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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the posthumously conceived biological child of married parents is a "child" of those parents 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 CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Constitutional Provisions

Federal Statutes

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF FOR THE RESPONDENT

STATEMENT

To put it plainly, the government's reading of the Social Security Act ("the Act") makes no sense at all. The government posits that Congress entitled adopted children, stepchildren, grandchildren, and even stepgrandchildren to qualify for child survivor benefits without regard to their rights under state intestacy law. Yet it insists that the entitlement to benefits of the biological children of married parents is settled, not by reference to the straightforward definition of "child" in 42 U.S.C. § 416(e), but by reference to state intestacy rules pursuant to 42 U.S.C. § 416(h)(2)(A). This reading is perverse. There can be no doubt that Congress would have regarded the biological children of married parents as lying at the core of any definition of "child." The government does not even attempt to explain why Congress would have erected a statutory structure that turns this understanding on its head.

And in fact, it did not. The plain and utterly unambiguous language of the Act establishes that the biological children of a married couple are eligible for Social Security benefits as the survivors of their deceased parents. It is only children whose parents were not married, and whose parentage or parental relationships the 1939 Congress that enacted the governing provisions would have regarded as uncertain, who need have recourse to the intestacy mechanism of Section 416(h)(2)(A). The Third Circuit faithfully applied the Act in accord with its text and purpose. The decision below should be affirmed.

A. Statutory Provisions

1. Congress enacted the Social Security Act in 1935 to preserve "the security of the men, women, and children of the Nation" and 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). Members of Congress lauded the Act as "the broadest program for social security ever launched at one time by any government." H.R. Rep. No. 76-728, at 3 (1939). The Act's many important provisions include Title II, which offered disability and retirement benefits to insured workers. 42 U.S.C. § 401 *et seq.*

In 1939, Congress expanded the Act to include benefits for the families—including children—of deceased wage earners. Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. II, § 402, 53 Stat. 1363-1366. Congress intended "to strengthen and extend the principles and objectives" of the Act, with the goal of providing survivor benefits that would offer "more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 5, 7. And in 1965, Congress amended the Act's child survivorship benefits, expanding coverage to children born out of wedlock who it believed were the subject of unfair treatment under state intestacy laws. Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, tit. III, § 339, 79 Stat. 409; see also S. Rep. No. 89-404, at 109-110 (1965).

2. In keeping with this purpose, the Act today grants survivor benefits to "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual * * *." 42 U.S.C. § 402(d)(1). Section 416(e), in turn,

provides that "[t]he term 'child' means * * * the child or legally adopted child of an [insured] individual" (Section 416(e)(1)) or, in defined circumstances, the "stepchild" (Section 416(e)(2)) or "grandchild" (Section 416(e)(3)) of an insured individual.[1]

This case concerns the relationship between Section 416(e) and another provision of the Act, 42 U.S.C. § 416(h), which is titled "Determination of family status." Section 416(h) provides additional guidance on how to determine the existence of certain family relationships in specified circumstances. In particular, Section 416(h)(2)(A) 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 shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State" in which the wage earner was "domiciled at the time of his death * * *." Any applicant for benefits "who according to such law would have the same status relative to taking intestate personal property as a child * * * shall be deemed such." *Ibid.*

Sections 416(h)(2)(B) and 416(h)(3)(C) provide two additional grounds for coverage of a "son or daughter" who "is not (and is not deemed to be) the child of such insured individual" under Sections

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[1] To receive benefits, a "child" must satisfy certain criteria: (1) he or she must file an application for benefits, (2) must be unmarried and under the age of eighteen, and (3) must have been dependent on the deceased wage earner "at the time of * * * [the wage earner's] death." 42 U.S.C. § 402(d)(1)(A)-(C). Full-time students remain eligible until age nineteen, and the Act extends eligibility to children disabled before the age of twenty-two. See 42 U.S.C. § 402(d)(1)(B).

416(e) or 416(h)(2)(A). A "son or daughter" may be "deemed" the child of an insured parent if the child's parents "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment * * * would have been a valid marriage." 42 U.S.C. § 416(h)(2)(B). Or a "son or daughter" may be "deemed" a child of an insured individual if specified reliable indicia of parentage exist: written acknowledgement of parentage, a court decree establishing parentage, or other evidence of parentage satisfactory to the Commissioner of Social Security. See 42 U.S.C. § 416(h)(3)(C).

B. Factual Background

In 1999 Robert Nicholas ("Nick") Capato and respondent Karen Kuttner married in New Jersey. Only a few months later, Nick Capato was diagnosed with esophageal cancer. Pet. App. 16a, 18a. Recognizing that Nick Capato's chemotherapy treatment could leave him sterile, the Capatos attempted to guarantee that they could some day have a family together. Pet. App. 17a. In April 2000, Nick Capato began depositing sperm for the purpose of in vitro fertilization ("IVF") at a clinic in Florida. Pet. App. 18a.

Nick Capato's prognosis appeared to be improving, and in August 2001 Karen Capato gave birth to a naturally conceived son, Devon. Pet. App. 17a. Just a few months later, however, Nick Capato's condition began to deteriorate. Pet. App. 18a. Because the Capatos wanted siblings for Devon, they refocused their attention on IVF. Pet. App. 17a-18a. Aware that future children might be born after Nick Capato's death, they instructed their attorney to provide for unborn children in his will, so that "it would be understood that * * * they'd have the rights and be

supported in the same way that [Devon] was." Pet. App. 3a (citation omitted). The Capatos also swore before a notary that "[a]ny children born to us, who were conceived by use of our embryos shall in all respects and for all purposes including but not limited to, descent of property, [be] the children of our bodies." ALJ R. 47. Nick Capato's will, however, did not include this provision at the time of his death. Pet. App. 3a.

In March 2002, Nick Capato passed away at the age of forty-four. Pet. App. 2a. Karen Capato soon resumed the couple's attempt to have another child. Pet. App. 3a. Eighteen months later, after a successful round of IVF, she gave birth to twins. Pet. App. 3a. The government does not dispute that the twins are the biological children of Nick and Karen Capato.

C. Administrative and Court Proceedings

1. Immediately after the birth of her children, Karen Capato applied for Social Security survivor benefits on their behalf. Pet. App. 3a. The Social Security Administration denied her claim. Pet. App. 3a. Karen Capato then requested a hearing before an administrative law judge ("ALJ"). Pet. App. 3a.

In his opinion, the ALJ praised Karen Capato for her "highest intentions" and lack of an "ulterior motive" in applying for survivor benefits. Pet. App. 44a. The Capatos, he wrote, showed "courage in the face of tragic medical adversity and acted in a manner that we all can understand." Pet. App. 44a. For these reasons, the ALJ believed 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. Nevertheless, the ALJ felt "constrained" to deny

eligibility for survivor benefits to the Capato twins. Pet. App. 45a. In the ALJ's view, posthumously conceived children must establish that they are eligible to inherit from their deceased parents under state intestacy law before they may qualify as "children" within the meaning of the Act. Pet. App. 39a. Finding that Nick Capato was domiciled in Florida, where posthumously conceived children may not inherit from parents who die intestate, the ALJ held that the Capato twins did not satisfy the intestacy requirements of Section 416(h)(2)(A) and therefore could not receive survivor benefits. Pet. App. 40a-41a, 46a-47a.

2. On appeal, the district court acknowledged that the Act defines "child" as "the child * * * of an individual" (Pet. App. 23(a)), but nevertheless affirmed the ALJ's decision. Pet. App. 15a. The court found controlling the terms of Section 416(h)(2)(A), which it determined was "Congress's instructions for the primary method" of identifying eligible children. Pet. App. 23a. Like the ALJ, the district court accordingly looked to Florida intestacy law and found that the Capato twins could not inherit from their father's estate. Pet. App. 24a. As a result, the court held that the twins had no basis for claiming survivor benefits. Pet. App. 24a.

3. The court of appeals reversed, rejecting the government's contention that state intestacy law and Section 416(h)(2)(A) govern the eligibility for survivor benefits of all posthumously conceived children. Pet. App. 1a-14a. The court found that the government's position ignored a "fundamental question": Why Section 416(h) should factor into a case concerning "the undisputed biological children of a deceased wage earner and his widow" when Section 416(e) "so

clear[ly]" resolved their status under the Act. Pet. App. 10a. The court explained that,

> [t]o 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 that child can inherit under the intestacy laws of the domicile of the decedent. There is no reason apparent to us why that should be so * * *.

Pet. App. 7a-8a.

Instead, the court of appeals held that the Capato twins qualified as eligible children under the unambiguous text of Sections 402(d) and 416(e) of the Act. Pet. App. 10a, 12a. The court found that the government had inverted the statute's analytical hierarchy: "The 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.

As the court noted, "a basic tenet of statutory construction 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). Here, because "all parties agree" that the Capato twins are the "biological offspring" of Nick Capato, the court found that "[t]he term 'child' in § 416(e) requires no further definition." Pet. App. 10a-11a.

Thus, in response to the "narrow question" whether a deceased wage earner's biological children qualify as "children" within the meaning of the Act, the court answered with "a resounding 'Yes.'" Pet. App. 12a. It added that, "[b]ecause we can resolve this issue based on our analysis of Congress' 'unambiguously expressed intent' in the statutory language, we need not determine whether the Commissioner's interpretation is a permissible construction of the statute." Pet. App. 11a n.5 (citing *Chevron, U.S.A., Inc.,* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)). The court vacated the district court's order in part and remanded for a determination whether the Capato twins should be deemed "dependent" on Nick Capato as required to receive benefits under the Act. Pet. App. 12a.[2]

SUMMARY OF ARGUMENT

A. The question in this case is answered by the plain language of the Act. Insofar as relevant here, Section 402(d)(1) makes benefits available to "every child (as defined in section 416(e) of this title)." Section 416(e), in turn, defines a "child" to include "the child or legally adopted child" of an insured individ-

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[2] There are substantial reasons why, under the governing regulations, Nick Capato's children should be "conclusively deemed dependent on [him] under the Act." *Gillett-Netting* v. *Barnhart*, 371 F.3d 593, 599 (9th Cir. 2004). See *Mathews* v. *Lucas*, 427 U.S. 495, 498-499 (1976) ("a child who is legitimate * * * is considered to have been dependent at the time of the parent's death"). The court of appeals also left open whether Nick Capato was domiciled in Florida at the time of his death (Pet. App. 12a n.6), an issue that would have to be addressed on remand if the government prevails before this Court; for reasons explained in our brief in opposition to the petition for certiorari (at 9-12), there are substantial arguments that he was not.

ual (in clause (1)); "a stepchild" who satisfies certain requirements (in clause (2)); and a "grandchild or stepgrandchild" who satisfies specified requirements (in clause (3)). There is no doubt that the word "child" reaches (and in 1939 was understood to reach) the biological child of married parents—and therefore that Section 416(e)(1) applies to the Capato twins. This reading is confirmed by the statutory context and structure: It is plain that Congress used the word "child" in clause (1) to mean the biological child of married parents, as distinct from the adopted, step-, and grandchildren addressed in the remainder of Section 416(e). A plain application of Section 416(e)(1) therefore resolves this case.

B. The government cannot overcome the clear statutory text by arguing that the intestacy rule of Section 416(h)(2)(A) applies in all cases, including that of children defined by Section 416(e). In fact, the government concedes that Section 416(h)(2)(A)'s intestacy test does *not* apply to adopted children, stepchildren, grandchildren, or stepgrandchildren—that is, *all* of the children addressed by Section 416(e) *except* the biological children of married parents. The government's contention that some, but not all, applicants for benefits who are defined as a child by Section 416(e) must have their eligibility determined by reference to Section 416(h)(2)(A) finds no support in the statutory language; makes impermissible extra-textual distinctions between and even within clauses of Section 416(e); and renders the statute nonsensical, making benefits automatically available to adopted, step-, and grandchildren, but not to the biological children of married parents. It also leaves Section 416(h)(2)(A) itself unintelligible. That provision states that applicants who have the "same status" under state intestacy law "as a child" shall "be

deemed such." This language make sense only if Section 416(e)(1) provides an independent meaning to the word "child."

In fact, it is plain from the statutory language and context that Congress included Section 416(h)(2) in the Act to *expand* the statute's coverage beyond the biological children of married parents, reaching those whose parentage might be doubtful (in particular, children born out of wedlock). That is plain from the statutory context. In hinging qualification for benefits on state intestacy law, Congress would have been thinking *only* of the children of unmarried parents; in 1939, the biological children of married parents universally could take their parents' intestate personal property, while the intestacy rules for children born out of wedlock were much more restrictive. That Congress was thinking only of illegitimate children in Section 416(h)(2)(A) is supported by Section 416(h)(2)(A)'s companion provision, Section 416(h)(2)(B), which provides benefits to children whose parents went through a technically invalid marriage ceremony. And it is confirmed by Congress's repeated use of the word "deemed" in Section 416(h)(2), which shows that Congress meant that children who qualify for benefits under that provision are not, but should be treated as though they are, the biological children of married parents.

C. The government gets no support from the history and purpose of the Act. The history of the Act's 1965 amendment shows that Congress favored uniformity in the availability of benefits. The Act's broader purposes indicate that Congress regarded the statute as a remedial provision that would be interpreted generously; the government is wrong that survivor benefits are warranted only when the in-

sured's death was "unanticipated." Principles of federalism have no application to this case, which concerns entitlement to *federal* benefits. And agency deference cannot save the government's case: The statutory language is wholly unambiguous, and, in any event, the Social Security Administration's discriminatory reading of the Act draws arbitrary and irrational distinctions. If, as the government contends, new technologies lead to results that Congress did not anticipate, it is for Congress, and not an agency or the courts, to make any desirable changes in the statutory language.

ARGUMENT

The government's argument hinges on the proposition that Congress established, and limited, the Social Security survivorship rights of the biological children of married parents through circuitous indirection. But that improbable assertion is wrong. Congress regarded such children as the *principal* beneficiaries of the Social Security survivorship program; indeed, Congress saw that principle as so obvious that it did not require many words to establish. On this question, the text and structure of the Act is plain: Children like the Capato twins, conceived by parents in a marital relationship, qualify for Social Security child survivor benefits.

A. The Term "Child" As Used In Section 416(e)(1) Includes The Biological Children Of Married Parents Without Regard To When Or How The Child Is Born.

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 not at issue here, "[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 a child's insurance benefit." 42 U.S.C. § 402(d)(1) (emphasis added). The question before the Court is whether the Capato twins are "children" within the meaning of this provision.

The Third Circuit 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 court below therefore looked at the definition of "child" provided by Section 416(e), as it was expressly directed to do by Section 402(d)(1). Section 416(e) provides: "The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild [who satisfies specified requirements], and (3) a person who is the grandchild or stepgrandchild of an [insured] individual or his spouse [in specified circumstances where the applicant child's parents predeceased the grandparent or stepgrandparent]."

The Third Circuit found this definition of "child" in Section 416(e)(1) to be "unambiguous[]" and to cover the Capato twins. Pet. App. 11a n.5. As the court noted, because the twins are the "undisputed biological offspring of a deceased wage earner and his widow," "[t]he term 'child' [in the statute] requires no further definition." Pet. App. 10a-11a. That holding was correct: At the time of the enactment of Section 416(e), the principal definition of "child" for legal purposes was: "[i]n *Law*, legitimate offspring." *Webster's New International Dictionary* 465 (2d ed.

1934). And the ordinary, nonspecialized definition of child was, and remains, a "son or daughter," terms that in turn are understood to mean a male or female "descendant." *Merriam Webster's Collegiate Dictionary* 214, 317, 1189 (11th ed. 2003). See *Webster's New International Dictionary* 465 (2d ed. 1934) (definition includes "[a] son or a daughter; a male or female descendant in the first degree; the immediate progeny of human parents"). 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* v. *Barnhart*, 371 F.3d 593, 596-597 (9th Cir. 2004); *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."). Accordingly, while the status under the Act of children whose parents were *not* married might be debated (a question we address below), there is no doubt that the biological offspring of married parents fall squarely within even the narrowest understanding of the word "child" as used in Section 416(e)(1).

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 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 as used in 1939 (and today), the Capato twins are the marital "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). And that makes mystifying the government's statement that the Third Circuit "made little effort to anchor [its] position to the text of the statute." Gov't Br. 9.[3]

2. In fact, the government's complaint is that the statutory language is *too* plain: It maintains that the definition "a 'child' is a child" is a "tautology" that cannot be given "full meaning * * * without help from neighboring provisions." Gov't Br. 11 (internal quotation marks and citations omitted). But that argument is wrong, for several reasons.

First, any doubt about the meaning of the definition of "child" *is* resolved by the neighboring language of Subsection 416(e). That provision defines "child" to mean "child or legally adopted child of an individual" in clause (1); "stepchild" (in specified circumstances) in clause (2); and "grandchild or stepgrandchild" (in specified circumstances) in clause (3). These clauses listed what would, in 1939, have

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[3] The kind of definition adopted in Section 416(e), which recognizes that the word "child" has a settled meaning in common usage, is typical of many statutes enacted around the same time as the Act. For example, in the National Service Life Insurance Act of 1940, Congress provided that "[t]he term 'child' includes an adopted child" (38 U.S.C. § 801(e) (1940)) but did not elaborate on what a child is. For other examples from around that time, see, for example, World War Adjusted Compensation Act, Pub. L. No. 57-120, 43 Stat. 130 (1924) (not defining "child," but providing that it "includes" certain categories of child, for purposes of benefits to veterans after World War I); Pub. L. No. 70-701, 45 Stat. 1254 (1929) (same, in context of children of dependents of Army, Navy, Marine Corps, and other government personnel); and Nationality Act of 1940, Pub. L. No. 76-863, 54 Stat. 1138 (same, for purposes of Nationality Act of 1940).

been the principal custodial, familial adult/child relationships. And in context, it is apparent that Congress used the unadorned word "child" in clause (1) to mean undisputed biological child of married parents, as distinct from an adopted, step-, or grandchild. The text might be more felicitous had Congress used a formulation other than "a child is a child" to capture this concept, but when read against the other categories of child listed elsewhere in clause (1) and in clauses (2) and (3) of Section 416(e), there can be no doubt what Congress meant by "child" in Section 416(e)(1). It is fundamental that "words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks omitted), and when that is done the meaning of "child" as used in Section 416(e)(1) is not tautological at all.[4]

Second, as we explain in more detail below, the government recognizes that the entitlement to child survivor benefits of every sort of applicant *other* than

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[4] The government is of course correct in stating that the Act does not use the terms "undisputed biological child" or "biological child" (Gov't Br. 9), but the contrast and parallel treatment the Act draws between "child," "adopted child," and "stepchild" leaves little doubt that "child" as used in Section 416(e)(1) refers to the biological child of married parents. In the context of the time, those would have been the characteristics that Congress had in mind as the paradigm of a "child" in a family relationship; at the time of enactment of the Act, some 96 percent of children in the United States were born to married parents. Stephanie A. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940-99*, U.S. Dep't of Health & Human Servs. 17 (2000), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf (showing that only 3.8% of children were born out of wedlock in 1940).

a "child" listed in Section 416(e)(1) (that is, every adopted child, stepchild, grandchild, and stepgrandchild) is determined *solely* by reference to the Section 416(e) definition. That being so, it would be most peculiar if Congress expected the definition of "child" in Section 416(e)(1), alone among these terms, to require supplementation from some other part of the Act. The ordinary rules of construction preclude such a reading. Cf. *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 720-721 (1995) (Scalia, J., dissenting) (noting that similar items in a list should be interpreted alike); *Beecham* v. *United States*, 511 U.S. 368, 371 (1994); (same); *Massachusetts* v. *Morash*, 490 U.S. 107, 114-115 (1989) (same). And that is especially so because the words "stepchild" and "grandchild"—which the government concedes stand on their own—are no more "legal" or self-defining, and no less tautological in this context, than the word "child."[5]

Third, the Section 416(e)(1) definition of "child" is not tautological at all; it provides that the *legal* definition of "child" for purposes of the Act is the common usage of the term. As Judge Davis observed in his dissent from the Fourth Circuit's decision in *Schafer* v. *Astrue*, 641 F.3d 49, 65 (4th Cir. 2011), *cert. pending*, No. 11-824, Congress's definition of the term "child" in Section 416(e) to include "a child" *and*

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[5] The government also asserts that "'child' is a term of art under the Act that describes the *legal* relationship the applicant must have to the insured in order to be eligible for benefits." Gov't Br. 10-11. But that surely is not true so far as Section 416(e) is concerned—except for its specification of a "legally adopted" child. The relationship of a "grandchild" to his or her grandparent, for example, is no more (or less) a legal one than that of a "child" to his or her parent.

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[]." Recognizing that usage does not render 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. That is just what the Third Circuit did.

B. The Government's Contrary Reading Is Inconsistent With The Plain Language And Structure Of The Act.

In arguing to the contrary, the government does not, and could not, deny that each of the Capato twins is a "child" of Nick Capato within the ordinary meaning of that word. Instead, it contends that Section 416(h) must be used to supply "further definition" to the meaning of "child" as the word is defined in Section 416(e) (Gov't Br. 8), and that "Section 416(h) provides a clear indication" that the word "child" as used in Section 416(e) should *not* bear its "ordinary, contemporary, common meaning." Gov't Br. 10 (citation and internal quotation marks omitted); see Gov't Br. 9-14. The government places principal reliance for this contention on Section 416(h)(2)(A). The first sentence of that provision states that the Commissioner, "[i]n determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, * * * 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." The second sentence of Section

416(h)(2)(A), which the government omits from its quotation of the provision in the text of its brief (Gov't Br. 8), then provides: "Applicants who according to such law *would have the same status* relative to taking intestate personal property *as a child* or parent *shall be deemed such*." (Emphasis added).

Although Sections 402(d)(1) and 416(e) make no reference to Section 416(h), the government insists that Section 416(h)(2)(A)'s statement that the Commissioner "shall apply" state intestacy law "demonstrates that the test set out in that provision is exclusive where, as here, the alternative tests in Section 416(h)(2)(B) and (3)(C) are not satisfied." Gov't Br. 10. See *id*. at 15 ("[T]he tests in Section 416(h)(1), (2), and (3) are intended to be used in *all* cases to determine whether the requisite family status is established as a legal matter."). But here, too, the government is wrong. In fact, it is plain from the statutory language and context that Congress included Section 416(h)(2) in the Act to *expand* the statute's coverage beyond the biological children of married parents, reaching those (like children born out of wedlock) whose parentage might be doubtful. For several reasons, that provision has no bearing in this case.

1. Most obviously, the government's central contention—that Section 416(h)(2)(A)'s intestacy test is the "exclusive" qualification for benefits and applies in "*all* cases" (except those where Sections 416-(h)(2)(B) and (h)(3)(C) apply)—is self-evidently incorrect, as the government itself impliedly recognizes. The government expressly acknowledges that the eligibility for benefits of legally adopted children, stepchildren, grandchildren, and stepgrandchildren is determined *exclusively* by reference to the definitions

stated in Sections 416(e)(1), (2), and (3), and that these very significant categories of children need *not* satisfy the Section 416(h)(2)(A) intestacy test. Gov't Br. 12 n.2. This means that, despite what it says so forcefully in its brief, the government realizes that the use of "shall" in Section 416(h)(2)(A) does *not* require application of an intestacy screen in all cases concerning dependency benefits; indeed, it means that the government *agrees with our reading of the statute* as it applies to *all* the categories of children listed in Section 416(e) *except* the biological children of married parents addressed in Section 416(e)(1).[6]

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[6] Although the government does not explain why it takes the position that Section 416(h)(2)(A) applies to only one of the categories of "child" identified in Section 416(e), it presumably recognizes that a contrary view would read some of Section 416(e) out of the Act altogether. Thus, 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 died" should not have a right to receive survivor benefits under Section 402(d)(1). But in some 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 (West 2011). Applying Section 416(h)(2)(A) to such stepchildren would do violence to Section 416(e)(2). Similarly, Section 416(e)(3) provides that grandchildren and stepgrandchildren qualify for survivor benefits only in specified circumstances. Under the intestacy laws of many states, however, grandchildren and stepgrandchildren whose parents predecease them inherit automatically from their grandparents or stepgrandparents. See, *e.g.*, Va. Code Ann. § 64.1-3 (West 2011). Application of Section 416(h)(2)(A) to these children would displace the carefully defined limits drawn by Section 416(e)(3)**.** The lesson of these provisions, of course, is that Congress intended Sections 416(e) and (h)(2)(A) to operate independently.

The government's actual contention—that some, but not all, applicants for benefits who are defined as a "child" by Section 416(e) must have their eligibility determined by reference to Section 416(h)(2)(A)—finds *absolutely* no "anchor" in the "text of the statute." Gov't Br. 9. That reading also renders the statute nonsensical: It means that Congress intended to make benefits automatically available to all legally adopted children and (in specified circumstances) stepchildren, grandchildren, and stepgrandchildren, but *not* to the biological children of married parents, who must make a separate showing under a different provision of the Act. The government offers no explanation why Congress would have accorded different and less favorable treatment to the biological children of a married couple than to that couple's adopted or stepchildren, or to their grandchildren. It is very difficult to imagine what that explanation could be.

For several reasons, the government's concession that the Section 416(e) definitions are controlling for most categories of children is fatal to its case here. It belies the government's plain language reliance on the use of "shall" in Section 416(h)(2)(A) as making that provision's test determinative in all cases. As we have shown, it makes impermissible extra-textual distinctions in the application of Section 416(e) between and even within the clauses of that provision, making satisfaction of Section 416(e)'s definitions dispositive for some but not for other applicants. It renders the word "child" in Section 416(e)(1) a "nullity." *Schafer,* 641 F.3d at 64 (Davis, J., dissenting).[7]

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[7] The government denies that is so, maintaining that "Section 416(e)(1) clarifies that both natural children and legally adopted children are eligible for benefits." Gov't Br. 12. But that

And, not least, it attributes to Congress an intention that is perverse: "If § 416(e) overrides * * * § 416-(h)(2)(A) in the exotic case of stepgrandchildren—that is, if one accepts the Commissioner's position * * * and acknowledges that a stepgrandchild is entitled to benefits regardless of his or her ability to take under a particular state's intestacy law—it is not apparent why the same would not be true in the case of a biological child." *Id*. at 66.

2. That is enough to require rejection of the government's argument. But there is more: The government's reading renders Section 416(h)(2)(A) *itself* unintelligible. After instructing the Commissioner to apply state intestacy law "[i]n determining whether an applicant is [a] child," the second 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 second sentence is nonsensical unless the word "child" has independent force and is given the meaning we describe above:

> That is, §416(h)(2)(A) requires *precisely the same interpretation of "child"* that the [government] fled from in § 416(e)(1). 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

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hardly answers the superfluity point. If, as the government argues, all children who would inherit under state intestacy law were eligible for benefits, and *only* children who would inherit under state intestacy law were eligible for benefits, Section 416(e)(1) would not add clarification to the Act; indeed, it would add nothing at all.

> 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). Such a circular reading of the Act cannot be correct. See *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 101 (1991) (goal when courts interpret statutes is to "make sense rather than nonsense out of the *corpus juris*").

3. Moreover, although professing to heed the statute's plain language, the government argues that, in providing for the payment of benefits to every child "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).

Thus, Section 402(d)(1) 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) (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).

In this setting, as Judge Davis 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). This accordingly "is not a case in which we must choose between two competing statutory definitions, for here *Congress has chosen for us*." *Ibid.* Indeed, "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.*

4. An examination of the statutory context and background makes clear what Congress actually *did* intend in Section 416(h)(2)(A): Not a general screen governing all child applicants for survivor benefits that trumps Section 416(e)(1), but a method for children to qualify for benefits when their relationship to the wage earner might be unclear—in particular, for children whose parents were not married. Several compelling considerations support this conclusion.

a. The context in which Congress enacted Section 416(h)(2)(A) strongly suggests that, in hinging qualification for benefits on state intestacy law, Congress would have been thinking *only* of the children of unmarried parents. Although the biological children of married parents universally could take their parents'

intestate personal property in 1939[8]—and applying Section 416(h)(2)(A)'s intestacy test to such children accordingly would have been a most peculiar and indirect way of establishing their entitlement to survivor benefits—the rules for children born out of wedlock were very different: Some states permitted inheritance only if the father married the mother, others allowed the child to inherit from the father if the father acknowledged the child, and at least one state apparently had no provision permitting the child to inherit from the father at all.[9] A rule premised on

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[8] "As the Commissioner has [elsewhere] conceded, Congress believed that 'all state laws … provided for inheritance of marital children.'" *Schafer*, 641 F.3d at 67-68 (Davis, J., dissenting) (citation omitted; ellipses added by the court). See also 43 Fed. Reg. 57590, 57591 (1998) ("A child of a valid marriage has inheritance rights under the laws of all states.").

[9] See, *e.g.*, Colo. Stat. Ann. ch. 176, § 8 (Bradford-Robinson 1935) (an illegitimate child may inherit from the father only if the father marries the mother and acknowledges the child); Fla. Comp. Gen. Laws tit. 1, § 5480(7) (Harrison 1936) (an illegitimate child may inherit directly from his father if his father acknowledges him in writing, but may not inherit from his father's kindred); Md. Code Ann. art. 46, § 6 (Lord Baltimore 1924) (an illegitimate child may inherit from the father if the father marries the mother and acknowledges him); Mich. Comp. Laws tit. 26, § 13443 (Franklin DeKleine 1929) (an illegitimate child may inherit from his father if he marries the mother or if he acknowledges the child in a manner authorized by law); Minn. Gen. Stat. ch. 74, § 8723 (Review 1923) (an illegitimate child may inherit from his father if the father acknowledges him in writing and before a witness, or if the parents intermarry); Miss. Code Ann. tit. 5, § 474 (Harrison 1942) (an illegitimate child may inherit from his father if the father and mother intermarry); Mo. Rev. Stat. ch. 1, § 315 (Midland 1939) (an illegitimate child may inherit from his father if the parents intermarry and the father recognizes the child to be his); Mont. Rev. Code Ann. § 7074 (Tribune 1935) (an illegitimate child is the

status under intestacy law plainly seems directed at such children.

And that understanding of the congressional intent is confirmed by the companion provision enacted along with Section 416(h)(2)(A), Section 416(h)(2)(B), which provides that an applicant who is not a "child" of an insured individual (presumably under the Section 416(e) definition) and is not "deemed" to be a child (presumably under Section 416(h)(2)(A)) "shall nevertheless be deemed to be the child of such insured individual" if the insured individual and the child's other parent "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment * * * would have been a valid marriage." Inclusion of this provision along with Section 416(h)(2)(A) strongly suggests that Congress meant Section 416(h)(2) to provide a means to overcome uncertainty about parentage or the strength of the parental relationship. *Cf.*

heir of the person who acknowledges himself to be the child's father, but is not heir to the father's kin unless the parents intermarry); Neb. Comp. Stat. § 30-109 (1929) (an illegitimate child is the heir of the person who acknowledges himself to be the child's father, but is not heir to the father's kin unless the parents intermarry); N.H. Rev. Laws ch. 360, § 5 (1942) (an illegitimate child may inherit from his mother; no provision made for child to inherit from father); N.J. Rev. Stat. §§ 3:5-7, 3:5-8 (1937) (an illegitimate child may inherit from his mother, but not from his father, unless the parents intermarry and the child resides with them); N.M. Stat. Ann. § 31-118 (Bobbs-Merrill 1941) (an illegitimate child may inherit from father if father recognizes him in writing before multiple witnesses, or if such recognition be "general and notorious"); Or. Code Ann. § 10-201 (Bobbs-Merrill 1930) (an illegitimate child may inherit from father if his parents intermarry; no provision made for paternal inheritance without marriage); Utah Code Ann. § 101-4-10 (1933) (an illegitimate child may inherit from his father as a legitimate child if his father acknowledges him).

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)].").[10]

That conclusion receives further support from Section 416(h)(3)(C), which Congress added to the Act in 1965. That provision makes benefits available to individuals where parentage has been established by a parent's written acknowledgement, a judicial decree, a court order of support, or other evidence sufficient to show the Commissioner that the insured was the parent and had been supporting the applicant. Tellingly, the 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 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 2050. This suggests, as Judge Davis put it, that "§ 416(h) was meant to be *additive*—extending benefits 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).

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[10] Section 416(h)(2)(B) also highlights another bizarre consequence of the government's construction. If the Capato twins "could show that there was some technical defect in the[ir parents'] marriage paperwork, then, even under the [government's] reading of the statute, [each of the twins] would qualify as a 'child' under § 416(h)(2)(B). *To deny [them] benefits because [their] parents' marriage was valid would be bizarre.* This provision again shows that Congress intended to include children of a valid marriage in its definition of 'child,' for what possible purpose would Congress have for covering children of a technically invalid marriage but not those of legally valid ones?" *Schafer*, 641 F.3d at 69 (Davis, J., dissenting).

b. The conclusion that Congress intended Section 416(h)(2) to provide applicants who are not the biological children of married parents an alternative mechanism with which to qualify for benefits also is suggested by the Act's otherwise curious use of the word "deemed." As we have noted, Section 416(h)(2)(A) provides that applicants who "would have the same status relative to taking intestate personal property as a child"—by which, as we also have explained, Congress meant the same as a biological child of married parents—"shall be deemed" to be a child. "Deemed" is a word generally used to require that something be treated for legal purposes "as if (1) it were really something else or (2) it has qualities that it does not have." *Black's Law Dictionary* 477 (9th ed. 2009). See also *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 307 & n.9 (2d Cir. 2007) (en banc). Congress surely meant by this formulation that children who qualify for benefits under the intestacy route are not, but should be treated as though they are, the biological children of married parents. "[T]his second sentence makes it pellucidly clear that § 416(h)(2)(A) *supplements*, rather than *replaces* § 416(e)(1)" and its definition of a "child." *Schafer*, 641 F.3d at 66 (Davis, J., dissenting).

The point is confirmed by the repeated use of "deemed" in Sections 416(h)(2)(B) and (h)(3)(C), each of which refers to an applicant "who is not (*and* is not deemed to be)" a "child." 42 U.S.C. § 416(h)(2)(B), (h)(3)(C) (emphasis added). This usage must be understood to reflect Congress's understanding that Sections 416(e) and 416(h) provide *alternative* means of qualifying for benefits (an applicant either "*is* a child" or "*is deemed to be* a child"), and that an applicant who is "deemed" to be a child has different characteristics (*i.e.*, is not the biological offspring of

married parents) than an applicant who "is" a child (*i.e.*, is such an offspring). If that were not so—if, as the government contends, the substance of Section 416(h) "is already incorporated into Section 416(e)(1)'s definition of 'child'" (Gov't Br. 12)—the "deemed" language of Sections 416(h)(2) and 416(h)(3) would be superfluous (indeed, it would be meaningless); all that would matter is whether the applicant is, or is not, a "child." And "[i]t is * * * a cardinal principle of statutory construction that a statute ought * * * to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 489 n.13 (2004) (internal citations omitted).

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)(C) *per se* "dependent," except in limited circumstances, such as where a child did not live with the decedent parent *and* the child was 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 of unmarried

parents, and not in cases like this one, that Section 416(h) comes into play. See *id*. at 596-597.

c. The government also is wrong in equating the Act's treatment of husbands, wives, widows, and widowers under Section 416(h)(1)(A)(i) with its treatment of children in Section 416(h)(2)(A). Gov't Br. 13-14, 15. In fact, the language of the provisions is not parallel in their invocation of state intestacy law. Section 416(h)(1)(A) (emphasis added) says that "[a]n applicant *is* the wife, husband, widow, or widower" of an insured individual if the courts of the relevant state would find that they were validly married; the statute does *not* say that persons who satisfy this test are "deemed" to be a wife, husband, widow, or widower.

Section 416(h)(2)(A), in contrast, says that, "*[i]n determining whether an applicant is the child or parent*" of an insured individual, the Commissioner shall apply state intestacy law and "*[a]pplicants who according to such 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). None of the italicized language, referring to a determination by the Commissioner whether the applicant has the "same status" as a child or parent for the purpose of "deeming" them such, appears in the provision addressing wives, husbands, widows, and widowers. This difference in the language of adjacent provisions drafted at the same time must be regarded as intentional and given effect—and the only logical way to explain this difference in phrasing is that the definitional provisions relating to children have independent force, while those relating to husbands and wives do not. As we have explained, the Commissioner himself

has given (most of) Section 416(e) just that reading, and differentiated it from Section 416(h)(1)(A)(i), in just that way.[11]

C. The Act's History And Purpose Confirm That The Intestacy Test Of Section 416(h)(2)(A) Does Not Apply To The Biological Children Of Married Parents.

In challenging the decision below, the government also looks to the legislative history and purpose

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[11] The government also finds support in the language of Sections 416(h)(2)(B) and (h)(3)(C), which provide that a person will be deemed a "child" if he or she "is the son or daughter of [the] insured" and also satisfies other conditions. The government asserts that "[t]he terms 'son' and 'daughter,' which are not otherwise defined in the Act, refer to an applicant who is the natural (biological) child of the insured. But that biological relationship is not alone enough to qualify; the applicant must satisfy additional criteria." Gov't Br. 14. Therefore, the government concludes, if being an undisputed biological child makes one a "child" within the meaning of Section 416(e)(1), and that status is not alone enough to qualify a child for benefits, the Section 416(e)(1) definition cannot be determinative. This argument, however, does not advance the government's position, for two reasons. *First*, it is circular. The government *assumes* that the words "son" and "daughter" describe a child whose biological relationship with the insured person already has been established and is "'undisputed.'" Gov't Br. 15 (citations omitted) But the Act, which does not define son or daughter, does not say that. In fact, read in context Sections 416(h)(2)(B) and 416(h)(3)(C) appear to provide a means of *establishing* a proxy for a biological relationship, at a time when genetic paternity tests had not yet been developed and, absent marriage, establishing paternity in a manner regarded as determinative was impossible. *Second*, the government's argument is no answer at all to our submission that Section 416(e)(1) defines the biological child of a *married* couple to be a "child" entitled to benefits, as Sections 416(h)(2)(B) and (C) have no application to such children.

of the Act. Gov't Br. 16-22. The clarity of the Act's language makes that exercise unnecessary: "When the words of a statute are unambiguous," the "judicial inquiry is complete." *Conn. Nat'l Bank*, 503 U.S. at 254 (internal citations omitted). But the government's argument is, in any event, incorrect on its own terms.

1. The government misreads the 1965 legislative history.

The government first looks for support in the Senate Report accompanying the 1965 amendment that added Section 416(h)(3)(C) to the Act, which it quotes as stating that "'whether a child meets the definition of a child depends'" upon state intestacy law. Gov't Br. 17 (quoting S. Rep. No. 89-404, at 109 (1965)). But that one statement hardly proves the government's sweeping conclusion that "Congress understood—and agreed with—the proposition that under the pre-1965 version of the Act, children who could not inherit under applicable state intestacy law were ineligible for survivor benefits." Gov't Br. 18. To the contrary, Congress intended the 1965 amendment 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 are 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*." S. Rep. No. 89-404, at 109 (emphasis added).

Nothing in this history demonstrates that Congress in 1965—let alone in 1939, when it enacted Sections 416(e)(1) and 416(h)(2)(A)—intended Sec-

tion 416(h)(2)(A) to trump Section 416(e)(1). The 1965 amendment sought to expand the availability of benefits in States with laws that were less generous to children born outside of marriage, including children in a "normal family relationship" whose "friends and neighbors have [no] reason to think that *the parents were never married*." S. Rep. No. 89-404, at 110 (emphasis added). The amendment 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). This does not suggest a preference for state rather than national rules in determining the entitlement to benefits of the biological children of married parents. Instead, "[t]he report's reference to § 416(h)(2)(A) is simply a reference to an expanded scope of survivorship benefits reaching *beyond* marital children; not a suggestion that paragraph (2)(A) was *limiting* benefits granted via § 416(e)'s 'plain language' definition." *Schafer*, 641 F.3d at 68 (Davis, J., dissenting).

2. The Act's broader purposes favor entitlement to benefits for all biological children of married parents.

In addition, the government pays no attention at all to the fundamental purpose of the Act, which waged "a unified, well-rounded program of attack" on 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 (1935). 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).

Of particular relevance here, Congress 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 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 (1935). The earliest version of Social Security legislation accordingly offered an annual appropriation 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://www.ssa.gov/history/reports/NRPB/NRPBChapter4b.pdf.

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 pro-

gram, "[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 (1939). As we have noted, Congress expanded on this purpose in 1965.

From this history emerge two important concerns that historically have guided Congress in its approach to survivor benefits: (a) guaranteeing broad protection to children and their families against misfortune, and (b) offering *uniform* protection for such families in the form of aid that is neither funded nor controlled by the States, nor doled out unfairly because of strict state eligibility requirements. In particular, it makes perfect sense that Congress would define "child" beneficiaries independently from state law: Congress enacted the Social Security Act Amendments to make up for the States' paralysis in the wake of the Great Depression. This understanding is bolstered by Congress's decision in 1965 to further expand the Act's coverage, refusing to leave illegitimate children at the mercy of state intestacy law.

These concerns favor respondent here. As a law explicitly drafted "for the security of children" (S. Rep. No. 74-628, at 16 (1935)), 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. And it eases the expenses of keeping "the young children with their mother in their own home." *Id.* at 17. The ALJ in this case 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.

Unsurprisingly given this history, courts consistently have construed the Act liberally in favor of coverage.[12] "In a close case, it is well to bear in mind that [the Act's] intent is inclusion rather than exclusion * * *." *Cohen* v. *Sec. of Dep't of Health and Human Servs.*, 964 F.2d 524, 531 (6th Cir. 1992). For over seventy years, settled judicial practice—which the government urges this Court to abandon—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).

In taking this approach, the lower federal courts followed this Court's lead in applying the "well-accepted principle that remedial legislation * * * is to be given a liberal construction consistent with the [Act's] overriding purpose." *United States* v. *Bacto-*

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[12] See, *e.g.*, *Cunningham* v. *Harris*, 658 F.2d 239 (4th Cir. 1981); *Broussard* v. *Weinberger*, 499 F.2d 969 (5th Cir. 1974); *Haberman* v. *Finch*, 418 F.2d 664 (2d Cir. 1969); *Combs* v. *Gardner*, 382 F.2d 949 (6th Cir. 1967); *Rodriguez* v. *Celebrezze*, 349 F.2d 494 (1st Cir. 1965); *Dvorak* v. *Celebrezze*, 345 F.2d 894 (10th Cir. 1965); *Celebrezze* v. *Bolas*, 316 F.2d 498 (8th Cir. 1963); *Ewing* v. *Risher*, 176 F.2d 641 (10th Cir. 1949); *Henry Broderick, Inc.* v. *Squire*, 163 F.2d 980 (9th Cir. 1947); *Carroll* v. *Social Sec. Bd.*, 128 F.2d 876 (7th Cir. 1942).

Unidisk, 394 U.S. 784, 798 (1969).[13] As this Court noted, "[t]he hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering* v. *Davis*, 301 U.S. 619, 641 (1937). Such an ambitious objective counsels interpreting the Act's provisions expansively to achieve the end sought by Congress.

3. The policy rationales invoked by the government offer it no support.

In arguing instead for a narrow construction of the Act that denies benefits to posthumously conceived children, the government asserts that any other interpretation would be (a) "inconsistent with the principles of federalism" and (b) "poorly tailored to 'the Act's basic aim of primarily helping those children who lost support after the unanticipated death of a parent.'" Gov't Br. 21 (quoting *Schafer*, 641 F.3d at 58). Neither assertion accurately states the congressional purpose.

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[13] This is a general principle that has been applied to a wide range of remedial statutes. See, *e.g.*, *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'"); *Atchison, Topeka and Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 562 (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'"); *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 Exchange Act "should be construed broadly to effectuate its purposes").

a. The government doubtless is correct that "[t]he Act contains nothing to suggest that Congress wished to depart from its usual practice by displacing state law and creating a federal rule governing parent-child relationships." Gov't Br. 31. But that is beside the point, because the claim here would not displace state law in any respect; it concerns the meaning of the terms governing entitlement to a federal benefit. The government thus cannot suggest that Congress stepped on state toes when—as the government acknowledges—it created a federal rule governing the payment of benefits to adopted children, stepchildren, grandchildren, stepgrandchildren, and the children of defectively married or unmarried parents addressed in Sections 416(h)(2)(B) and 416(h)(3)(C). Its treatment of the biological children of married parents is no different.

In fact, Congress has treated the Act's various child aid provisions less as an exercise in federalism than a response to the States' inability to provide adequate relief to dependent children during the Great Depression and their patchwork intestacy regimes, which left deserving but illegitimate children ineligible for survivor benefits until the 1960s.[14]

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[14] In its key 1935 committee report on the Social Security Act, the House Ways and Means Committee noted the need for federal intervention because the States could not adequately provide for their dependent children: "Forty five States now have laws providing such aid, *but in many of these States the laws are only partially operative or not at all so*. With *the financial exhaustion of State and local governments* a situation has developed in which there are more than three times as many families eligible for such aid as are actually in receipt of it * * *." H.R. Rep. No. 74-615, at 10 (1935) (emphasis added).

The federal government—not the States—operates and funds the program, dispensing benefits out of the Old Age and Survivors' Insurance Trust Fund. 42 U.S.C. § 401; see *Old Age and Survivors' Insurance Trust Fund*, SOCIAL SECURITY ONLINE: OFFICE OF THE CHIEF ACTUARY, http://www.ssa.gov/OACT/ProgData/describeoasi.html (last visited Jan. 29, 2012). The federal definition of "child" thus does not encroach on any state interest in controlling costs or protecting the integrity of its relief rolls. In this context, no State has an interest in relying on its own law as a means of "allocating its limited resources * * *, reduc[ing] the caseload of its social workers and provid[ing] increased benefits to those still eligible for assistance." *King* v. *Smith*, 392 U.S. 309, 318 (1968).

Nor can the government evade the clear language of the Act through a rote appeal to background principles of federalism. Although the government is correct that "domestic relations are preeminently matters of state law" (*Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989)), it overlooks that "[t]he *scope of a federal right* is, of course, a *federal question* * * *." *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956) (emphasis added). When (as here) Congress enacts a statute creating a federal benefits program, it is Congress's text and purpose that ultimately determine who qualifies as a rights-holder under the law. And as we make clear above, Congress unmistakably supplied a core definition of "child" that is independent of state law. "Principles of federalism cannot narrow [the Act's] clear scope." *CSX Trans., Inc.* v. *Ala. Dep't of Rev.*, 131 S.Ct. 1101, 1112 (2011).

In addition, the usual reasons for deference to state domestic relations law are absent here. This is

not a case in which federal law threatens to usurp the States' settled powers over domestic affairs, family status, or probate law. Notably absent are the thorny questions arising when federal courts are presented with issues such as divorce, alimony, or child custody—areas in which the States are historically presumed to possess unique authority and competence as the sovereign "which created those legal relationships." *De Sylva*, 351 U.S. at 580; *Ankenbrandt* v. *Richards*, 504 U.S. 689, 703-704 (1992). And this case raises no "delicate issues of domestic relations" better left "to the state courts." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 13 (2004). States will remain free to regulate posthumous conception in whatever manner they see fit, and can craft their state inheritance laws and state benefit policies accordingly.

b. The government also contends that denying posthumously conceived children benefits under the Act is consistent with the goal of awarding survivor benefits only when death of the insured individual was "unanticipated." Gov't Br. 21-22. But this argument is internally inconsistent, lacks a statutory basis, and undermines the purpose of the Act.

First, the Act undoubtedly provides benefits to children conceived by couples who are fully aware at the time of conception that one of the parents will soon die and be unable to support the child. The government does not dispute that if Karen Capato conceived the twins naturally before Nick Capato died—even after a warning that Nick's early death was inevitable—the children would be eligible for benefits under the Act and state intestacy law. Similarly, if Karen had conceived through IVF before Nick died—with full knowledge that he would not survive to

support the children—the twins would be eligible for benefits. Thus, the government's position leads to this result: if Karen successfully conceived the day before her husband died, the twins would be eligible for benefits; but because she continued the course of IVF after his death, the twins are not eligible. There is no reason to believe that Congress drew such an irrational distinction.

Second, the government's "unanticipated loss" rationale cannot be squared with this Court's rejection of the same argument in the disability benefits context in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). In *Jimenez*, the Court considered whether illegitimate children born after the onset of a disability could be eligible for child's insurance benefits. The government presented much the same argument that it raises here: It contended that the Act's purpose was "to replace only that support enjoyed *prior to the onset of disability*; no child would be eligible to receive benefits unless the child had experienced actual support from the wage earner prior to the disability, and no child born after the onset of the wage earner's disability would be allowed to recover." *Id.* at 634 (emphasis added). The Court rejected that argument, concluding: "We do not read the statute as supporting that view of its purpose." *Ibid.* Instead, the Court held that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner" and that granting benefits to children born after the parent became disabled was consistent with that goal. *Ibid.*

There is thus no basis for the government's derisive contention that granting benefits to posthumously conceived children amounts to "'subsidizing the continuance of reproductive plans.'" Gov't Br. 22

(citation omitted). As noted above, the Court in *Jimenez* clearly did not regard granting benefits to disabled workers' children as "subsidizing reproductive plans." For practical reasons, the subsidy analogy is even more inappropriate here, where couples must invest significant fiscal and emotional resources in the IVF process. As the ALJ noted in this case, "[t]here is no ulterior motive here and *the amount of expense to which the parents went in order to conceive the children is clearly more than they might ever receive as Social Security benefits*." Pet. App. 44a (emphasis added).

Third, the government's construction of the Act takes no account of the complex, real-world hardships that families face when a wage-earner's death is looming. This case highlights the painful uncertainties that families face during these times. After Nick was diagnosed with cancer in 1999, the Capatos began the IVF process in April 2000. Pet. App. 18a. A year later, Nick's doctor said he was responding to aggressive treatment and "doing quite well." *Id.* By Thanksgiving 2001, the cancer had returned and Nick was faring poorly. *Id.* He died in March 2002, and Karen completed IVF shortly afterward. Pet. App. 19a.

In such circumstances, the Capatos and families like them will have invested substantial effort, money, and planning in assisted reproduction *before* the wage earner passes away. And the time when IVF treatment will be successful cannot be precisely predicted. If a woman in Karen's situation begins treatment before her husband dies, it makes no sense to base her children's right to benefits on whether they were fortunate enough to be conceived before their father passed away. Indeed, such a rule creates per-

verse incentives for such women, who may feel compelled to begin IVF immediately, before their husbands have died, simply because their children will miss out on benefits if they do not. The Social Security Act, which assists families like the Capatos by offering "security against the major hazards and vicissitudes of life" (Address of the President of the United States, H.R. Doc. No. 74-01, at 2-4 (1935)), does not require such a result.

4. The government's construction of the Act raises serious constitutional concerns.

Finally, if doubt remains about the meaning of the Act, the Court should affirm the Third Circuit's reading to avoid serious equal protection issues that are presented by the government's proposed rule.[15] It is fundamental that "an act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); see also, *e.g.*, *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2513 (2009); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Because the government's reading of the Act "would raise a multitude of constitutional problems" (*Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005)), the Court—if it regards our textual argument as a "fairly possible" one (*Crowell*, 285 U.S. at 62)—should follow that course here.

Under the government's interpretation of the Act, posthumously conceived children are treated as an inferior subset of natural children who are ineli-

[15] The Third Circuit affirmed dismissal of respondent's Equal Protection challenge to the denial of benefits to posthumously conceived children. Pet. App. 4a n.1.

gible for government benefits simply because of their date of birth and method of conception. Yet posthumously conceived children are otherwise similarly situated to children who are eligible to receive survivor or disability benefits. For example, a child born after a wage earner has already stopped working and has started receiving disability payments may qualify for survivor benefits under the Act, even though the event establishing eligibility for benefits occurred before the child's birth. *Jimenez*, 417 U.S. at 634-635.

Such a reading of the Act should not survive intermediate scrutiny under the equal protection component of the Fifth Amendment, which requires that "a statutory classification * * * be substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). This Court has "[struck] down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise," *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972) (holding the unequal treatment of illegitimate children by Louisiana's worker's compensation law unconstitutional under the Fourteenth Amendment). Birth method, like illegitimacy, is an immutable characteristic over which posthumously conceived children have no control. See *Matthews* v. *Lucas*, 427 U.S. 495, 505 (1976). Posthumously conceived children also share a history of discrimination, stigma, and legal handicaps with other children born and raised in nontraditional families. Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal To Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 Conn. Pub. Int. L.J. 234, 273 (2005). For these reasons, discriminating against posthumously conceived children is "contrary to the basic concept of

our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175. Children should not be penalized for their parents' reproductive choices. See *ibid.*

Yet no important government objective for this classification of natural children exists. First, denying posthumously conceived children benefits cannot be justified on the ground that the Act's purpose is simply to replace income lost due to *unanticipated* death or injury; as we have noted, the Court rejected this narrow view in *Jimenez*, 417 U.S. at 634. Similarly, children adopted by a surviving spouse can, under certain circumstances, claim survivor benefits as the adopted children of the deceased wage earner. 20 C.F.R. 404.356. And grandchildren adopted by one grandparent after the death of that grandparent's spouse may also qualify for survivor benefits. 20 C.F.R. 404.358. In all of these cases, the "unanticipated" nature of the tragedy is not dispositive; it should not be so here.

Second, denying posthumously conceived children benefits is unnecessary to stop spurious claims. Advances in technology now generally make proof of paternity a straightforward affair, and the carefully monitored steps taken at each stage of assisted reproduction make proof of paternity in such cases, if anything, considerably *easier* than in cases of natural conception. Less restrictive means exist to prevent abuses of the system than barring an entire class of children from receiving survivor benefits. Goodwin, *Not All Children Are Created Equal*, at 280-282 (proposing alternative schemes). In these circumstances, where constitutional concerns vanish

under the reading of the Act adopted by the court below, this Court should affirm that holding.

D. The Social Security Administration's Interpretation Of The Act Is Not Entitled To Deference.

The government ultimately retreats to an argument from deference under step two of the *Chevron* analysis. Gov't Br. 22-26. But that contention cannot save its reading of the Act.

1. To begin with, under step *one* of *Chevron* the Court will first consider whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). As the Court has explained, "[w]e only defer * * * to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *INS* v. *St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron*, 467 U.S. at 843 n.9); see *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-447 (1987). And here, for the reasons we have explained, the ordinary tools of statutory construction show the text of the Act to be wholly *un*ambiguous, leaving no room for the exercise of agency discretion. See also Pet. App. 11a n.5 (quoting *Chevron*, 467 U.S. at 842-843); *Gillett-Netting*, 371 F.3d at 596-597 (finding that the Section 416(e) definition of "child" controlling and declining to defer to the agency's contrary view).

2. Moreover, even if the Court were to find the Act ambiguous in its treatment of the undisputed biological children of married parents, the government's interpretation fails because it is arbitrary and capricious. The Social Security Administration treats such children differently, and less favorably, than

adopted children, stepchildren, grandchildren, and stepgrandchildren when determining eligibility for survivor benefits. For all of these categories of children, the government relies exclusively on the terms of Section 416(e) to determine eligibility for benefits; only biological children are subjected to the stiffer requirements of Section 416(h)(2)(A). 20 C.F.R. 404.355-404.359; see *Beeler* v. *Astrue*, 651 F.3d 954, 960 (8th Cir. 2011) ("The regulations provide different sets of qualifications for adopted children, stepchildren, grandchildren, and stepgrandchildren, who—unlike natural children—are not required to satisfy one of the relevant provisions of § 416(h).").

This unjustified and inequitable distinction in the Social Security Administration's regulations interpreting Sections 416(e) and 416(h) can lead to less favorable outcomes for biological children than for other children. The agency, following its regulations and interpretive manual, would prevent the posthumously conceived biological child of a married couple from qualifying for survivor benefits without recourse to state intestacy law. Yet the same regulations permit a grandchild legally adopted "by the insured's surviving spouse after his or her death" to be considered an "adopted child" in satisfaction of Section 416(e), without reference to state law. 20 C.F.R. 404.358. Similarly, a child adopted after the insured's death by his or her surviving spouse may be considered the insured's legally adopted child based on state adoption law rather than state intestacy law. 20 C.F.R. 404.356. Because the government's position "acknowledge[s] § 416(e)'s force with respect to every listed relation but one," and offers no rationale for that distinction, it is an "irrational" construction of the statute not entitled to deference. *Schafer*, 641 F.3d at 68 (Davis, J., dissenting).

3. In addition, the Social Security Administration's Program Operations Manual System ("POMS"), the chief source of the government's construction of the Act in this case, also should not receive deference, as an interpretation either of the Act or of the Social Security Administration's own regulations. The POMS specifies that a "child conceived by artificial means after the [insured's] death cannot be entitled under the Federal law provisions of the Act" and "can only be entitled if he or she has inheritance rights under applicable State intestacy law." SSA, POMS GN 00306.001(C)(1)(c), https://secure.ssa.gov/apps10/poms.nsf/lnx/0200306001.

In seeking deference for this pronouncement, the government invokes *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), "to the extent [the POMS] reflects an interpretation of the SSA's own regulations." Gov't Br. 25-26. But *Auer* has no application here. Its rule comes into play only when the meaning of an agency's regulation is in dispute, in circumstances where "the language of the regulation is ambiguous." *Christensen* v. *Harris Cnty*., 529 U.S. 576, 588 (2000). *Auer* deference is *not* warranted where, as here, the government has made no arguments to support the conclusion that its *regulations*—as opposed to the Act itself—are ambiguous.

Deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944), is the best the government can hope for when the POMS provision is correctly viewed as an agency construction of the Act. See Gov't Br. 25; *United States* v. *Mead Corp.*, 533 U.S. 218, 234 (2001). Still, regardless of the applicable standard of deference, the POMS provision cannot justify setting aside the plain language and meaning of the statute. Indeed, the single instance cited by

the government of this Court deferring to the POMS (Gov't Br. 25) highlights this point. In *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), the Court acknowledged the persuasive force of a provision of the POMS "in closing the door on any suggestion that the usual rules of statutory construction should get short shrift * * *." *Id.* at 385. But here, the usual rules of statutory construction lead to a markedly different conclusion from the interpretation of the Act propounded in the POMS and now offered to this Court by the government.

4. A final point bears emphasis. Congress doubtless did not have in mind the range of assisted reproductive technologies that are now available when it wrote Sections 416(e) and 416(h)(2)(A) in 1939. But Congress drafted language that established a clear principle: that the undisputed biological child of a married couple is the "child" for statutory purposes of each of the parents. The world has changed since then, but the meaning of those words has not. There surely can be no doubt, for example, that a child whose conception is assisted through reproductive technology like IVF or artificial insemination at a time when both parents are alive is the "child" of each parent for purposes of the Act[16]; that conception occurred some months after the father's death does not make that son or daughter any less his or her father's "child."

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[16] Artificial insemination was not unknown at the time Congress wrote the Act. See Kay Elder, Julie Ribes & Doris Baker, *Infections, Infertility, and Assisted Reproduction* 7-8 (2004); Allen D. Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 Am. Bar Ass'n J. 1089, 1090 (1957).

If advances in technology lead to a result that was not anticipated by Congress in 1939, the courts and the Commissioner do not have license to depart from the statutory text; any change must come from Congress. As Justice Frankfurter noted: "In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 545 (1947). Or, as the Court put it more recently: "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA* v. *Hill*, 437 U.S. 153, 185 (1978); see also *Lewis* v. *City of Chicago*, 130 S. Ct. 2191, 2199-2200 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.").

To be sure, as the government notes, new technology makes possible more complicated situations, involving such innovations as donor eggs and sperm, and surrogate wombs. Gov't Br. 11, 21, 22. But these circumstances are not presented here. The Capato children are the biological son and daughter of a father who was married to their mother. It is enough to resolve this case for the Court to recognize that these children are the paradigm of the "child" defined by Section 416(e)(1)[17]—and "if it is not neces-

[17] "Like any word, the word 'child' comprises both a core of relations it clearly encompasses and a hazy periphery where the label becomes increasingly contested." *Schafer*, 641 F.3d at 65

sary to resolve more, it is necessary not to resolve more." *PDK Labs, Inc.* v. *U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). The Court should apply the plain language of the Act, as did the Third Circuit, and reserve for another day the more exotic questions raised by the government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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(Davis, J., dissenting). This case lies at the core of the statutory definition.