda A. Jacobs, *et al*., *Adult Cancer Survivorship: Evolution, Research, and Planning Care*, CA: A Cancer Journal for Clinicians, Nov.-Dec. 2009, at 391, 392, *available at* http://caonline.amcancersoc.org/cgi/content/full/59/6/391. Radiation and chemotherapy have nearly doubled the five-year survival rate of cancer patients over the last fifty years. Gregory Dolin, *et al*., *Medical Hope, Legal Pitfalls: Potential Legal Issues in the Emerging Field of Oncofertility*, 49 Santa Clara L. Rev. 673, 673 (2009) (reporting that the five-year survival rate rose from thirty-five percent in 1950–1954 to sixty-seven percent in 1996–2004). Regrettably, those life-saving treatments can have a devastating effect on the reproductive capacity of cancer survivors. Teresa K. Woodruff, *The Emergence of a New Interdiscipline: Oncofertility* 3, *in Oncofertility* (T.K. Woodruff & K.A. Snyder eds., 2007), *available at* http://oncofertility.northwestern.edu/sites/default/files/uploadedfilecontent/onco_chapter_1.pdf.

Radiation and chemotherapy can lead to "immediate infertility in some cases" and a lowered probability of conception in others. Dolin, *supra*, at

683. Some treatment methods result in infertility rates of up to 69% percent in females. Laxmi A. Kondapalli, *Oncofertility: A New Medical Discipline and the Emerging Scholar* 9, *in Oncofertility*, *supra*, *available at* http://oncofertility.northwestern.edu/sites/default/files/uploadedfilecontent/onco_chapter_16.pdf. As a result of the risks and new advances in assisted reproduction technology, medical professionals are encouraged to discuss fertility preservation with cancer patients before beginning treatment. *See generally id.*

Cancer patients are not alone in choosing life-saving treatments at the expense of their own ability to bring life into the world. Treatment for other medical issues, including autoimmune diseases, involves risks to fertility, and patients may engage in fertility preservation to effectuate their reproductive choices. Susan L. Barrett & Teresa K. Woodruff, *Gamete Preservation* 5, *in Oncofertility* (T.K. Woodruff, *et al*. eds., 2010), *available at* http://oncofertility.northwestern.edu/sites/default/files/uploadedfilecontent/chapter_3_word.pdf. In addition, there have been reports since 1991 of military personnel depositing sperm before deploying to war zones, and astronauts in the 1960s deposited their sperm in the event radiation in space adversely affected their fertility. *See* Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 Ariz. L. Rev. 91, 91-92 (2004). While some fertility preservation options have advanced in recent years, planning to reproduce in the face of dire circumstances is nothing new. *See* Shauna L. Gardino & Linda L. Emanuel, *Choosing Life When Facing Death: Understanding Fertility Preservation Decision-Making for Cancer Patients*, *in Oncofertility* 447, 448 (T. K. Woodruff, *et al*. eds., 2010), *available*

at http://oncofertility.northwestern.edu/sites/default/files/uploadedfilecontent/chapter_34_word.pdf (describing fertility preservation as "a modern twist on the old practice of siring before leaving for war" and discussing the wartime baby boom of the early 1940s).

B. Fertility Preservation is a Legitimate Means to Effectuate Reproductive Choices

Cancer patients have several options for preserving their fertility. Men can cryopreserve (freeze) semen, while women can undergo ovarian stimulation for maturation and retrieval of eggs, which can either be frozen immediately or fertilized to produce embryos, which are then frozen. *See* Dolin, *supra*, at 683-85; *see generally* Jacqueline S. Jeruss, *et al*., *Preservation of Fertility in Patients with Cancer*, 360 N. Eng. J. Med. 902 (2009); Barrett & Woodruff, *supra*. Preserved sperm can be used for intrauterine insemination, as well as to fertilize preserved eggs to create embryos, which can be implanted in the female and carried to term. The embryos may be created before or after the death of the parent.

Fertility preservation and assisted reproduction can be costly, but these tools are becoming increasingly accessible to patients. Disability rights organizations such as the Cancer Legal Resource Center are actively advocating for insurance coverage of fertility preservation in connection with treatment for cancer, to enable all patients to retain their ability to exercise their right to procreate following treatment. *See generally* Daniel Basco, *et al.*, *Insuring Against Infertility*, J. L., Med. & Ethics, Winter 2010, at 832, *available at* http://oncofertility.northwestern.edu/sites/default/files/uploadedfileconte

nt/basco_et_al._2010.pdf.

C. Posthumous Conception as an Effectuation of Pre-mortem Choices

Although cancer patients generally preserve their fertility in the hopes that they will survive and be able to live a "healthy" life, *see* Dolin, *supra*, at 674, some decide to have genetic children regardless whether they survive. *Cf.* Mark D. Hornstein, *Disposition of Banked Sperm and Embryos*, Fertility Weekly, Oct. 6, 2003, at 4 (providing statistics on male patients' choosing to release their genetic material to a survivor upon their death).

Despite a pre-mortem decision to reproduce and the initiation of the process of reproduction, the physical act of conception can occur before or after the parent's death. There are several common situations in which the moment of conception may occur after a parent's death, even though the process was initiated while both parents were living. First, consider a couple who intend to have a child, initiate in vitro fertilization, and successfully fertilize one or more embryos, but the fertilized embryos have not been implanted by the time of the father's death. Consistent with the couple's earlier decision to have a biological child through IVF, the wife undergoes embryo transfer and conceives. Such a child would be conceived after death, but is clearly the product of a pre-mortem reproductive choice.

Second, consider a family which has decided to conceive a child, but deliberately waited until the success or failure of cancer treatment to consummate assisted reproduction. Terminal illness can place an enormous amount of strain on a family's time, emotions, and finances. The couple has spent most of their money on life-prolonging treatments. The wife

prefers to spend her husband's last days by his side rather than in a fertility clinic, and does not feel emotionally situated to have a healthy pregnancy. *Cf.* Michal Braun & Lea Baider, *Souvenir Children: Death and Rebirth*, 25 J. Clinical Oncology 5525, 5526 (2007) (suggesting that surviving spouses wait a year to grieve before pursuing conception). After waiting a year, she has the embryos implanted, and conceives. Again, the physical act of conception occurred after the death of a parent, but there was an unbroken chain linking the child's birth to a pre-mortem decision to reproduce.

Much of the criticism of assisted reproduction has focused on the hypothetical situation in which a surviving spouse uses the decedent's genetic material without consent. *See, e.g.*, Bob Simpson, *Making "Bad" Deaths "Good": The Kinship Consequences of Posthumous Conception*, 7 J. Royal Anthrop. Inst. 1 (2001). Indeed, some states have imposed "heightened consent requirements," to ensure that certain rights "go *only* to those whom the deceased parent intended to support as a child." *Schafer v. Astrue*, 641 F.3d 49, 59 (4th Cir. 2011) (emphasis added). Even if surviving spouses could use a decedent's genetic material without consent, *cf. Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) (holding that the providers of genetic material have control over its disposition at death); *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 850 (1993) (same), the legal significance of the lack of consent would affect only whether such a child was "dependent" on the wage-earner under the Act (which is not presently before the Court), not whether the child was a "child" under the Act. *See infra* at 16-18.

More important, such a scenario is not at issue in this case. In each of the four U.S. Court of Appeals

cases dealing with survivors' benefits for posthumously conceived children, the decedent expressed his intent that the surviving spouse use his genetic material to conceive a child. *See Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011) (couple had not attempted to conceive, but husband signed statement that he desired his wife to use his frozen sperm to conceive a child); *Schafer*, 641 F.3d at 51 (although no consent in writing, evidence existed that the decedent intended for his wife "to use the stored semen to conceive a child after his anticipated death"); *Capato v. Comm'r*, 631 F.3d 626, 627 (3d Cir. 2011) (although the couple was able to conceive a son naturally after the decedent's semen was stored, evidence existed that decedent wished that son to have a sibling); *Gillett-Netting v. Barnhart*, 371 F.3d 593, 594-95 (9th Cir. 2004) (wife miscarried twice during conventional conception attempts; and prior to death, husband "confirmed that he wanted [his wife] to have their child after his death using his frozen sperm").

II. THE COMMISSIONER'S CONSTRUCTION RAISES SERIOUS CONSTITUTIONAL CONCERNS, WHICH MAY BE AVOIDED BY ADOPTING THE THIRD CIRCUIT'S CORRECT CONSTRUCTION

The Commissioner's attempt to deny benefits to posthumously conceived children raises serious Constitutional concerns with respect to children's rights to be free from discrimination based on their parents' status and parents' decisions to have children. The Court should reject the Commissioner's interpretation because when "'a construction of the statute is fairly possible by which a serious doubt of constitutionality may be avoided,' a court should adopt that construction." *Califano v. Yamasaki*, 442

U.S. 682, 693 (1979) (internal brackets omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see also United States v. Clark*, 445 U.S. 23, 33-34 (1980) (broadly construing the Civil Service Retirement Act's requirement that a beneficiary child "lived with" a covered federal employee where such "construction [was] necessary to avoid a serious constitutional question"). The Third Circuit's correct construction avoids those Constitutional concerns.

A. The Statute Is Clear That "Child" Means "Child"

The language of the statute is clear. Section 402(d)(1) provides that a "child (as defined in Section 416(e) of this title)" is entitled to benefits if the child meets other specified criteria. The cross-referenced section, Section 416(e), provides that "[t]he term 'child' means * * * the child * * * of an individual * * * ." 42 U.S.C. § 416(e). The Third Circuit's decision is correct, and the Court should reject the Commissioner's arguments that Section 416(h)(2)(A) affects the outcome of this case, as that subsection is not cited in either Section 402(d)(1) or Section 416(e).

B. Posthumously Born Children Have a Right To Be Free From Discrimination Based on the Circumstances of Their Conception

The Commissioner's interpretation of the Act would have the effect of denying benefits to children on the grounds that they were not conceived through what some would call "traditional means." By allowing states to deem posthumously conceived children categorically ineligible for Social Security survivors' benefits, the Commissioner's interpretation echoes the same type of social stigmas that have been rightly

rejected with respect to legitimacy.

As choices to pursue fertility preservation options inevitably become more common, discrimination against posthumously conceived children will one day seem as antiquated as the attempts by states to discriminate against "illegitimate" children. As the Court explained in *Gomez v. Perez*:

> [A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust."

409 U.S. 535, 538 (1973) (citation omitted).

This analysis applies with equal force to posthumously conceived children. By preventing posthumously conceived children from obtaining Social Security survivors' benefits, the Commissioner's interpretation would give rise to a number of "illogical and unjust" distinctions between similarly-situated children. For example, the Commissioner would not dispute that benefits are available for a child conceived (through either natural or artificial means) by a terminally ill father shortly before the father's death. Yet, under the Commissioner' theory, benefits could potentially be denied if the child were conceived on the day after the father's death. It is undisputed that, in each

hypothetical case, the child is indeed the "child" of the deceased father. Further, in each case the death was not unanticipated. To distinguish between the two creates an unacceptable risk of irrational discrimination between two children conceived in virtually identical circumstances.

The Commissioner is unable to present adequate justification of his choice not to consider posthumously conceived children to be "children" of their parents just like any other children. Historically, the distinction between "legitimate" and "illegitimate" children was supposed to rest on "lurking problems with respect to proof of paternity." *Id.* But, to the extent it ever was the real reason for discriminating against "illegitimate" children, similar problems are not present here: there is no doubt that the applicants are the genetic offspring of their father. Just as children of IVF are considered "children" though they were conceived through once-unfamiliar technology, so too are children who are conceived through the use of fertility preservation technology. To the extent that the Commissioner would justify discrimination against the applicants on account of concerns that the decedent's death was foreseeable, or that principles of federalism require blind application of state law, those arguments are rejected *infra* at 19-22.

Moreover, such discrimination affects more than the posthumous child him- or herself. Because the "primary objective" of Social Security survivors' benefits is "to provide workers *and their families* with basic protection against hardships created by the loss of earnings * * * ," *Mathews v. De Castro*, 429 U.S. 181, 185-86 (1976) (emphasis added), the improper denial of benefits to a posthumously conceived child has a direct and harmful effect on the other members

of that child's entire family. In effect, the Commissioner's interpretation raises Constitutional concerns about discrimination against children (who have no control over the timing and method of their conception and birth), their siblings, and their surviving parents (who did nothing more objectionable than exercise their fundamental right to procreate, *see infra* at 14-15). This interpretation should be rejected in favor of the Third Circuit's alternative construction, which presents none of the difficult problems of Constitutional law posed by the Commissioner's approach.

C. Parents Have A Fundamental Right To Decide Whether To Have Children

The Commissioner's proposed construction also implicates the Constitutionally protected rights of individuals to control their reproductive choices. Consenting adults have a fundamental right to decide whether to have children. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the "liberty" protected by the Fourteenth Amendment includes "the right of the individual * * * to marry, establish a home and bring up children * * * ."). When a cancer patient decides to preserve his or her genetic material for future use in reproduction, the

patient has exercised his or her Constitutionally protected right to "deci[de] whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453.

The Commissioner's interpretation of "child" would have the effect of interfering with the timing and mechanics of a parent's decision to have children. Other cases addressing the legal ramifications of artificial reproductive technologies recognize that parental rights (and concomitant responsibilities) attach at the moment at which the parents decide to procreate, rather than at the moment of childbirth or even pregnancy. *See, e.g.*, *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1418-19 (1998) (collecting cases for the proposition that courts have "universally * * * assigned parental responsibility to the husband based on conduct evidencing his consent to [his wife's] artificial insemination" (internal quotation marks omitted)).

Moreover, the Commissioner's interpretation may encourage prospective parents with serious illnesses to delay or even forego life-prolonging treatment in order to ensure that federal benefits are available to their progeny. Consider a couple, in the midst of dealing with the physical, emotional, and financial burdens associated with cancer diagnosis and treatment, having to decide whether to prioritize procreation or life-prolonging treatment. Under the Commissioner's interpretation, even when the couple has already decided to have a child and begun the physical process of doing so, electing to delay conception until after radiation and chemotherapy may come at the expense of their child's benefits under the Act.

To steer clear of the difficult Constitutional questions presented by this scenario, the Third Circuit's correct construction of the statute should be

adopted.

III. THE COMMISSIONER'S DEPENDENCY CONCERNS ARE MISPLACED

The Commissioner places undue emphasis on whether a child conceived through the use of fertility preservation methods is dependent upon the decedent. By doing so, the Commissioner wages a battle other than the one before this Court: the statutory test whether a potential beneficiary is a "child" of the wage earner is an entirely separate inquiry than as to whether the potential beneficiary "was dependent upon" the wage earner, 42 U.S.C. § 402(d)(1)(C). The case has focused entirely on the definition of "child," and the question before the Court is limited to the definition of "child." A record has not been established as to dependency—and in fact the lower court remanded to create such a record—but the Commissioner nevertheless attempts to subsume the dependency standard into the definition of a "child."

Throughout his brief, the Commissioner invokes a desire to protect a supposed "core beneficiary class: the children of deceased wage earners *who relied on those earners* for support," and expresses a fear that the Third Circuit's decision "serve[s] a purpose more akin to subsidizing the continuance of reproductive plans." Pet. Br. 22 (quoting *Schafer*, 641 F.3d at 58-59) (emphasis added). In effect, the Commissioner suggests that only a dependent can be a child. But, those arguments have no relation to whether an applicant is a "child" under the Social Security Act. Rather, they bear solely on the dependency prong of the eligibility test that is not currently at issue.

The Social Security Act provides child survivors' benefits to "[e]very child * * * of an individual who

dies a fully or currently insured individual," provided that the child (a) files an application, (b) is unmarried and meets the age requirements, and (c) "was dependent upon such individual * * * at the time of such death." 42 U.S.C. § 402(d)(1). At issue in this case is whether the posthumously conceived twins of Robert Capato are his "child[ren]" for the purposes of the Act. Should the Court agree that the children are, in fact, "children," the case must still be remanded to determine whether the children meet the dependency requirement in 42 U.S.C. § 402(d)(1)(C), which no court has yet decided. The dependency battle is not yet at hand, and the Commissioner cannot be permitted to fight it through the guise of the meaning of "child."

The requirements of child status and dependency are separate under the Act and may not be conflated. *Compare* 42 U.S.C.§ 402(d)(1) (setting forth the "child" status requirement), *with id.* § 402(d)(1)(C) (setting forth the dependency requirements). Reading a requirement of "rel[ying] on th[e] earner for support" into the definition of "child" would render the dependency requirement superfluous, a result that should be avoided based on common sense as well as traditional canons of construction. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("[The Court] construe[s] statutes, where possible, so as to avoid rendering superfluous any parts thereof." (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))).

The Commissioner further attempts to conflate "dependency" with the definition of "child" by arguing that:

> [A]lthough this case involves a deceased father who was married to the children's mother, the logic of the court

> of appeals' decision would be equally applicable to children conceived by means of sperm from an anonymous donor who was insured under the Act, who happened to die before conception, but who was later identified.

Pet. Br. 22. This (mercifully short) parade of horribles, too, is stopped in its tracks by the dependency requirement. *Cf. Gillett-Netting*, 371 F.3d at 598 (even under a broad reading of the Act, "completely unacknowledged, illegitimate children must prove actual dependency in order to be entitled to child's insurance benefits.") While not at issue in this case, there can be no doubt that a court would closely consider whether a child could be "dependent on" an anonymous donor. There is simply no reason to torture the definition of "child" so as to declare a biological child to not be a "child" in order to avoid a hypothetical scenario that Congress already addressed through a separate test for dependency.

The Commissioner's arguments regarding support and a "core class of beneficiaries" are red herrings. The Act already has a provision in place for narrowing its class of beneficiaries—the dependency requirement—and arguments about whether posthumously conceived applicants "relied on the deceased wage earner for support" should be directed to that requirement and addressed where they belong: on remand.

IV. THE SOCIAL SECURITY ACT DOES NOT REQUIRE THE "UNANTICIPATED DEATH" OF THE WAGE EARNER

The Commissioner, quoting the Fourth Circuit, ascribes to the Act a "basic aim of primarily helping

those children who lost support after the *unanticipated death* of a parent." Pet. Br. 21 (quoting *Schafer*, 641 F.3d at 58) (emphasis added). He then argues that posthumously conceived children fall outside the core class of beneficiaries of the Act because they are "brought into being by a surviving parent with the knowledge that the deceased biological parent will not be able to contribute wages for the child's support." *Id.* at 22. *Schafer* does not provide support for the proposition that the Act finds children whose parents' deaths are unanticipated somehow "worthier" than children whose parents' deaths were foreseeable, nor could it. Nothing in the text or legislative history of the Act suggests a preference on behalf of Congress for survivors of "unanticipated" deaths, let alone that survivors of anticipated deaths are not the "child" of the decedent. *See supra* at 16-18.

To be clear, death is not always foreseeable in cases of posthumous conception. Assisted reproduction often involves multiple steps, and may require multiple attempts. At the time the parents commit to pursuing procreation through assisted reproduction, the parents may not anticipate the insured's death. At the point death becomes likely, eggs may have been stimulated, sperm may have been preserved, embryos may have been fertilized, and the couple may even have already made several failed attempts at implantation. Much time, money, emotional investment, and effort may have already been sacrificed. Yet the Commissioner would treat a child differently if the successful embryo was implanted in the final moments before the insured's death rather than the first moments thereafter. The proper turning point is the decision to reproduce and the start of the process, not the moment of birth, not the

moment of last chance to terminate pregnancy, and certainly not the moment of conception (whether such moment takes place in a test tube or in a human body).

Moreover, there is no "unanticipated death" standard for conventional reproduction, and any construction of the Act favoring lack of anticipation has been rejected. *See* Resp. Br. 40. An insured could spend his final moments conceiving by conventional means, fully anticipating that he would die before the child's birth, and the Commissioner would consider the resulting child a "child" just as any other insured's child. But, under the Commissioner's view, a child conceived moments after the insured's death (whether anticipated or not) may not be a "child."

The dichotomy of anticipated and "unanticipated" deaths is yet another attempt to read a dependency requirement into the definition of "child," and should fail for the reasons expressed *supra*, at 16-18. The Act treats equally children who are conceived while a wage earner was actively earning wages, retired, disabled, or even knowingly on death's doorstep. At best, the Commissioner's emphasis on lack of anticipation is misleading; at worst, it is entirely inconsistent with the statutory language.

The Court should decline the Commissioner's invitation to read a preference for unanticipated deaths into the purposes of the Act. That requirement was never intended by Congress.

V. THE COMMISSIONER'S FEDERALISM CONCERNS ARE NOT RELEVANT

The statute's command that "'child' means * * * the child * * * of an individual * * *," 42 U.S.C. § 416(e),

in no way impinges on principles of federalism. Contrary to the Commissioner's arguments, the administration of a federal benefits program in a manner consistent with Congress's command will not impermissibly intrude on state prerogatives or otherwise "create a federal common law of parental relationships in the context of posthumously conceived children." Pet. Br. 21. Congress has already made the relevant policy determinations, and has decided as a matter of federal statute that "child" means "child" for the purposes of the Act; the states remain free to implement their own benefits programs as they see fit.

Although the Commissioner observes that the Third Circuit's decision "adopted a rule that is broader than that adopted by any State" that has addressed posthumous conception, Pet Br. 20, nothing in Section 416(e) requires that the definition of "child" be consistent with, or narrower than, state law. In fact, Section 416(e) is *intentionally broader* than state law, as it includes, for example, children for whom adoption proceedings were instituted but not completed, and children who would be the stepchildren of insureds but for marriage ceremonies suffering particular "legal impediment[s] * * * ." 42 U.S.C. § 416(e). The Commissioner's attempt to require exact symmetry between Section 416(e) and state law cannot be squared with the statute's several provisions in which state law is plainly inapplicable.

By giving effect to the statute's distinct federal definition of "child," the Court will not interfere with subject matter that is traditionally administered by the states. The Court's decisions recognize that even in traditional areas of family law, federal law can prevail over state law. *E.g.*, *Mansell v. Mansell*, 490 U.S. 581, 588-89 (1989) (holding that statutes

governing federal veteran benefits preempted state community property law). Because Section 416(e)'s definition of "child" is limited to "this subchapter"—*i.e.*, the portion of the Social Security Act dealing with old-age, survivors, and disability insurance benefits, *see* 42 U.S.C. §§ 401-434—the Third Circuit's interpretation will not affect states' administration of their own intestacy laws and benefits programs. Nothing requires states (or, for that matter, federal courts addressing other statutes) to adopt this definition of "child" for any purpose other than the Social Security Act's survivors' benefits provision.

Finally, this Court must adhere to its rule in *De Sylva v. Ballentine* that states may not "use the word 'child[]' in a way entirely strange to those familiar with its ordinary usage * * * ." 351 U.S. 570, 581 (1956). The Capatos' twin children are undeniably the children of Robert and Karen Capato, he being their undisputed biological father, and she being their undisputed biological mother. Under *De Sylva*, the Court must deem them to be Robert Capato's "child[ren]" under Section 416(e), regardless whether state intestacy laws recognize this common-sense conclusion for entirely separate state purposes.

VI. THE STATUTORY LANGUAGE SUPPORTS THE THIRD CIRCUIT'S DECISION, AND THE COURT SHOULD REJECT THE COMMISSIONER'S ATTEMPTS TO CIRCUMVENT THE CLEAR LANGUAGE OF THE STATUTE

The language of the statute is unambiguous: under Section 402(d)(1), a child (as defined in Section 416(e)) is entitled to benefits, and under Section 416(e), "[t]he term 'child' means * * * the child * * * of

an individual * * * ." 42 U.S.C. § 416(e). It is undisputed that each of the applicants here is the biological "child" of Robert Capato.

The Commissioner invokes a number of extrinsic authorities in an attempt to avoid this straightforward application of Congress's clear language. The Court should reject each of these arguments.

First, the Commissioner argues that the Third Circuit's interpretation of Section 416(e) renders Sections 416(h)(2)(B) and (3)(C) superfluous, as the latter two subsections presuppose that the applicant is the biological child of the insured individual. Pet. Br. 14. But as Respondent explains, Sections 416(h)(2)(B) and (3)(C) contribute to the determination whether the applicant is "deemed dependent" on the insured under Section 402(d)(3). Resp. Br. 28-29; *see also Norton v. Mathews*, 427 U.S. 524, 526 n.1 (1976). Specifically, whereas Section 402(d)(3)(A) deems all "legitimate" biological children to be dependent on the insured (save two exceptions not relevant here), Section 402(d)(3) permits "illegitimate" biological children to be deemed dependent on the insured only in the limited circumstances set out in Sections 416(h)(2)(B) and (3)(C). Thus, the Third Circuit's reading of Section 416(e) does not cause those sections to be duplicative.[2]

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[2] Moreover, even if the Court were to view Sections 416(h)(2)(B) and (3)(C) as duplicative of Section 416(e), the Court should recall that Sections 416(h)(2)(B) and (3)(C) were added to the statute decades after the enactment of 416(e)'s predecessor (which contained language that was materially identical to the language in the current version of the statute). Social Security Amendments of 1960, Pub. L. No. 86-778, § 208(b), 74 Stat. 924, 951, *codified at* 42 U.S.C. § 416(h)(2)(B); Social Security

Second, the Commissioner relies on a Senate Committee Report from 1965 as evidence that a child's eligibility for benefits is determined by state intestacy law. Pet. Br. 17-18 (citing S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 109 (1965)). But because the relevant statutory language was enacted in 1939 rather than 1965, this legislative history does not control the meaning of Section 416(e). *See* Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 201, sec. 202(c)(1), 53 Stat. 1360, 1364 ("Every child (as defined in section 209(k)) of an individual entitled to primary insurance benefits, or of an individual who died a fully or currently insured individual * * * shall be entitled to receive a child's insurance benefit * * * ."); *id.* at § 201, sec. 209(k), 53 Stat. at 1377 ("[t]he term 'child' * * * means the child of an individual"). The 1965 Senate Report "form[s] a hazardous basis for inferring the intent" of the 1939 Act's drafters. *United States v. Price*, 361 U.S. 304, 313 (1960); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994) ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight, and the views of the committee of one House of another Congress are of even less weight." (citations omitted)). To the extent the legislative history of the 1965 amendment is even relevant, that history is actually *favorable* to Capato, as it shows that "Congress *assumed* that the biological children of married parents are eligible for benefits." Resp. Br. 31.

Amendments of 1965, Pub. L. No. 89-97, § 339(a), 79 Stat. 286, 409-10 (1965), *codified at* 42 U.S.C. § 416(h)(3). The "preference for avoiding surplusage constructions is not absolute," *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004), and it ought not lead the Court to adopt a forced construction of Section 416(e).

Finally, the Commissioner invokes principles of administrative deference in support of the argument that the Commissioner's regulations (and interpretations thereof) reasonably construe Sections 402(d)(1) and 416(e). Pet Br. 22-26. But because the statute's language is clear, and because Respondent's children are indisputably the biological children of Robert Capato, the Court should reject the Commissioner's argument. *E.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation." (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984))).

In sum, the plain language of Section 416(e)—"[t]he term 'child' means * * * the child * * * of an individual"—must control the Court's decision despite the Commissioner's attempts to incorporate dependency requirements or potentially discriminatory standards into the definition of "child."

CONCLUSION

For the reasons set forth above and in the brief of the Respondent, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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