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.
Respondent.

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

BRIEF IN OPPOSITION

BERNARD A. KUTTNER
24 Lackawanna Plaza
Millburn, NJ 07041
(973) 467-8300

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Respondent

QUESTION PRESENTED

Whether the Third Circuit correctly determined that a posthumously conceived child is a "child" for the purpose of receiving survivor benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

BRIEF IN OPPOSITION

Respondent, Karen K. Capato, respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

STATEMENT

In this case, the Third Circuit reached the unsurprising conclusion that the biological offspring of a married couple is the "child" of each of its parents, as that word is used in the Social Security Act (the "Act"). This Court should not review that decision. Even if the Court were inclined to consider the issue presented in the government's petition, this would be the wrong case in which to do so: Unresolved issues below leave unclear whether adoption of the government's proposed rule would change the ultimate outcome here. There also is no compelling need for immediate resolution of the circuit conflict described by the government so as to achieve national uniformity in the treatment of posthumously conceived children: The government's proposed rule would have entitlement to federal benefits turn on the varying intestacy laws of the individual States, and therefore would *perpetuate* inconsistency in the treatment of similarly situated children from one State to another. And, not least, the decision below is correct, properly applying the plain language and manifest purpose of the Act. The government's petition accordingly should be denied.

A. Statutory Provisions

1. Enacted in 1935, the Act was lauded as "the broadest program for social security ever launched at one time by any government." H.R. Rep. No. 76-728,

at 3 (1939). Placing "the security of the men, women, and children of the Nation first," the Act promised to provide a "safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours." Review of Legislative Accomplishments of the Administration and Congress, H.R. Doc. No. 73-397, at 2 (1934). To provide that safeguard against calamity, Title II of the 1935 Act offered disability and retirement benefits to insured workers. 42 U.S.C. § 401 *et seq*.

In 1939, Congress amended the Act to offer benefits to the surviving family members, including dependent minor children, of a deceased wage earner. Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. II, § 402, 53 Stat. 1360, 1363. Congress intended the amendments "to strengthen and extend the principles and objectives of the" earlier Act, and made clear its hope that survivor benefits would offer "more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 5, 7. In 1965, Congress amended the law once again—this time, to cover children born out of wedlock who were (in Congress's eyes) unfairly barred by state intestacy laws from receiving benefits. Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, tit. III, § 339, 79 Stat. 286, 409; see also S. Rep. No. 89-404, at 109-110 (1965). The amended Act has thus remained true to Congress's conviction, first voiced in 1935, that children are at "[t]he heart" of the statutory regime. S. Rep. No. 74-628, at 16 (1935).

2. Consistent with this core purpose, the Act grants survivor benefits to certain categories of children following the death of a "fully or currently insured individual." 42 U.S.C. § 402(d)(1). Section 402(d)(1) generally provides for the payment of bene-

fits to "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual * * * ." Section 416(e), in turn, provides that "[t]he term 'child' means * * * the child or legally adopted child of an individual," as well as, in defined circumstances, the "stepchild" or "grandchild" of an individual. 42 U.S.C. § 416(e). Sections 402(d)(1)(A)-(C) also set out the general criteria that a "child" must satisfy to receive benefits, providing, in part, that (1) an application for benefits must be filed, (2) the child must be unmarried and under the age of eighteen, and (3) the child must have been dependent on the deceased wage earner "at the time of [the wage earner's] death." See 42 U.S.C. §§ 402(d)(1)(A)-(C).[1]

This case is primarily concerned with the relation of Section 416(e) to another provision of the Act, 42 U.S.C. § 416(h), which is entitled "Determination of family status." As this title suggests, Section 416(h) offers direction on how to determine the existence of certain family relationships—such as, for example, "wife, husband, widow, or widower," 42 U.S.C. § 416(h)(1)(A)(i)—in specified circumstances. A part of this provision states that, "[i]n determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter," the Commissioner of Social Security is to apply the intestacy laws of the State "in which [the wage earner] was domiciled at the time of his death." 42 U.S.C. § 416(h)(2)(A). Any person "who according

[1] The Act raises the eligibility age by one year for full-time students and also extends eligibility to disabled children if their disability began before the age of twenty-two. See 42 U.S.C. § 402(d)(1)(B).

to such law would have the same status relative to taking intestate personal property as a child * * * shall be deemed such." *Ibid.* The Act then lists three other ways in which an applicant who does not qualify as a child under 42 U.S.C. § 416(h)(2)(A) may nevertheless be "deemed" to have child status for purposes of Section 416(e). 42 U.S.C. § 416(h)(2)(B); *id.* §§ 416(h)(3)(C)(i)-(ii).

B. Factual Background

Robert Nicholas ("Nick") Capato was born in Washington State in 1957 and lived there or in California for most of his life; he met his future wife, respondent Karen Kuttner, in the mid-1990s in Seattle, and they subsequently lived for two years in Colorado. Pet. App. 2a; see Pet. App. 16a. They were married in New Jersey. Pet. App. 2a. In 1999, the Capatos started a chain of health clubs in Florida, although they planned ultimately to return to New Jersey "and took some steps in that regard." Pet. App. 2a; see Pet. App. 16a. During this time, Nick Capato made repeated visits to New Jersey to look for a family home and to set up a business there. ALJ Hr'g Tr. at 11-12.

In summer 1999, the Capatos' plans were tragically interrupted when Nick Capato was diagnosed with esophageal cancer. Pet. App. 2a. Aware that his chemotherapy treatment would likely leave him sterile, Nick Capato deposited sperm at a fertility clinic so that respondent might subsequently conceive his children. Pet. App. 2a, 16a-17a.

In 2001, respondent gave birth to a son, Devon, who was conceived naturally despite Nick Capato's radiation treatments and chemotherapy. Pet. App. 2a, 17a. A few months later, however, Nick Capato's

doctor informed him that his prognosis had worsened. Pet. App. 18a. Natural conception became impossible. The Capatos, hoping to give Devon siblings, turned to in vitro fertilization (IVF) using Nick Capato's sperm. Pet. App. 3a, 19a. They also "specifically" told their attorney to mention unborn children in Nick Capato's will so that "'they'd have the rights and be supported in the same way that [Devon] was already privileged to [be],'" Pet. App. 3a (citation omitted). Similarly, the Capatos acknowledged before a notary "that any child(ren) born to us, who were conceived by the use of our embryo(s)[,] shall in all respects be our natural child(ren)[] and are the heirs to our bodies * * * for all purposes (including, but not limited to[,] descent of property)." ALJ R. 47. Nick Capato's will, however, did not include this provision at the time of his death. Pet. App. 3a.

A few months later, Nick Capato passed away at the age of forty-four. Pet. App. 2a. Following a successful IVF procedure, respondent gave birth to twins eighteen months after his death. Pet. App 19a. The government does not dispute that the twins are Nick Capato's biological children.

C. Administrative Proceedings

One month after the twins were born, respondent applied under the Act for survivor benefits on behalf of her two newborns. Pet. App. 3a. After the Social Security Administration ("SSA") denied her claim, respondent requested a hearing before an administrative law judge ("ALJ"). Pet. App. 3a. Respondent and multiple other witnesses testified at the hearing. Pet App. 3a.

The ALJ found all of the testimony "fully credible," and he praised the Capatos' "courage" and

"highest intentions." Pet. App. 44a. He further acknowledged that "equity supports the claimant's applications" and that "allowing benefits to the children would appear to be consistent with the purposes of the Social Security Act." Pet. App. 45a. The ALJ believed, however, that Section 416(h)(2)(A) controls the definition of a "child" entitled to benefits under the Act, and that a child conceived after the death of the wage earner can demonstrate eligibility for survivor benefits only by showing that he or she is entitled to inherit from the wage earner under the intestacy laws of the State where the wage earner was domiciled at the time of death. Pet. App. 39a. The ALJ also determined that Nick Capato was domiciled in Florida when he died and that posthumously conceived children may not inherit from their father under Florida law. Pet. App. 40a-41a. The ALJ thus ruled that the Capato twins were ineligible for survivor benefits. Pet. App. 46a-47a.

D. Court Proceedings

1. The district court affirmed. Pet. App. 15a. The court acknowledged that Section 416(e) of the Act defines "child" as "the child * * * of an individual." Pet. App. 23a. But, like the ALJ, the court looked for guidance not to Section 416(e) but to Section 416(h)(2)(A), concluding that state intestacy law is the "primary method" for determining whether an individual is a "child" for purposes of the Act. Pet. App. 23a. Agreeing with the ALJ that Nick Capato was domiciled in Florida at the time of his death, the court found that "[t]he Capato twins are neither heirs under Florida's intestacy law nor beneficiaries of the decedent's will." Pet. App. 24a. The court thus concluded that "the twins are not entitled to Social Security benefits." Pet. App. 24a.

2. The court of appeals reversed, holding that the Capato twins are entitled to survivor benefits under Sections 402(d) and 416(e). Pet. App. 12a. The court noted that "Section 416(e) defines 'child' broadly as, in relevant part, 'the child or legally adopted child of an individual,'" and that "Section 416(h), entitled 'Determination of family status,' offers other ways by which to determine whether the applicant is a 'child.'" Pet. App. 6a. Against this background, the court rejected the government's argument that status as a child is in all circumstances determined by Section 416(h) and state intestacy law: "To accept the argument of the Commissioner [of Social Security], one would have to ignore the plain language of § 416(e) and find that the biological child of a married couple is not a 'child' within the meaning of § 402(d) unless the child can inherit under the intestacy law of the domicile of the decedent. There is no reason apparent to us why that should be so * * * ." Pet. App. 7a-8a.

Responding specifically to the government's reliance on Section 416(h), the court explained that "[t]he plain language of § 402(d) and 416(e) provides a threshold basis for defining benefit eligibility," while "[t]he provisions of § 416(h) then provide for '[d]etermination of family status'—subsection (h)'s heading—to determine eligibility where a claimant's status as the deceased wage-earner's child is in doubt." Pet. App. 10a. "[A] basic tenet of statutory construction," the court continued, "is that [i]n the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning." Pet. App. 10a (citation and internal quotation marks omitted). And "[t]he term 'child' in § 416(e) requires no further definition when all parties agree that the applicants here are

the biological offspring of the Capatos." Pet. App. 10a-11a. Thus faced with "the narrow question" whether "the undisputed biological children of a deceased wage earner and his widow [are] 'children' within the meaning of the Act," the court concluded that "the answer is a resounding 'Yes.'" Pet. App. 12a.

Having reached this conclusion, the court found it unnecessary to decide definitively where Nick Capato was domiciled at the time of his death. Pet. App. 12a n.6. Instead, the court remanded the case for a determination whether his "children were dependent or deemed dependent on him, the final requisite of the Act remaining to be satisfied." Pet. App. 12a.

REASONS FOR DENYING THE PETITION

Simply stated, this is the wrong case in which to resolve the conflict in the circuits asserted by the government in its petition. The Third Circuit's interpretation of the Act is correct: That court was right to read the statute as using the word "child" in its ordinary and wholly uncontroversial sense as including the biological offspring of a married parent. This being so, there is no compelling need for this Court to review the decision below. There is substantial reason to believe that *this* case would come out the same way in the end under both the government's and the Third Circuit's approach. And the government has managed to apply different readings of the Act in different circuits for many years without any evident difficulty. In these circumstances, if this Court is to reach the issue presented here, it should await the arrival of a better vehicle.

I. THIS CASE IS A POOR VEHICLE FOR REVIEW.

Whatever merit there is to the government's claim of a conflict in the circuits, this case does not present an appropriate vehicle in which to reach the question presented. The reason is simple: It is not apparent that answering the government's question will have any effect on the ultimate outcome of this case. On the one hand, the Capato twins may well be entitled to benefits even under the government's own rule because there is substantial reason to believe that, at the time of his death, Nick Capato was domiciled in a State whose intestacy laws would allow the twins to recover from his estate; on the other, the government takes the position that the twins are not entitled to recover even under the Third Circuit's rule because they were not dependents of their father at the time of his death. If the Court is going to resolve this issue, it should be in a case that does not involve such uncertainties and in which the issue is presented more concretely.

1. At the outset, substantial evidence indicates that Nick Capato was not domiciled in Florida at the time of his death. His connections with Washington State were deep and long-standing. He was born in Washington, his business was incorporated there, and his passport listed Seattle as its place of issuance. Pet. App. 26a-27a. He spent the vast majority of his life in California and Washington. ALJ Hr'g Tr. at 24.

In contrast, Nick Capato's ties to Florida were weak and temporary. He and respondent spent a total of just three years in Florida. Pet. App. 2a. Rather than buying a home there, the Capatos briefly rented an apartment and lived with respondent's

grandmother as Nick Capato expanded his business. ALJ Hr'g Tr. at 24. The Capatos made no further attempt to make a home in Florida because they never intended to stay there. See *ibid.*

Instead, before Nick Capato's death, the Capatos made plans to move to New Jersey. Pet. App. 2a, 16a-17a. They began searching for a suitable home in that State, and Nick Capato attempted to incorporate a business there. Pet. App. 17a. These arrangements to move so soon after arriving in Florida strongly suggest that the Capatos viewed Florida as no more than a short-term residence. And these facts cast significant doubt on the ALJ's determination that Nick Capato was domiciled in Florida. The Third Circuit, although stating in passing that it "would likely" find Florida to be his domicile were it to decide the question, pointedly left the issue unresolved. Pet. App. 12a n.6. If this matter is revisited in further proceedings, the result could well be a finding that Nick Capato was domiciled outside of Florida.

And such a determination could be dispositive of the twins' eligibility for benefits under the interpretation of Sections 402(d) and 416 urged by the government. Many States and the District of Columbia, unlike Florida, allow for posthumously born children to receive distributions from the estate of a deceased parent without reference to the date of conception. See, *e.g.*, D.C. Code § 19-314 (2011); 755 Ill. Comp. Stat. 5/2-3 (2011). Others deem children born within a specified period after a parent's death capable of inheriting under certain circumstances. See, *e.g.*, Cal. Prob. Code § 249.5(c) (West 2011) (providing that the child must be conceived within two years of the parent's death); La. Rev. Stat. Ann. § 9:391.1

(2011) (providing that the child must be born within three years of the parent's death).

For this reason, even if the government were to prevail on its argument concerning the relevance of state intestacy law, the Capato twins may still be eligible for benefits. Washington intestacy law defines "issue" as "*all* the lineal descendants of an individual." Wash. Rev. Code Ann. § 11.02.005(4) (West 2011) (emphasis added). It provides for the distribution of a share of the decedent's estate "[t]o the issue of the intestate." *Id.* § 11.04.015(2)(a). Posthumously conceived children are never explicitly mentioned in this section, though children "conceived prior to the death of a parent but born after the death of the deceased parent" are deemed "the *surviving issue* of the deceased parent * * * ." *Id.* § 11.02.005(4) (emphasis added). It is telling that the legislature chose not to limit the distribution of an intestate decedent's estate to surviving issue or any other narrow subset of a decedent's lineal descendants. Washington intestacy law, by imbuing "all [] lineal descendants" with the ability to inherit, is plausibly read as encompassing children conceived after the death of a biological parent.

Similarly, both New Jersey and California intestacy law support the proposition that the Capato twins may be eligible for survivor benefits even if the government prevails on the question it has presented to this Court. In circumstances quite like those here, a New Jersey court determined that a pair of posthumously conceived twins born eighteen months after the death of their father could inherit from their father's estate. *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). And under California law, a child "in utero using the decedent's genetic

material * * * within two years of the date of issuance of a certificate of the decedent's death" may, when certain criteria are met, inherit from an intestate parent. Cal. Probate Code § 249.5(c). Accordingly, a determination that Nick Capato's domicile at the time of death was Washington, New Jersey, or California would make a decision by this Court in the government's favor immaterial to the final outcome.

2. In addition, the government's position is that the Capato twins should be denied benefits even under the Third Circuit's rule. To be eligible for survivor benefits under Section 402(d)(1), a qualifying child must be "dependent upon" the insured decedent. 42 U.S.C. § 402(d)(1)(C). Although we maintain that the twins satisfy this test, see *Gillett-Netting* v. *Barnhart*, 371 F.3d 593, 599 (9th Cir. 2004), the government took the position below that the twins were not dependents of their father. The Third Circuit left the question open, see Pet. App. 8a n.3, and "remand[ed] for a determination of whether, as of the date of Mr. Capato's death, his children were dependent or deemed dependent on him." Pet. App. 12a. If the courts below agree with the government on this issue, benefits will be unavailable no matter how this Court answers the question presented in the government's petition, again making resolution of that question immaterial to the ultimate outcome.

As a consequence, deciding the question presented by the government may be of only theoretical importance in this case. For this reason, review of the decision below is premature at this time.

II. THERE IS NO NEED FOR IMMEDIATE REVIEW.

Denial of the petition also is warranted for a second, related reason: although we acknowledge the disagreement between the courts of appeals described by the government in its petition, Pet. 17-18,[2] there is no compelling need for immediate review of the question presented.

First of all, this is not a case where adoption of the government's rule will lead to nationwide uniformity in the treatment accorded the affected class of children. To the contrary, the government embraces a rule that avowedly accords *different* treatment to similarly situated children from State to State, depending upon the vagaries of state intestacy law.

---

[2] We also note that the Eighth Circuit has issued its decision in *Beeler* v. *Astrue*, 651 F.3d 954 (8th Cir. 2011), which was pending when the government filed its petition, see Pet. 18 n.*, disagreeing with the Third Circuit's holding in this case and agreeing with the Fourth Circuit's decision in *Schafer* v. *Astrue*, 641 F.3d 49 (4th Cir. 2011). Having said that, the government overstates the extent of the conflict; several of the decisions it cites involved very different facts than does this case and are not directly germane to the issue here. See Pet. 18-19. For example, *Conlon* v. *Heckler*, 719 F.2d 788 (5th Cir. 1983), concerned a child born out of wedlock rather than a posthumously conceived child. At issue in *DeSonier* v. *Sullivan*, 906 F.2d 228 (6th Cir. 1990), was which version of Texas intestacy law should be applied: the law in effect at the time of the wage earner's death or the law in effect at the time of the application for benefits. The *DeSonier* court did not address whether the term "child" includes a posthumously conceived child. And *Javier* v. *Commissioner of Social Security*, 407 F.3d 1244 (D.C. Cir. 2005), considered doctrines of standing to challenge a paternity determination under Philippine law—not whether a posthumously conceived child was legally a "child." These decisions do not squarely conflict with the holding below.

As a result, any regional variation attributable to the conflict among the circuits does not produce the kind of pressing concern that might arise where the courts of appeals disagree about the meaning of a substantive federal rule.

Nor does the varying statement of the rule by the courts of appeals create significant administrative problems for the government. Under *Gillett-Netting* v. *Barnhart*, for the last seven years posthumously conceived children have been considered "children" for the purpose of receiving survivor benefits in the nine States that make up the Ninth Circuit. The government has had no evident difficulty dealing with this variation: The Commissioner of Social Security issued an "Acquiescence Ruling" in 2005 after the decision in *Gillett-Netting*. See Social Security Acquiescence Ruling 05–1(9), 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005).

Indeed, administration of the Act is likely to be far more difficult and expensive under the government's approach, both for the government and for private litigants, than it is under the Third Circuit's rule. In every case involving a posthumously conceived child there will be both a factual question (as to the father's place of domicile at death) and a legal question (as to the intestacy rule of that State). As this case demonstrates, those inquiries will often be complex and difficult. But there is no need at all to answer those questions under the Third Circuit's commonsense application of the Act.

Moreover, there may well be better vehicles for the Court to use in addressing the issue presented by the government. In *Schafer* v. *Astrue*, 641 F.3d 49 (4th Cir. 2011), for example, the decedent's domicile was not contested and does not remain an open is-

sue, as it does in this case. And because the Fourth Circuit in *Schafer* affirmed the ALJ and district court rulings against the plaintiff's posthumously conceived child, no question of dependency remains to be resolved. *Id.* at 52 n.2. Similarly, in *Beeler* v. *Astrue*, 651 F.3d 954 (8th Cir. 2011), the Eighth Circuit came to a final conclusion on all relevant issues. *Schafer*, *Beeler*, or a future case in which the domicile and dependency issues have been satisfactorily resolved would provide a more suitable vehicle for resolution of the question raised in the government's petition.

III. THE DECISION BELOW IS CORRECT.

Finally, there is an additional, very significant reason why immediate review is not warranted: The decision below is correct. The Third Circuit's reading of the Act comports with the statute's plain text and clear purpose. The government's does not.

A. The Government's Reading Cannot Be Reconciled With The Text And Structure Of The Statute.

1. The Act sets out a threshold requirement for the award of survivor benefits: that the survivor be a "child." In particular, Section 402(d)(1) provides that, upon the satisfaction of certain conditions, "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual * * * shall be entitled to child's insurance benefit." The question before the Third Circuit was whether the Capato twins were "children" within the meaning of this provision.

The court answered this question by applying basic principles of statutory interpretation. All agree that "[t]he task of resolving [a] dispute over the

meaning of [a statute] begins * * * with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The Third Circuit therefore looked at the definition of "child" provided by Section 416(e), as it was directed to do by Section 402(d)(1). Section 416(e) includes several definitions of "child" that are applicable in different situations, but the first, and most general, is broad and simple: "The term 'child' means (1) the child or legally adopted child of an individual * * * ." 42 U.S.C. 416(e).[3]

The Third Circuit found this definition of "child" to be "unambiguous[]" and to cover the Capato twins. Pet. App. 11a n.5. As the court noted, because the twins are the "biological offspring" of the deceased party, "[t]he term 'child' [in the statute] requires no further definition." Pet. App. 10a. That holding was correct: The ordinary definition of a "child" is a "son or daughter," terms that in turn are understood to mean a male or female "descendant." *Random House Webster's Unabridged Dictionary* 358, 509, 1819 (2d ed. 2001). Or, as the Restatement (Third) of Property puts it, "[a]n individual is the child of his or her genetic parents." Restatement (Third) of Property (Wills & Donative Transfers) § 2.5(1) (1999). See also *Gillett-Netting*, 371 F.3d at 596-597; *Tsosie* v. *Califano*, 630 F.2d 1328, 1333 (9th Cir. 1980) ("Under § 416(e), the term 'child' includes a person's natural children and his legally adopted children.").

The Third Circuit thus did no more than apply common sense and the guidance of this Court: "In the absence of an indication to the contrary, words in

---

[3] Other definitions of a "child," which are not relevant to this case, address stepchildren and grandchildren.

a statute are assumed to bear their ordinary, contemporary, common meaning." *Walters* v. *Metro. Educ. Enters. Inc.*, 519 U.S. 202, 207 (1997) (citation omitted). And the government very notably does not deny that, under the ordinary meaning of the word, the Capato twins are the "children" of their biological father. The government's approach to the question here thus discounts the possibility that, in Sections 402(d)(1) and 416(e), Congress simply "sa[id] * * * what it mean[t] and mean[t] * * * what it sa[id]." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992).[4]

2. Instead, the government argues that *another* provision of the statute, Section 416(h)(2), must be used to modify the meaning of "child" as that term is defined in Section 416(e). Pet. 7. Section 416(h)(2)(A) provides that the Commissioner, in determining whether an applicant is a "child" or a "parent," "shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual * * * was domiciled at the time of his death." Although Sections 402(d)(1) and 416(e) make no reference to Section 416(h), the government insists that

---

[4] For this reason, the government's discussion of agency deference, Pet. 16-17, is beside the point. Judicial deference to agency determinations is appropriate only "if the statute is silent or ambiguous with respect to the specific issue" and Congress has "explicitly left a gap for an agency to fill." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see also Conn. Nat'l Bank*, 503 U.S. at 254 ("When the words of a statute are unambiguous," then "judicial inquiry is complete." (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981))). The word "child" is not in the least ambiguous as it applies in the circumstances of this case, and there accordingly is no gap to fill.

"further defin[ition]," omitted from Section 416(e) but needed to make that provision comprehensible, "is supplied by "Subsection (h) of Section 416." Pet. 7. The government appears to rest this assertion on two propositions: that, in common parlance, it is not evident that the "'undisputed biological child'" of married parents *is* the "child" of its parents, Pet. 8; and that use of the word "shall" in Section 416(h)(2)(A) means that the provision trumps the Section 416(e) definition, Pet. 7. Both of these propositions are wrong.

As to the government's first point, far from being a "definitional tautology," Pet. 9 (quoting *Conlon* v. *Heckler*, 719 F.2d 788, 800 (5th Cir. 1983)), the Section 416(e) definition of "child" is not tautological at all; it provides that the *legal* definition of "child" for purposes of the Act is the common English *dictionary* definition. As Judge Davis observed in his dissent from the Fourth Circuit's decision in *Schafer*, Congress's definition of the term "child" in Section 416(e) to include "a child" *and a range of other individuals* was "a kind of legislative shorthand" that "substitute[s] a single word or phrase as an abbreviation" for a complicated and "cumbersome list[]." *Schafer*, 641 F.3d at 65 (Davis, J., dissenting). Recognizing as much does not render the use of the word "child" in Section 416(e)(1) in any way "unclear," but instead simply requires a court to undertake the familiar interpretive task of determining whether a word as used by Congress applies in particular circumstances.[5]

[5] "Like any word, the word 'child' comprises both a core of relations it clearly encompasses and a hazy periphery where

The government's second point, meanwhile, simply disregards the structure of the statute: Although professing to heed the statute's plain language, the government argues that, in using the words "as defined in section 416*(e)*," Congress actually meant to say "as defined in section 416*(h)*," a different statutory provision that uses an altogether different formulation. Yet the structure of the Act demonstrates that Congress intended Section 416(e) to stand alone without implicitly incorporating Section 416(h). As Judge Davis also noted, "Congress *specifically* invoked § 416(e)" in Section 402(d)(1) "and went on to *specifically* invoke § 416(h) in a neighboring provision," Section 402(d)(3), for a different purpose. *Schafer*, 641 F.3d at 64 (Davis, J., dissenting).

Section 402(d)(1)(C)(iii) provides that "[e]very child *(as defined in section 416(e) of this title)* * * * shall be entitled to a child's insurance benefit * * * ." 42 U.S.C. § 402(d)(1)(C)(iii) (emphasis added). Neither it nor Section 416(e) makes reference to Section 416(h)(2). But a different, and analytically distinct, provision in Section 402(d) *does* refer to the determination of "child" status described in Section 416(h)(2). In Section 402(d)(3), the Act provides that, "[f]or purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to *section 416 (h)(2)(B) or section 416 (h)(3)* of this title shall be deemed to be the legitimate child of such individual." 42 U.S.C. § 402(d)(3) (emphasis added). Thus, as Judge Davis noted, "[t]his is not a case in which we must choose between two competing statutory definitions, for here *Congress has chosen for us*." *Schafer*, 641 F.3d at 64 (Da-

---

the label becomes increasingly contested." *Schafer*, 641 F.3d at 65 (Davis, J., dissenting).

vis, J., dissenting). In this setting, "it is difficult to imagine how Congress could have more clearly indicated that it understood the difference between the two definitions and was deliberately choosing to apply § 416(e)[]," and *not* Section 416(h), in setting the eligibility for benefits of children whose familial relationship with the wage earner is undisputed. *Ibid.*

3. An examination of the statute and its background also reveals the different circumstances in which Congress intended the two provisions to apply. Unlike Section 416(e), which defines the category of applicants entitled to survivor benefits when "child" status is undisputed, Section 416(h) (insofar as it applies to children) is a narrowly drawn provision that is relevant with respect only to determining the eligibility for benefits of certain children whose status as a dependent "child" is likely to be challenged or unclear. *Cf. McMillian* v. *Heckler*, 759 F.2d 1147, 1150 (4th Cir. 1985) ("An illegitimate claimant may establish that he is a 'child' for eligibility purposes under [§ 416(h)].").

Section 416(h)(2) covers an individual either (a) who has inheritance rights under state intestacy laws, or (b) whose parents were ostensibly married in a ceremony that was actually invalid by reason of a legal defect. Section 416(h)(3), in turn, covers individuals whose parentage has been established by a parent's written acknowledgement, a judicial decree, or some means other than marriage. Tellingly, the relevant Senate Report accompanying the 1965 amendment that enacted Section 416(h)(3) describes 416(h) as designed to determine the status only of "a child born out of wedlock." S. Rep. No. 89-404, at 109 (1965). This suggests, as Judge Davis put it, that "§ 416(h) was meant to be *additive*—extending bene-

fits to the children of unwed parents—rather than an attempt to supplant and, in places, narrow the scope of benefits promised by § 416(e)'s definition of 'child.'" *Schafer*, 641 F.3d at 67 (Davis, J., dissenting).

Section 402(d)(3)—the only provision of the Act that expressly invokes Sections 416(h)(2) and 416(h)(3)—supports this understanding of Section 416(h). To be eligible for survivor benefits under Section 402(d)(1), a qualifying child must be "dependent upon" the insured decedent. 42 U.S.C. § 402(d)(1)(C). Section 402(d)(3) deems a "child" covered by Section 402(d)(1) *per se* "dependent," except in limited circumstances, such as where a child does not live with the decedent parent *and* the child is born out of wedlock. Yet Section 402(d)(3) deems a child who is within the scope of Sections 416(h)(2)(B) and 416(h)(3) legitimate for purposes of this provision (even though, as a matter of fact, he or she may have been born outside of marriage). Thus, the children of unmarried parents who satisfy the terms of Sections 416(h)(2) and 416(h)(3) are entitled to the legal presumption of dependency, whereas that presumption is inapplicable to the children of unmarried parents who do not satisfy those terms. See *Gillett-Netting*, 371 F.3d at 598. It is in *that* context, and not in cases like this one, that Section 416(h) comes into play. See *id.* at 596-597.[6]

---

[6] It is not surprising that Congress used different definitions in different sections of the Act. Section 416(h), which determines whether a child is a "dependent," naturally looks to state intestacy law; the aim of intestacy law, after all, is to support dependents. See, *e.g.*, *Matthews* v. *Lucas*, 427 U.S. 495, 514 (1976) ("[W]here state intestacy law provides that a child may take personal property from a father's estate, it may reasonably

4. In fact, it is the government's argument that the definition of "child" in Section 416(e) is controlled by Section 416(h)(2)(A) that would render the statutory definitions circular. Pet. 6-11. After instructing the Commissioner to apply state intestacy law "[i]n determining whether an applicant is a child," the last sentence of Section 416(h)(2)(A) provides that "[a]pplicants who according to [state intestacy] law would have the same status relative to taking intestate personal property *as a child* or parent shall be deemed such." 42 U.S.C. § 416(h)(2)(A) (emphasis added). This latter provision is meaningless unless the word "child" has independent force and is given its common English meaning. "One cannot reasonably compare a claimant's status under intestacy to the status of 'a child' until one settles on the definition of 'child.' Thus it makes little sense to abandon § 416(e)(1) on the ground that the word 'child' is vague in favor of § 416(h)(2)(A), which *also* requires an extraneous definition of 'child.'" *Schafer*, 641 F.3d at 66 (Davis, J., dissenting). The government's contrary understanding would render Section 416(h)(2)(A) *itself* nonsensical. See *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 101 (1991) (The goal when courts interpret statutes is to "make sense rather than nonsense out of the *corpus juris*").

In addition to being circular, the government's proposed application of Section 416(h) would in some instances make that provision either inconsistent or redundant with Section 416(e). For example, Section 416(e)(2) provides that a stepchild who had been a stepchild for "less than nine months immediately preceding the day on which [the insured] individual

---

be thought that the child will more likely be dependent during the parent's life and at his death.").

died" should not have a right to receive survivor benefits under Section 402(d)(1). 42 U.S.C. § 416(e)(2). But in certain States, such as California, stepchildren may inherit from their stepparents regardless of the length of time that the stepchild-stepparent relationship has lasted. See Cal. Prob. Code § 6454. For applicants covered by such intestacy laws, the government's approach reads the applicable language of Section 416(e)(2) out of the statute.

The same type of problem arises with respect to Section 416(e)(3), which provides that grandchildren and stepgrandchildren qualify for survivor benefits only in certain limited circumstances. Under the intestacy laws of many States, however, grandchildren or stepgrandchildren whose parents predecease them inherit *automatically* from their grandparents or stepgrandparents. See, *e.g.,* Va. Code Ann. § 64.1-3 (West 2011). With respect to such applicants, Section 416(h)(2)(A) would displace the carefully defined limits drawn by Section 416(e)(3), leaving that lengthy subparagraph to accomplish nothing. These conflicts suggest not that "§ 416(h) somehow usurps § 416(e)," *Schafer*, 641 F.3d at 68 (Davis, J., dissenting), but that Congress meant to define two separate categories of potential beneficiaries.

B. The Decision Below Effectuates Congressional Intent.

The Third Circuit's reading of the statutory language is confirmed by looking to the clear policy behind the statute. The award of benefits to posthumously conceived children fits squarely within the central purpose of the Act, which is to protect families against the loss of income. And the Act's background and history shows that Congress intended the statute to be read broadly: In fact, all of the pro-

visions that the government relies upon to *restrict* benefits in this case were enacted by Congress specifically to *expand* survivor benefits, making them available to larger numbers of children. The government's reading would turn this statutory purpose on its head.

1. Through the Act, Congress and the President waged "a unified, well-rounded program of attack" to address the "principal causes of destitution and want" for American families—including the "loss of the wage earner of the family." S. Rep. No. 74-628, at 2. The Act promised "some safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours." H.R. Doc. No. 73-397, at 2. The legislation was intended to be a "broad program" to offer American families "security against the major hazards and vicissitudes of life." Address of the President of the United States, H.R. Doc. No. 74-01, at 3 (1935).

Congress further emphasized that "[a]ll parts of the [Act] are in a very real sense measures for the security of children." S. Rep. No. 74-628, at 16. "The heart of any program for social security must be the child." *Ibid.* At the time of initial enactment, the House committee focused particularly on "[o]ne clearly distinguishable group of children * * * for whom better provision should be made": children "in families lacking a father's support." H.R. Rep. No. 74-615, at 10 (1935). And committees in both the House and Senate emphasized the importance of financial aid to such families, so that "it is possible to keep the young children with their mother in their own home." S. Rep. No. 74-628, at 17. The enacted bill accordingly offered an annual appropriation of approximately $25 million to assist the States in offering relief to

"needy dependent children." Nat'l Res. Planning Bd., Security, Work and Relief Policies 83 (1942), *available at* http://tinyurl.com/4xhtq56.

Four years later, Congress revisited the issue after a 1938 report by the Advisory Council on Social Security concluded that "there is great need for further protection of dependent children." Final Report of the Advisory Council on Social Security, S. Doc. No. 76-04, at 18 (1938). The Council criticized the 1935 program as offering aid that was "insufficient to maintain normal family life or to permit the children to develop into healthy citizens." *Ibid.* Further, because of the technical cut-offs of the need-based program, "[m]any deserving cases are not able to obtain any aid." *Ibid.*

Among its reform recommendations, the Council proposed that dependent children and widows of a deceased wage earner receive survivor benefits as a matter of right. *Id.* at 17-18. The Council explained that such benefits would "sustain[] the concept that a child is supported through the efforts of the parent, [and] afford[] a vital sense of security to the family unit." *Id.* at 18. Congress ultimately approved the survivor benefits amendments to the Act, stating that the changes were "designed to afford more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 7.

2. In 1965, Congress again amended the Act to grant benefits to another class of children: those born out of wedlock who were unable to inherit property under state intestacy laws. As with the 1939 program, Congress focused its attention on eliminating obstacles to the Act's ultimate objectives—obstacles that excluded deserving children from the program

on the basis of technical cut-offs or archaic state intestacy rules. S. Rep. No. 89-404, at 109-110.

Although the Senate Committee that drafted this section did observe that "whether a child meets the definition of a child" depended upon state intestacy law, that one statement hardly proves the government's sweeping conclusion that "Congress understood—and agreed with—the proposition that * * * children who could not inherit under applicable state intestacy law were ineligible for survivor benefits." Pet. 13. To the contrary, Congress intended this provision to address the specific case of children born out of wedlock, for whom it might be difficult to establish paternity. But Congress *assumed* that the biological children of married parents were eligible for benefits: In its description of the disparate treatment States offered illegitimate children, the Senate Committee observed that "[i]n some States a child whose parents never married can inherit property *just as if they had married*." (emphasis added). S. Rep. No. 89-404, at 109.

The amendments sought to grant benefits for children in States with laws that were less generous to children born outside of marriage—children in a "normal family relationship" whose "friends and neighbors have [no] reason to think that *the parents were never married*." *Id.* at 110 (emphasis added). The bill was thus consistent with the Committee's belief that, "in a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, *whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live*." *Ibid.* (emphasis added).

The Act's purpose clearly dictates eligibility for children like the Capato twins. As a law explicitly drafted "for the security of children," S. Rep. No. 74-628, at 16, the Act as applied to families in respondent's situation softens the impact of life's misfortunes—in this case, the primary wage-earner's untimely death. It offers a measure of security to the remaining family unit. It eases the expenses of keeping "the young children with their mother in their own home." *Id.* at 17. And it promises couples in the Capatos' circumstances that, when illness threatens their ability to have a family, the couple's plans for the future need not come to a halt. The ALJ recognized as much, finding that "[t]here is little doubt * * * that a favorable decision [for respondent] would not be inconsistent with the intention of the statute." Pet. App. 45a.

3. Lest there be any question about this, the decision below properly adhered to the "well-accepted principle that remedial legislation * * * is to be given a liberal construction consistent with the [statute's] overriding purpose." *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 798 (1969).[7] The government urges ex-

[7] The Court has applied this principle to a wide range of remedial statutes. See, *e.g.*, *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 569 (1987) (Federal Employers' Liability Act "recognized generally" as a "broad remedial statute" and thus given a "standard of liberal construction in order to accomplish [Congress's] objects"); *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 395 (1987) (Administrative Procedure Act should be construed not "grudgingly but as serving a broadly remedial purpose"); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977) (Longshoremen's and Harbor Workers' Compensation Act should be read liberally because "such a construction is appropriate for this remedial legislation"); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967) (Securities

actly the opposite approach, proposing a reading that neither conforms "with [the Act's] purpose" nor "avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

In ruling for respondent, the Third Circuit followed the long-standing practice—uniform across the circuits—of applying the Act generously "'in consonance with its remedial and humanitarian aims.'" Pet. App. 5a (quoting *Eisenhauer* v. *Mathews*, 535 F.2d 681, 686 (2d Cir. 1976)); see also *Acierno* v. *Barnhart*, 475 F.3d 77, 81 (2d Cir. 2007) (describing the Act as "a remedial statute, to be broadly construed and liberally applied"); *Dorsey* v. *Bowen*, 828 F.2d 246, 248 (4th Cir. 1987) (determining that the Act should be broadly read "in favor of beneficiaries"). The courts of appeals are not, and have never been, split on this question: "In a close case, it is well to bear in mind that '[the Act's] intent is inclusion rather than exclusion * * * .'" *Cohen* v. *Sec'y of Dep't of Health & Human Serv.*, 964 F.2d 524, 531 (6th Cir. 1992) (quoting *Marcus* v. *Califano*, 615 F.2d 23, 29 (2d Cir. 1979)). Thus, for over seventy years, judicial practice has been to construe the Act in favor of coverage if it is reasonable to do so, not "so as to withhold benefits in marginal cases." *Smith* v. *Heckler*, 820 F.2d 1093, 1095 (9th Cir. 1987).

The rationale for that rule is plain: The Act "embrace[d] the broadest program for social security ever launched at one time by any government." H.R. Rep. No. 76-728, at 3. The courts interpret such statutes by "reading the whole statutory text, considering the purpose and context of the statute." *Dolan* v. *U.S.*

Exchange Act "should be construed broadly to effectuate its purposes").

Postal Serv., 546 U.S. 481, 486 (2006). Interpretation of the word "child" should thus accord with—and not frustrate—Congress's overriding vision for the Act. The decision below does just that.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BERNARD A. KUTTNER
24 Lackawanna Plaza
Millburn, NJ 07041
(973) 467-8300

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Respondent

OCTOBER 2011